IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SUZANNE M GAUCH Claimant **IA VETERANS HOME – MARSHALLTOWN** Employer	**APPEAL 17A-UI-04223-LJ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/12/17** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 6, 2017 (reference 04) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for insubordination. The parties were properly notified of the hearing. A telephone hearing was commenced on May 9, 2017, and was continued until May 22, 2017. The claimant, Suzanne M. Gauch, participated. The employer, Iowa Veterans Home – Marshalltown, participated through Karen Connell, Operations Division Administrator; and Malia Maples of Employers Edge, L.L.C., represented the employer. Employer's Exhibits 1 through 28 was received and admitted into the record over objection.

Claimant asked that the administrative law judge specifically note that she was not provided a copy of the fact-finding documents, despite requesting them twice from the fact-finder and another staff-member. Claimant first requested that the Appeals Bureau send the fact-finding documents to her on May 22, 2017. The administrative law judge offered to email the documents to claimant to expedite the process, but claimant insisted that the documents be mailed to her. The employer objected to a second continuance of the hearing, as claimant had ample opportunities to request the fact-finding documents from the Appeals Bureau. The administrative law judge sustained the objection and denied claimant's request to postpone the hearing so the fact-finding documents could be mailed to her. The administrative law judge took official notice of the fact-finding documentation. However, the documentation was not read to claimant or the employer during the hearing, and it was not given any evidentiary weight.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a Public Service Manager 1, from November 18, 2016, until March 6, 2017, when she was discharged for insubordination.

On March 2, 2017, during claimant's morning meeting with Connell, claimant stated that she intended to collect the personal cell phone numbers of the maintenance staff. Connell instructed her that she was not permitted to do this, as it was inappropriate for several reasons. Among these reasons, Connell explained to claimant that the maintenance employees were AFSCME-covered positions and were not permitted to carry their cell phones on duty, and Connell did not supervise these employees and would not need to be contacting them. Connell testified that claimant appeared to understand this directive, while claimant testified that Connell changed her mind during the conversation and told her it would be a good idea to collect the cell phone numbers.

On the morning of March 6, one of the maintenance employees reported to a maintenance supervisor that claimant had asked him for his cell phone number. After he reluctantly gave her his number, claimant texted him while he was working to notify him that he had been approved to take some requested sick leave. Connell testified that this was outside the standard protocol for approving requested leave in multiple ways: leave requests are submitted and processed electronically and not typically done via texting; a centralized staffing number is available if an employee needs to call in; and claimant was not this maintenance employee's supervisor and should not have been reviewing his leave request. Additionally, the maintenance employee would have had access to a radio, if he needed to contact someone immediately. Claimant testified that the electronic leave request system was brand-new and the maintenance employee had not previously accessed it, so she felt texting would be a better method of communication. Claimant provided conflicting statements about who proposed texting as a means of communication that day. She also testified that she was not aware of any other method for handling leave requests within the maintenance department.

Connell testified that claimant was not meeting the employer's expectations prior to this incident in March. According to Connell, claimant had received coaching and counseling on her performance thirteen times, and she had five incidents involving serious concerns about her conduct and performance. On one occasion, claimant told Connell that she held a meeting that she did not hold. That morning, claimant did not arrive at work on time, and she did not show up for the meeting. When asked about this meeting during the hearing, claimant gave numerous statements about a meeting she had observed the Friday before. Claimant did not explain why she had told Connell that she held the meeting, when she was not present for it. Connell also testified that claimant was frequently late to work. Claimant testified that she did not realize her start time was 7:30 a.m. and not 8:00 a.m. Claimant acknowledged that her employment offer letter stated that her start time was 7:30 a.m., but she testified that the timekeeping system showed that she worked eight hours each day, which she believed told her that she started work at 8:00 a.m.

The unemployment insurance decision was mailed to the appellant's address of record on April 6, 2017. The unemployment insurance decision stated claimant needed to file an appeal by April 16, 2017. As April 16, 2017, fell on a Sunday, claimant was given until April 17, 2017, to file her appeal. Claimant's appeal letter, dated April 17, 2017, indicates claimant received the unemployment insurance decision prior to the deadline to appeal it. Claimant provided screen shots of the website showing that she was receiving error messages due to "technical difficulties" with the site. Claimant successfully submitted her appeal at 12:19 a.m. on Tuesday, April 19, 2017.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

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.

Here, claimant’s attempt to file an appeal in a timely manner was thwarted by the IWD website and was not due to delay by the party. Claimant wisely documented this failure and persisted in attempting to file her appeal. She missed the deadline to appeal by less than one hour. Therefore, the appeal shall be accepted as timely.

The next question is whether claimant was discharged for disqualifying, job-related misconduct. Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
>
> 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 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).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the

administrative law judge finds the employer provided more credible testimony than claimant. Claimant made multiple contradictory and inconsistent statements during the hearing. In contrast, the employer provided one consistent narrative regarding the end of claimant's employment. Claimant also made numerous statements attacking the credibility of both the employer and the administrative proceeding. Claimant's statements attacking the credibility of her employer were not supported by any evidence and were not relevant to the end of her employment.

The employer submitted substantial and credible evidence that claimant was specifically instructed not to acquire the cell phone numbers of the maintenance employees. Four days after receiving this instruction, she asked a maintenance employee for his personal cell phone number and proceeded to contact him on that number for a non-emergency work issue. Claimant had other methods of communicating with this employee, should she need to, and there was no legitimate reason that she needed to text him on March 6. The evidence presented is convincing evidence that claimant was discharged for insubordination. Benefits are withheld.

DECISION:

The April 6, 2017 (reference 04) unemployment insurance decision is affirmed. Claimant filed a timely appeal. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Elizabeth A. Johnson
Administrative Law Judge

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Decision Dated and Mailed

lj/rvs