IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KARI L HAYGOOD Claimant **ABRH LLC** Employer	**APPEAL 16R-UI-11908-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/14/16** **Claimant: Respondent (5)**

Iowa Code § 96.6(2) - Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the August 31, 2016 (reference 01) unemployment insurance decision that allowed benefits based upon claimant voluntarily quitting her employment with good cause attributable to the employer. The parties were properly notified of the hearing. A telephone hearing was held on November 28, 2016. The claimant, Kari L. Haygood, participated personally and was represented by Attorney Stuart Higgins. The employer, ABRH LLC, participated through witnesses Lisa Harroff and Tim Chapman. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits record including the fact finding documents.

ISSUES:

Is the employer's appeal is timely?
Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds as follows:

A decision allowing unemployment insurance benefits was mailed to employer's last known address of record on August 31, 2016. The employer did receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by September 10, 2016. The decision also stated that if September 10, 2016 fell on a Saturday, Sunday, or legal holiday, the appeal period is extended to the next working

day. September 10, 2016 was a Saturday, so the employer's appeal was due on September 12, 2016.

The appeal was filed on September 19, 2016 by fax transmittal, which is after the date noticed on the decision. However, the employer's designated agent attempted to submit the appeal by fax on four separate occasions on September 12, 2016, however, the fax line rang with no answer on each of the four separate occasions.

The claimant was employed full-time as a supervisor. This employer operates a restaurant. She began her employment on May 14, 2016. Her last day physically worked on the job was Wednesday, July 27, 2016. Claimant's immediate supervisors were Tim Chapman and Debbie Mariatto.

In early July of 2016 claimant reported to Ms. Mariatto that she was being sexually harassed by Ryan Simmons, who was a co-worker. Mr. Simmons worked as a cook in the restaurant and claimant was his supervisor. Mr. Simmons grabbed and touched claimant's private areas of her body without her permission. When she reported this to Ms. Mariatto claimant was told this was just the way Mr. Simmons acted.

On or about July 17, 2016 claimant was sexually assaulted by Mr. Simmons in the office at work. Claimant reported this to Mr. Chapman and Ms. Mariatto on Monday, July 25, 2016. That same day the claimant was scheduled to work her shift with Mr. Simmons.

She was told that an investigation would take place and she would be contacted by the Regional Manager, Mike Halepis. She was never contacted by Mr. Halepis. Mr. Chapman scheduled two meetings for claimant to come in to discuss her employment status with the company; however, claimant was unable to attend the meetings due to medical appointments. Mr. Chapman did not reach out to the claimant to reschedule the meetings because he was instructed by the human resources department not to do so. Mr. Chapman was also instructed by the human resources department to put claimant on a leave of absence. Claimant never requested a leave of absence.

Claimant also filed a report with the employer's corporate complaint line. No one contacted her regarding this complaint either.

On or about August 19, 2016 claimant received a letter from the employer stating that she was terminated for failing to cooperate in the investigation. The letter also stated that she was on a leave of absence.

The claimant's unemployment insurance record establishes that she has received unemployment insurance benefits in the gross amount of $1,974.00 for the fourteen weeks between August 20, 2016 and November 19, 2016. Employer did not participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

The first issue to be addressed is whether the employer's appeal was timely. The administrative law judge concludes that the appeal is timely.

Iowa Code § 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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 96.8, subsection 5.

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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976). In this case the employer attempted to fax the appeal on four separate occasions prior to the deadline for an appeal, but the fax line rang with no answer. The employer successfully faxed an appeal on September 19, 2016.

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 administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to the Agency's fax machine not receiving the fax because it rang with no answer. See Iowa Admin. Code r. 871-24.35(2). The appellant's attempt to file an appeal in a timely manner was thwarted by the inoperative fax line

and was not due to delay by the party. The appeal was filed within a reasonable time thereafter. Therefore, the appeal shall be accepted as timely.

The next issues relate to the claimant's separation from employment. The first issue is whether or not claimant voluntarily quit her employment or was discharged.

The decision in this case rests, at least in part, upon the credibility of the parties. The issue must be resolved by an examination of witness credibility and burden of proof. 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*. After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds that the claimant's version of events is credible.

While the employer has the burden to establish the separation was a voluntary quitting of employment rather than a discharge, claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980) and *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

Claimant did not intend to voluntarily quit her job. Claimant was told that she would be contacted regarding the investigation by Mr. Halepis. She was never contacted. She was then mailed a letter stating that she was being terminated for her failure to cooperate in the investigation relating to Mr. Simmons; however, according to Mr. Chapman's testimony Mr. Simmons had already been discharged.

Iowa Code section 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(4) provides:

> (4) Report required. The claimant's statement and the 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.

871 IAC 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.

Further, 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).

The fact that claimant was unable to attend two meetings to discuss her employment status does not rise to the level of misconduct. Especially in light of the fact that she did contact the employer stating that she was unable to attend. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). There is no evidence that the claimant's actions had any wrongful intent.

The employer has failed to meets its burden of proof in establishing that claimant engaged in any job-related misconduct sufficient to deny her benefits. As such, benefits are allowed. Because benefits are allowed, the issues of overpayment and chargeability are moot.

DECISION:

The employer/appellant's appeal is timely. The August 31, 2016 (reference 01) decision is modified with no change in effect. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

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