IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SYSAMONE PHONPHIBOUN
Claimant

ADVANCE SERVICES INC
Employer

APPEAL NO. 07A-UI-08240-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/17/07 R: 01
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Sysamone Phonphiboun (claimant) appealed a representative's July 26, 2007 decision (reference 03) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Advance Services, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 27, 2007. The claimant participated in the hearing. Callie Hodgson appeared on the employer's behalf. Chris Lo Chung served as interpreter. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely?

Was the claimant discharged for work-connected misconduct?

Is the employer's account subject to charge?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on July 26, 2007. The claimant did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by August 5, 2007. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, August 6, 2007. The appeal was not filed until it was hand-delivered in the local Agency office on August 28, 2007, which is after the date noticed on the disqualification decision. The claimant went into her local Agency office on that date to inquire as to why she had not received benefits for several weeks. She was then informed of the disqualification decision and was assisted in preparing and filing her appeal.

The employer is a temporary employment firm. The claimant's first and only assignment through the employer began on January 28, 2007. She worked full time as a production worker on the third shift at the employer's Le Mars, Iowa business client. Her last day worked on the assignment was June 13, 2007. The assignment ended because the employer discharged her from the assignment. The reason asserted for the discharge was excessive improperly reported absences.

Ms. Hodgson was the employer's on-site human resources coordinator at the Le Mars business client's location. On June 18 she learned from the business client that the claimant had absences and at least one tardy beginning June 4. Since the claimant had not separately contacted or informed the employer of those occurrences, the employer determined to discharge the claimant for failing to provide proper notification of her absences to the employer. The employer's policy provides in part that if the employee is going to be absent or late, the employee is to contact the employer at least one hour before the start time so that the employer can call the client. A copy of the policy had been presented to the claimant in orientation and she had a general understanding that she needed to report her absences, but due to some language issues did not have a complete or exact understanding of the policy.

The claimant was late for work on June 4 due to encountering a traffic accident en route that delayed her arrival. The employer asserted that the claimant was a no-call/no-show for work on June 5, but the claimant was not scheduled for work on that date. She had a surgery on that date, and on June 6 brought in a doctor's note indicating she was to be off work through June 12. She gave the note to the business client's third shift supervisor, who indicated she would take care of getting the information communicated to the proper persons including the employer. The claimant therefore assumed the employer would be advised of her condition and did not separately contact the employer to inform them of her absence.

On June 13, the claimant reported back to work for about two hours. However, while at work she began bleeding, so her supervisors sent her home. She returned to her doctor on June 14, who gave her a note covering her absence through June 18; she took the note to the business client the same day and gave it to her line supervisor, who responded that he would then see her on June 19. She assumed he also would pass the information on to the proper persons including the employer, and so did not separately contact the employer.

On June 19, the claimant sought to report back for work with the business client, but was told she needed to contact the employer. When she spoke to Ms. Hodgson, she was informed that the employer was discharging her due to her failure to separately inform the employer of her absences.

The claimant established an unemployment insurance benefit year effective June 17, 2007.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision.

Iowa Code § 96.6-2 provides in pertinent part:

> 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. . . . 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.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the 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).

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa 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 record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that the failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979), and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

871 IAC 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.

871 IAC 24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Cosper, supra. In this case, the employer asserts that the absences were not properly reported. However, it is clear that the claimant's failure to report her absence directly to the employer as well as to the employer's business client was not volitional, as she believed in good faith that the business client would convey the information to the employer.

The administrative law judge notes that the employer's policy indicates that the reason for an employee to notify the employer is so that the employer can notify the business client; since the business client did already know, at least the most important reason for the policy had been satisfied. Excessive unexcused absences can constitute misconduct, however, in order to

establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant had not previously been warned that she was reporting her absences incorrectly and that future incorrectly reported absences could result in termination. The employer has not established that the incorrect assumption regarding the communication of her absences from the business client to the employer was substantial misbehavior, as compared to inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or a good faith error in judgment or discretion. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began January 1, 2006 and ended December 31, 2006. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's July 26, 2007 decision (reference 03) is reversed. The appeal in this case is treated as timely. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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