IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

VALERIE D PORTER
Claimant

AKSHAYA FORT DODGE LLC
Employer

APPEAL NO. 15A-UI-06047-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/12/15
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Valerie Porter filed an appeal from the May 1, 2015, reference 01, decision that that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Ms. Porter had voluntarily quit on March 19, 2015 without good cause attributable to the employer by being absent for three days in a row without notifying the employer. After due notice was issued, a hearing was held on July 7, 2015. Ms. Porter participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate in the hearing. Exhibit A and Department Exhibit D-1 were received into evidence.

ISSUES:

Whether there is good cause to treat Ms. Porter's late appeal as a timely appeal. There is.

Whether Ms. Porter separated from the employment for a reason that disqualifies her for benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Valerie Porter worked as a part-time housekeeper at the Days Inn motel in Fort Dodge for about a decade and for a succession of owners. Ms. Porter became an employee of Akshaya Fort Dodge, L.L.C., when that company purchased the Days Inn in 2014. Ms. Porter last performed work for the employer on March 17, 2015 and completed her shift on that day. Ms. Porter's immediate supervisor was Tracy Hawley, Manager. While Akshaya Fort Dodge had not provided Ms. Porter with a written attendance policy, Ms. Porter knew that if she needed to be absent from work, the employer expected her to contact the workplace at least five hours prior to the scheduled start of her shift. Ms. Porter was dealing with some undiagnosed health issues on March 17, 2015. Those issues affected both her arms and her legs. The employer was aware that Ms. Porter was experiencing health issues and had another employee assist Ms. Porter with her housekeeping duties. On the evening of March 17, 2015, Ms. Porter notified

the Days Inn front desk clerk that she would not be at work the next day and would not be back at work until she saw a doctor.

On the morning of March 18, a front desk clerk telephoned Ms. Porter and told her that Ms. Hawley said that Ms. Porter needed to report for work. Ms. Porter did not report for work. Ms. Porter went to the emergency room, was treated for dehydration, and was discharged home with instructions to follow up with her doctor.

After a couple days away from work, Ms. Porter began to feel better and believed she was ready to return to work. On March 20, Ms. Porter telephoned Ms. Hawley to inquire about her job status. Ms. Hawley told Ms. Porter that they would need to meet to discuss Ms. Porter's employment status. When Ms. Porter appeared for the meeting, Ms. Hawley told Ms. Porter that she would not allow her to return to work until Ms. Porter resolved her health issues.

On May 1, 2015, Iowa Workforce Development mailed a copy of the May 1, 2015, reference 01, decision to Ms. Porter's last-known address of record. Ms. Porter received the decision on May 4, 2015. The decision contained a warning that an appeal from the decision must be postmarked by May 11, 2015 or received by the Appeals Section by that date. On or about May 9, 2015, Ms. Porter drafted an appeal letter and placed it in her mailbox in a stamped envelope addressed to the Appeal Section at 1000 East Grand Avenue in Des Moines. Ms. Porter raised the flag on her mailbox to signal that she had a letter for the Postal Service worker to collect. On of May 22, 2015, when Ms. Porter had not heard anything in response to her appeal letter, she enlisted her daughter's assistance in filing an online appeal. The Appeals Section received the emailed appeal on March 22, 2015. In the emailed appeal, Ms. Porter wrote, "I mailed a written statement and have not heard back. I then asked my daughter to help me with help filing it online."

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the

> administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. Beardslee v. IDJS, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982).

Ms. Porter's appeal was filed on May 22, 2015, when the Appeals Section received the emailed appeal. However, the weight of the evidence establishes that Ms. Porter took appropriate steps to mail an appeal on May 9, 2015, prior to the appeal deadline. The weight of the evidence establishes that the appeal Ms. Porter placed in the mail stream on May 9 was either misdirected by the United States Postal Service or by Iowa Workforce Development. Ms. Porter has presented sufficient evidence to establish good cause to treat her appeal as a timely appeal. See 871 IAC 24.35(2).

Workforce Development rule 871 IAC 24.1(113) provides as follows:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory–taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

Ms. Porter testified that she did not voluntarily quit the employment, but instead, that Ms. Hawley told her that she would not be allowed to return to work until she resolved her health issues. The employer did not participate in the appeal hearing. The employer did not present any evidence to establish a voluntary quit or to otherwise rebut Ms. Porter's testimony that she was discharged from the employment. The evidence in the record establishes that Ms. Porter was discharged from the employment.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in a discharge matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The employer did not present any evidence to establish unexcused absences or other misconduct in connection with the employment. The evidence in the record establishes a final absence that was due to illness and that was reported to the employer on March 17, 2015. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Porter was discharged for no disqualifying reason. Accordingly, Ms. Porter is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The May 1, 2015, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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