IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CAROLINA DIAZ
Claimant

ALLSTEEL INC
Employer

APPEAL NO. 17A-UI-12864-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/05/17
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) - Discharge
Iowa Administrative Code rule 871-24.22(j) – End of Leave of Absence
Iowa Code Section 96.5(1) – Voluntary Quit
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Carolina Diaz filed an appeal from the November 22, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Diaz had voluntarily quit on October 16, 2017 without good cause attributable to the employer. After due notice was issued, a hearing was held on January 4, 2018. Ms. Diaz participated personally and was represented by attorney Andrew Bribriesco. The employer registered telephone numbers for the hearing. However, at the scheduled start of the hearing, employer representative Sandra Linsin of Employers Edge notified the administrative law judge that the employer was waiving its presence at the appeal hearing. Spanish-English interpreters Perla Wiese and Sathi Pimentel of CTS Language Link assisted with the hearing. Exhibits 1 through 5 and Department Exhibit D-1 were received into evidence. The administrative law judge took official notice of the materials submitted for and generated in connection with the November 21, 2017 fact-finding interview.

ISSUES:

Whether there is good cause to deem Ms. Diaz's late appeal timely.

Whether Ms. Diaz separated from the employment for a reason 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: Carolina Diaz commenced her full-time employment with Allsteel, Inc. in November 2015 and last performed work for the employer on Thursday, October 12, 2017. Ms. Diaz worked in the accessory department and her job entailed packing parts. Ms. Diaz's usual work hours were 4:30 a.m. to 2:30 p.m., Monday through Saturday. Ms. Diaz is a native Spanish speaker and has limited English language skills. Ms. Diaz does not read English.

On August 21, 2017, Ms. Diaz spoke with Jessica Enriquez, Member and Community Relations (MCR) representative about her need to travel to Mexico on October 16, 2017 to assist with caring for her elderly and seriously ill father. Ms. Diaz's father is 82 years old and suffers from prostate cancer. In August 2017, the employer granted conditional approval of Ms. Diaz's request for a leave of absence under the Family and Medical Leave Act (FMLA) to begin October 16, 2017 so that Ms. Diaz could travel to Mexico to support her father. The conditional approval included a September 5, 2017 deadline for Ms. Diaz to provide the employer with a health provider certification in support of the leave. Ms. Diaz did not provide the employer with the medical certification by the September 5 deadline referenced in the August 21 conditional approval. On October 9, 2017, Ms. Diaz again spoke with Ms. Enriquez about her need to travel to Mexico on October 16, 2017 to support her father. At that time, Ms. Diaz and Ms. Enriquez agreed to a leave of absence to commence October 16, 2017 and a return-to-work date of October 30, 2017. Ms. Enriquez provided Ms. Diaz with a health care provider medical certification form so that Ms. Enriquez could forward the form to her father's doctor and return the completed form to the employer.

On October 12, 2017, Ms. Diaz notified her supervisor that she would be absent on Friday, October 13, 2017 so that she could collect her husband from the hospital in Iowa City.

As of October 13, Ms. Diaz understood that Ms. Enriquez expected her to appear at the workplace on Monday, October 16 to further address paperwork related to the leave request and approval. On October 15, 2017, Ms. Diaz provided the employer with the requested health care provider certification in support of her need to travel to Mexico to assist with her father's medical needs. Ms. Diaz was unable to report to the workplace on October 16 prior to leaving for Mexico because she had to address her own and/or her husband's medical issues. In September 2017, the employer had approved Ms. Diaz for intermittent FMLA leave in connection with her own serious medical condition.

On October 16, 2017, Ms. Diaz left for Mexico with her husband and children. Ms. Diaz returned to Iowa on Saturday, October 28, 2017 with plans to report for work at 4:30 a.m. on Monday, October 30, 2017. On October 20, 2017, the employer had mailed Ms. Diaz a letter memorializing a purported voluntary termination of the employment effective October 20, 2017. The letter was in English. The letter was waiting for Ms. Diaz when she returned from Mexico.

On the morning of October 30, 2017, Ms. Diaz attempted to report for work at her 4:30 a.m. start time, but was unable to gain access to the workplace because the employer had deactivated her ID badge. When Ms. Enriquez arrived for work, Ms. Diaz was able to speak with Ms. Enriquez by telephone. Ms. Diaz told Ms. Enriquez that she was back from Mexico, had attempted to report for work, but could not enter the workplace. Ms. Enriquez told Ms. Diaz that Ms. Diaz no longer had a job at Allsteel.

Ms. Diaz established an original claim for unemployment insurance benefits that was effective November 5, 2017. On November 21, 2017, Ms. Diaz participated in the fact-finding interview that addressed her separation from the employment. On November 22, 2017, Iowa Workforce Development mailed a copy of the November 22, 2017, reference 01, decision to Ms. Diaz at her last-known address of record. The decision disqualified Ms. Diaz for benefits, based on the Benefits Bureau deputy's conclusion that Ms. Diaz had voluntarily quit on October 16, 2017 without good cause attributable to the employer. The decision stated that an appeal from the decision must be postmarked by December 2, 2017 or be received by the Appeals Bureau by that date. The decision 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. December 2, 2017 was a Saturday. The next working day was Monday, December 4, 2017. On December 11,

2017, Ms. Diaz contacted Iowa Workforce Development to inquire about the status of her unemployment insurance benefits claim. Ms. Diaz contacted the agency at that time because she had not received a decision adjudicating her eligibility for benefits in connection with her separation from Allsteel. At the time of the contact on December 11, 2017, an agency representative advised Ms. Diaz that the agency would mail another copy of the November 22, 2017 decision to Ms. Diaz so that she could use it to file an appeal. On December 14, 2017, Ms. Diaz took to her neighbor a piece of mail that the United States Postal Service had erroneously delivered to Ms. Diaz's address. When Ms. Diaz delivered the note to her neighbor, her neighbor gave a piece of mail that the Postal Service had erroneously delivered to the neighbor's address. The correspondence in the neighbor's possession was Ms. Diaz's copy of the November 22, 2017, reference 01, decision. On December 14, 2017, Ms. Diaz contacted attorney Andrew Bribriesco and Mr. Bribriesco submitted an online appeal on Ms. Diaz's behalf. In the online appeal, Mr. Bribriesco outlined Ms. Diaz's late receipt of the November 22, 2017, reference 01, decision.

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 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).

Ms. Diaz's appeal was filed on December 14, 2017, the day on which Mr. Briebriesco completed the online appeal on Ms. Diaz's behalf and the day on which the Appeals Bureau received the appeal.

The evidence in the record establishes that 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 in the record establishes that Ms. Diaz did not have a reasonable opportunity to file an appeal by the December 4, 2017 extended deadline because she did not receive the November 22, 2017, reference 01, decision until December 14, 2017. Ms. Diaz received the decision late, on December 14, 2017, and filed her appeal that same day. There is good cause to treat the late appeal as a timely appeal, based on the United States Post Service's error in delivering the correspondence and associated delay in Ms. Diaz's receipt of the decision. See Iowa Administrative Code rule 871-24.35(2). Accordingly, the administrative law judge has jurisdiction to hear the appeal and enter a decision on the merits. See *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

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.

The employer waived participation in the appeal hearing and presented no evidence to prove that Ms. Diaz separated from the employment for a reason that would disqualify her for unemployment insurance benefits or to rebut the evidence presented by Ms. Diaz. The evidence in the record establishes that on October 16, 2017 Ms. Diaz commenced what she reasonably believed was a leave of absence approved by the employer. Ms. Diaz attempted to return to work on October 30, the agreed upon return to work day, but the employer refused to allow her to return to the employment.

Iowa Admin. Code r. 871-24.22(2)j(1)(2)(3) provides:

> Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.
>
> (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.
>
> (2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.
>
> (3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

Under this leave of absence analysis of the separation, Ms. Diaz would be deemed laid off effective October 30, 2017, based on the employer's refusal to allow her to return to the employment. Ms. Diaz would be eligible for benefits, provided she meets all other eligibility requirements and the employer's account could be charged for benefits.

The separation from the employment may also be analyzed as a discharge based on attendance.

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 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.

Under the discharge analysis, the evidence would establish a discharge for no disqualifying reason. The employer presented no evidence to prove a single unexcused absence. The weight of the evidence establishes that the employer terminated the employment effective October 20, 2017, at a time when Ms. Diaz reasonably believed herself to be absent with the employer's approval. Under the discharge analysis, Ms. Diaz would be eligible for benefits, provided she met all other eligibility requirements.

The separation from the employment may also be analyzed as a voluntary departure from the employment to care for an ill immediate family member.

Iowa Code section 96.5(1)c provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:
>
> c. The individual left employment for the necessary and sole purpose of taking care of a member of the individual's immediate family who was then injured or ill, and if after said member of the family sufficiently recovered, the individual immediately returned to and offered the individual's services to the individual's employer, provided, however, that during such period the individual did not accept any other employment.

Iowa Administrative Code rule 871-24.26(8) echoes the statute as follows:

> 24.26(8) The claimant left for the necessary and sole purpose of taking care of a member of the claimant's immediate family who was ill or injured, and after that member of the claimant's family was sufficiently recovered, the claimant immediately returned and offered to perform services to the employer, but no work was available. Immediate

> family is defined as a collective body of persons who live under one roof and under one head or management, or a son or daughter, stepson, stepdaughter, father, mother, father-in-law, mother-in-law. Members of the immediate family must be related by blood or by marriage.

As of October 16, 2017, Ms. Diaz's absence from the workplace was based on her bona fide need to assist with the serious medical needs of her 82-year-old father. Ms. Diaz had informed the employer of this situation prior to departing for Mexico. Ms. Diaz promptly returned to the employer to offer her services once she had finished assisting with her father's medical needs, but the employer declined to allow her to return to the employment. Ms. Diaz did not accept other employment while she was absent to care for her father. Under this voluntarily separation analysis, Ms. Diaz would be eligible for benefits provided she meets all other eligibility requirements and the employer's account could be charged for benefits.

DECISION:

The claimant's appeal from the November 22, 2017, reference 01, decision was timely. The November 22, 2017, reference 01, decision is reversed. The claimant was discharged on October 20, 2017 for no disqualifying reason. In the alternative, the employer failed to allow the claimant to return to the employment on October 30, 2017 at the end of an approved leave of absence. In the further alternative, the claimant left to care for an ill immediately family member, promptly returned to the employer on October 30, 2017 to offer her services once the need to care for the family member had concluded, and the employer refused to allow the claimant to return to the employment. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/rvs