IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

FRANCINE B BURHAMA
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 18A-UI-02149-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/14/18
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:

Francine Burhama filed a late appeal from the January 31, 2018, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Burhama was discharged on January 11, 2018 for excessive unexcused absenteeism and tardiness after being warned. After due notice was issued, a hearing was commenced on March 13, 2018 and concluded on March 15, 2018. Ms. Burhama participated. Kristi Rossiter represented the employer. Swahili-English interpreter Faith Nzirmakenga of CTS Language Link assisted with the hearing. Exhibit A, Department Exhibit D-1, and Exhibits 1 through 6 were received into evidence.

ISSUES:

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

Whether Ms. Burhama was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Francine Burhama is a native Swahili speaker with significant English language skills. Ms. Burhama arrived in the United States in 2006 and resided in Texas for about five years before moving to Iowa about eight years ago. Ms. Burhama attended high school in Texas and studied English language as part of her high school curriculum. Ms. Burhama established an original claim for unemployment insurance benefits that was effective January 14, 2018. Ms. Burhama established the claim for benefits in response to her January 11, 2018 involuntary separation from employer Tyson Fresh Meats, Inc. On January 30, 2018, Ms. Burhama participated in a fact-finding interview that addressed her separation from the employer.

On January 31, 2018, Iowa Workforce Development mailed a copy of the January 31, 2018 reference 01 decision to Ms. Burhama's last-known address of record. That address of record

was in Iowa City. The decision was mailed from Des Moines. The decision disqualified Ms. Burhama for unemployment insurance benefits and relieved the employer's account of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Burhama had been discharged on January 11, 2018 for excessive unexcused absenteeism and tardiness after being warned. The decision stated that an appeal from the decision must be postmarked by February 10, 2018 or be received by the Appeals Section by that date. The decision also stated that if the appeal deadline fell on a Saturday, Sunday or legal holiday, the appeal deadline would be extended to the next working day. February 10, 2018 was a Saturday and the next working day was Monday, February 12, 2018. Ms. Burhama did not receive the decision that was mailed to her address of record. On February 15, 2018, Ms. Burhama went to the Iowa City Workforce Development Center for assistance. While there, Ms. Burhama obtained a copy of the January 31, 2018, reference 01, decision from the Workforce Development Staff. At that time, Ms. Burhama completed an appeal form and delivered the completed appeal form to a Workforce Development representative. On February 15, 2018, the Iowa City Workforce Development Center faxed the completed appeal form and a copy of the January 31, 2018, reference 01, decision to the Appeals Bureau. The Appeals Bureau received the decision that same day.

Ms. Burhama was employed by Tyson Fresh Meats, Inc. as a full-time line production worker from September 2016 until January 11, 2018, when her immediate supervisor and the human resources manager discharged her for attendance. Ms. Burhama lived in Iowa City and commuted to the workplace, which was located 35 minutes from her home. If Ms. Burhama needed to be absent from or late for work, the employer's attendance policy required that she call the designated absence reporting number at least 30 minutes prior to the start of her shift and leave a message. The employer reviewed the attendance policy with Ms. Burhama at the start of her employment and Ms. Burhama understood the absence reporting requirement.

Ms. Burhama's official start time was 7:15 a.m. However, the employer allowed a seven-minute grace period, which meant that Ms. Burhama would be deemed on time so long as she clocked in by 7:22 a.m. By that time, Ms. Burhama was required to be dressed in her work clothes, equipped with her personal protective gear, clocked in, and ready to begin working. The time clock was located near Ms. Burhama's work area. The employer paid Ms. Burhama 15 minutes' wages for the "donning" period that was to run from 7:00 a.m. to 7:15 a.m. The employer provided an employee locker room for Ms. Burhama and others to use to get ready for work.

The final absence that triggered the discharge occurred on January 5, 2018. On that day, Ms. Burhama arrived at the workplace late and clocked in five minutes late. There was substantial snow on the ground that day and Ms. Burhama's late arrival was weather-related. Though Ms. Burhama has resided in Iowa for eight years, she remains apprehensive about driving in winter weather. During her commute on January 5, Ms. Burhama observed several weather related collisions during her commute to work. Ms. Burhama drove slower than usual out of caution and a desire to avoid being involved in a weather-related collision. Ms. Burhama had her cell phone with her, but did not notify the employer that she would be late getting to work. Ms. Burhama was concerning that trying to use her cell phone while she was driving would increase her risk of being in auto collision during her commute.

In making the decision to discharge Ms. Burhama from the employment, the employer considered Ms. Burhama's absences during the 12-months that preceded the final absence. Prior to the January 5, 2018 late arrival, the next most recent absence had been on December 28, 2017, when Ms. Burhama had again arrived late for work due to inclement weather. Ms. Burhama did not have the use of her cell phone and did not notify the employer

that she would be late on that date. The employer considered several earlier absences when making the decision to discharge her from the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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, subsections 10 and 11, 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 Iowa Administrative Code rule 871-24.35(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 Iowa Administrative Code rule 871-24.35(1)(b).

More than ten calendar days elapsed between the mailing date and the date this appeal was filed. 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). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC*, 212 N.W.2d 471, 472 (Iowa 1973).

The evidence establishes good cause to treat the late appeal as a timely appeal. Ms. Burhama did not have a reasonable opportunity to file an appeal from the January 31, 2018, reference 01, by the effective February 12, 2018 appeal deadline because she did not receive the decision until February 15, 2018. Ms. Burhama filed her appeal that same day. The administrative law judge had jurisdiction to enter a decision based on the merits of the appeal.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The disqualification shall continue 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.
>
> 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 this 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 evidence in the record establishes a discharge for no disqualifying reason. The final five-minute late arrival was due to adverse weather conditions that extended Ms. Burhama's 35-minute commute. In light of the weather conditions and the several collisions Ms. Burhama observed during her commute on January 5, 2018, it was reasonable for her to proceed with caution, which included not using her cell phone while she was driving. Because the final absence was attributable to circumstances beyond Ms. Burhama's control, the final absence was an excused absence under the applicable law. Because the absence that triggered the discharge was an excused absence under the applicable law, the discharge was not based on a current act of misconduct and would not disqualify Ms. Burhama for unemployment insurance benefits and the administrative law judge need not consider the earlier absences. Ms. Burhama is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The January 31, 2018, reference 01, decision is reversed. The claimant was discharged on January 11, 2018 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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