IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

HOLLY POLKINGHORN Claimant **DEERY BROTHERS OF DUBUQUE INC** Employer	**APPEAL 19A-UI-09596-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/27/19** **Claimant: Appellant (2R)**

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

STATEMENT OF THE CASE:

The claimant/appellant, Holly Polkinghorn, filed an appeal from the November 18, 2019 (reference 01) unemployment insurance decision that denied benefits. After proper notice, a telephone hearing was conducted on January 2, 2020. The claimant participated personally. The employer, Deery Brothers of Dubuque Inc., was represented by Katie Rettenmeier, office manager. Clarence Niner, owner, also testified. Department Exhibit D-1 was admitted. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did the claimant file a timely appeal?
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 claimant was employed full-time as a business development center representative and was separated from employment on November 1, 2019, when she was discharged. Mr. Niner informed the claimant he was going a different direction as the reason for discharge.

The evidence is disputed as to whether the claimant was trained on the employer's attendance rules and expectations at hire on September 23, 2019. The employer does not have a written policy for attendance but stated the claimant was informed to contact Mr. Niner, the owner, if she was going to be absent. The claimant stated she contacted her immediate supervisors, Jamie and Bryan, when she had absences as they were on site.

The employer indicated the claimant was discharged based upon being a no-call/no-show on October 24, October 25, and November 1, 2019. In addition, the employer considered the claimant to be late on October 26, 2019. The employer reported it had documented a

warning/coaching on October 28, 2019, but that documentation was never shown to the claimant, nor did she sign receipt of any warning. The claimant denied knowing she had been placed on warning for her attendance and stated the conversation on October 28, 2019 appeared to be due to misunderstanding her required shift times and communication with management.

The claimant reported she notified Jamie and Bryan prior to her shift on October 24, 2019 that her leg was swollen and she could not come in. She also reported prior to her shift to her direct manager that she would not be in on October 25, 2019 due to the leg issue. Neither Bryan nor Jamie attended the hearing and do not work for the employer currently. The employer disputed the claimant's evidence reporting it believed the leg call off was on October 4, 2019. The final incident according to the employer was that the claimant called after her start of shift on November 1, 2019 (which was then considered a no-call/no-show) to say she would be late due to transportation. She was subsequently discharged.

The claimant began part-time employment with Applebee's restaurant in Dubuque, Iowa on November 27, 2019. She has not reported any wages earned with this employer when making weekly continued claims each week. The issue of the claimant's eligibility due to new employment has not been addressed yet by the Benefits Bureau.

An initial unemployment insurance decision (Reference 01) resulting in a denial of benefits was mailed to the claimant's last known address of record on November 18, 2019. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by November 28, 2019. The claimant, her boyfriend and her landlord share a mailbox as the post office does not recognize her apartment number, which is located over the landlord's business. The claimant's landlord inadvertently took the claimant's mail and withheld it until November 29, 2019. She did not receive notice of the decision within the appeal period. The claimant delayed filing her appeal because her landlord withheld her mail until November 29, 2019. She filed her appeal within five days of receipt of the initial decision (Department Exhibit D-1) on December 4, 2019.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.6(2) provides, in pertinent part:

> Filing – determination – appeal.
> 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.

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

> Date of submission and extension of time for payments and notices.
> (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.
> a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
> b. The division shall designate personnel who are to decide whether an extension of time shall be granted.
> c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
> d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

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).

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 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

The claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received in a timely fashion. 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 claimant filed the appeal within five days of receipt. Therefore, the appeal shall be accepted as timely.

The next issue to address is whether the claimant's discharge from this employer was due to disqualifying job-related misconduct.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

> "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).

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 has the burden of proof in establishing disqualifying job misconduct. *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).

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). 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).

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*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

In this case, the claimant was discharged after three reported no-call/no-shows and tardy during her approximately six weeks of employment. The employer does not have a written attendance policy which outlines its rules and notification requirements. This led to a misunderstanding with the claimant reporting absences to her direct manager on site, rather than the owner, on October 24 and 25, 2019. The managers who the claimant did report the absences did not attend the hearing. The employer also did not present the claimant any written documentation or warning after a discussion on October 28, 2019.

Based on the evidence presented, and due in part to the lack of written policy, warning or clear communications, the claimant could not have reasonably anticipated her job was in jeopardy before November 1, 2019. Inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant’s discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant’s discharge was due to job related misconduct according to Iowa law. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

REMAND: The issues of unreported wages earned with Applebee’s beginning November 27, 2019 (when the claimant made weekly continued claims) and the claimant’s eligibility based upon employment at Applebee’s are remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

DECISION:

The November 18, 2019 (reference 01) initial decision is reversed. The claimant filed a timely appeal. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

REMAND: The issues of unreported wages earned with Applebee's beginning November 27, 2019 (when the claimant made weekly continued claims) and the claimant's eligibility based upon employment at Applebee's are remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

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Decision Dated and Mailed

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