

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JEFF W DECIOUS
Claimant

THEISENS INC
Employer

APPEAL 19A-UI-09292-AD-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 10/20/19
Claimant: Appellant (2)

Iowa Code § 96.6(2) – Filing – Timely Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

On November 25, 2019, Jeff Decious (claimant) filed an appeal from the November 4, 2019 (reference 01) unemployment insurance decision that found claimant was not eligible for benefits.

A telephone hearing was held on December 31, 2019. The parties were properly notified of the hearing. The claimant participated personally. Theisens Inc. (employer) participated by HR Generalist Heidi Lingle.

Official notice was taken of the administrative file, including the unemployment insurance online appeal submitted by claimant on November 25, 2019 and the unemployment insurance decision dated November 4, 2019.

ISSUE(S):

- I. Is the appeal timely?
- II. Was the separation a layoff, discharge for misconduct or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds:

Claimant worked for employer as a part-time sales associate. Claimant's first day of employment was December 30, 2015. The last day claimant worked on the job was April 22, 2019. Claimant's immediate supervisor was Store Manager Jim Lincoln. Claimant separated from employment on April 24, 2019. Claimant was discharged by Lincoln on that date for failing to maintain health and safety standards.

Claimant was suspended for several weeks on or about November 9, 2018, when the store manager saw bed bugs on his person and belongings. The store was treated for bed bugs as a

result. The suspension was for several weeks because it took several weeks before claimant's home could be treated for bed bugs and he could safely return to work.

On or around April 23, 2019, claimant contacted Lincoln to inform him his home was again being checked for bed bugs. However, this was just a check-up following the first treatment approximately six months ago. Claimant did not have bed bugs in his home on that second occasion.

On or around April 24, 2019, the store was again treated for bed bugs. Claimant was discharged at that time, as employer believed claimant had again brought bed bugs into the store. However, employer did not see any bed bugs on him or his belongings and did not otherwise confirm claimant was the source of the bed bugs.

Other than these two incidents, claimant had not any prior warnings or discipline for similar issues. Employer determined termination was appropriate because of sanitary concerns, including the possibility that customers or other associates could get bed bugs.

The Unemployment Insurance Decision was mailed to claimant at 4420 BOWLING ST SW in Cedar Rapids, IA on November 4, 2019. That was not claimant's correct address on that date, as it did not include the number for his trailer. Claimant did not receive that decision via mail.

After not hearing anything regarding his claim for several weeks, claimant contacted the department on Monday, November 25 to determine its status. He learned at that time he had been denied benefits. He immediately filed an appeal electronically.

The decision states that it becomes final unless an appeal is postmarked or received by Iowa Workforce Development Appeals Section by November 14, 2019.

REASONING AND CONCLUSIONS OF LAW:

I. Is the appeal timely?

For the reasons that follow, the administrative law judge concludes the claimant's appeal was timely.

Iowa Code § 96.6(2) provides, in pertinent part: "[u]nless 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."

Iowa Admin. Code r. 871-24.35(1)(a) provides:

1. Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

(a) If transmitted via the United States Postal Service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark on the envelope in which it is 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.

(b)

(c) If transmitted by any means other than [United States Postal Service or the State Identification Data Exchange System (SIDES)], on the date it is received by the division.

Iowa Admin. Code r. 871-24.35(2) provides:

2. The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

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 record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The record in this case shows that claimant did not receive the decision via mail. This appears to have been due to division and/or postal service error, as claimant's address was incomplete on the decision and likely did not reach his home for that reason. Therefore, the appeal notice provisions were invalid. Claimant did not have a reasonable opportunity to file a timely appeal. Claimant filed his appeal the same day that he learned of the decision denying benefits. Claimant's appeal is therefore timely.

Because the administrative law judge finds claimant's appeal is timely, the merits of the appeal will be considered.

II. Was the separation a layoff, discharge for misconduct or voluntary quit without good cause?

For the reasons set forth below, the November 4, 2019 (reference 01) unemployment insurance decision that found claimant was not eligible for benefits is REVERSED. Claimant is eligible for benefits, so long as he meets all other eligibility requirements.

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 provides in relevant part:

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.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa Ct. App. 1990). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman, Id.* In contrast, 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. *Newman, Id.*

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 554 (Iowa Ct. App. 1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a

forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

Employer has not carried its burden of proving claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2). While the administrative law judge finds claimant was responsible for bringing bed bugs into the store in November 2018, employer has not shown he was responsible for bringing bed bugs into the store in April 2019, the most recent incident leading to his discharge.

Unlike the November 2018 incident, employer did not see any bed bugs on claimant or his belongings and did not otherwise confirm claimant was the source of bed bugs at the store in April 2019. Furthermore, claimant credibly testified that the second bed bug inspection at his home was just a check-up, and he did not have bed bugs in his home on that second occasion.

In order for a discharge to be disqualifying, it must be based on a current act of substantial misconduct. The most recent incident of provable misconduct occurred approximately six months before claimant's termination and, as such, is not current.

DECISION:

The November 4, 2019, (reference 01) unemployment insurance decision is REVERSED. Claimant is eligible for benefits, so long as he meets all other eligibility requirements.

Andrew B. Duffelmeyer
Administrative Law Judge
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Decision Dated and Mailed

abd/scn