

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHAELENE W PRITCHARD
Claimant

CARE INITIATIVES
Employer

APPEAL 16A-UI-10092-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/12/16
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 July 1, 2016, (reference 01) unemployment insurance decision that denied benefits based upon misconduct. The parties were properly notified about the hearing. A telephone hearing was held on September 30, 2016. Claimant participated personally and was represented by attorney Dan Meloy. Employer participated through administrator Kristi Schubert and RN charge nurse Donelle Schultz and was represented by Susen Zevin. Claimant's Exhibit A was received. Employer's Exhibits 1 and 2 were received.

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: The unemployment insurance decision was issued by IWD on July 1, 2016. However, the decision was not mailed to the appellant's address of record until September 6, 2016. The appellant received the decision on September 8, 2016. The appeal was sent within ten days after receipt of that decision.

Claimant began working for employer on February 5, 2013. Claimant last worked as an RN charge nurse. Claimant was separated from employment on June 3, 2016, when she was terminated.

Employer has a policy prohibiting "using, selling, manufacturing, transferring, possessing, consuming, or being under the influence of illegal drugs or alcohol on the premises, or in company vehicles." Claimant was aware of the policy.

On June 2, 2016, at 9:50 p.m., claimant was working for employer. Claimant took a bottle of Smirnoff Ice and poured it into a Taco John's cup. Claimant began drinking out of the cup. RN charge nurse Donelle Schultz had just come on shift and observed claimant pour the alcohol

into her cup and take a drink. Claimant stated another nurse gave her the bottle of alcohol because she was having a rough night. Claimant continued to complete paperwork and did not clock out until approximately midnight.

On June 3, 2016, Schultz reported claimant's conduct to management. When confronted about the issue, the claimant asserted a visitor gave her the bottle of alcohol. Claimant would not disclose the visitor's name. Claimant admitted to possessing the alcohol on company premises, but denied consuming the alcohol. Claimant was terminated the same day.

Claimant had previously been given a written warning for coming to work with alcohol on her breath.

REASONING AND CONCLUSIONS OF LAW:

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, 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 appellant did not have an opportunity to appeal the unemployment insurance decision because the decision was not received in a timely fashion because the postmark date was well after the IWD decision date. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The appellant filed the appeal within ten days of receipt. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge further concludes the claimant was discharged from employment due to 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.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer has presented credible evidence that claimant violated its policy prohibiting use, possession, or being under the influence of alcohol while on company premises after having been warned. This is disqualifying misconduct. Although claimant denies drinking alcohol at work while on the clock, I do not find her testimony credible.

DECISION:

The July 1, 2016, (reference 01) unemployment insurance decision is affirmed. The appeal is timely. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant is deemed eligible.

Christine A. Louis
Administrative Law Judge
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Decision Dated and Mailed

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