IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRAD M ZIESER
Claimant

GRAND HAVEN HOMES INC
Employer

APPEAL NO: 14A-UI-08782-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/20/14
Claimant: Respondent (1)

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

PROCEDURAL STATEMENT OF THE CASE:

The employer appealed a representative's August 6, 2014 (reference 01) determination that held the claimant qualified to receive benefits and the employer's account subject to charge because the claimant had been discharged for non-disqualifying reasons. Hearings were held on September 11 and October 7. The claimant participated at both hearings. Shannon Hinton appeared on the claimant's behalf at the October 7 hearing. Sherri Niles, the administrator, appeared at both hearings. During the October 7 hearing, Employer Exhibits One through Five were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is qualified to receive benefits.

ISSUES:

Did the employer file a timely appeal or establish a legal excuse for filing a late appeal?

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in September 2006. He worked as a full-time CNA on second shift. When the claimant started this employment, he received a job description and knew the jobr required him to have patience, tact, a cheerful disposition, and enthusiasm, as well as willingness to handle difficult residents, to treat all residents fairly and with kindness, dignity, and respect. Also, the claimant understood he was to perform all assigned task in accordance with established policies and as instructed by his supervisor. The claimant knew and understood the employer's procedures required that when he fed residents who needed assistance, he was not to discuss unpleasant topics when the resident ate and should never make the resident feel the meal should be hurried. The employer required a CNA to give the resident his complete attention while assisting or feeding the resident. The claimant received a copy of the employer's handbook and understood cell phones were not to be used during working hours and that cell phones should not be on an employee's person while on the clock (Employer Exhibit Five).

When Hinton worked as the second shift supervisor, the director of nursing wanted the dining area quiet so eating meals would be relaxing for residents. When Hinton supervised the claimant she had no problems with him. Hinton considered the claimant a very good and conscientious employee.

During the summer of 2013, a new director of nursing started working for the employer. The claimant did not understand she wanted CNA's to interact with residents by talking to them until March 20, 2014. On March 20 the claimant received a written employee counseling form that told him to interact with residents. Alter the claimant received the counseling form; he put it in his locker. He did not understand he was supposed to return his copy after he signed it (Employer Exhibit One).

Niles became the administrative on June 28, 2014. On July 14 the daughter of a resident complained that the claimant did not interact with residents while feeding them and did not smile at her mother who was a resident. The employer gave the claimant his first written warning on July 15, 2014. The claimant received the written warning because the employer considered him disinterested, distracted, unfriendly, and remote when feeding residents (Employer Exhibit Two). After the claimant received the written warning, he informed the director of nursing that this resident made him uncomfortable with the sexual overtures she made toward him. The claimant understood from the director of nursing that the resident had more rights than he did and he just had to deal with her.

After the claimant received the July 15 written warning, Niles met with CNAs on July 18 to talk about the employer's expectation in the dining room. Niles told CNAs, including the claimant; the employer expected them to interact with residents (Employer Exhibit Three). Shortly after receiving the July 15 written warning, the director of nursing asked the claimant for a copy of the written counseling she had given him on March 20, 2014. He found the written counseling form in his locker. In mid-July, the director of nursing asked him to sign and date the form March 20, 2014.

On July 20, 2014 the claimant's son was very ill. The claimant had taken his son to a doctor's appointment before he was scheduled to work at 2:30 p.m. that day. The doctor's appointment lasted longer than the claimant had anticipated and he was late for work. On his way to work, the claimant called to let the employer know he would be late. At work the claimant kept his cell phone on his person in case his wife called with any news about their son's medical condition. While feeding a resident, the claimant took out his cell phone to see if he had any messages from his wife. After he checked for any messages, he put the cell phone back in a pocket. An employee saw the claimant when he looked at it and reported this to the employer.

The employer asked the claimant if he had used cell phone while feeding a resident. The claimant admitted he looked at it and why he had looked at his cell phone. After learning the claimant was on his cellphone during work hours, the employer discharged him for intentionally violating the employer's policy about cell phones (Employer Exhibit Four).

The claimant established a claim for benefits during the week of July 20, 2014. The employer participated at the fact-finding interview. The claimant filed claims for the weeks ending July 26 through October 4, 2014. He received a maximum gross benefit payment of $4,350.00 for these weeks.

As a result of information presented at the fact-finding interview, an August 6, 2014 determination was mailed to the parties at their current address of record. The determination held the claimant qualified to receive benefits and informed the parties an appeal had to filed or postmarked on or before August 16, 2014.

The claimant received the August 6 determination within a couple of days after it had been mailed. The employer has problems getting its mail because the post office reads the employer's address as Elm instead of Elim. When the employer had not received the determination by August 12, Niles called the local Workforce office to ask where the determination letter was. A representative told her the determination would be mailed to her. Even though Niles asked about the decision, she was told this information could not be scanned, emailed, or verbally communicated over the phone.

The employer received a copy of the August 6 determination on August 23. The postmark on the envelope indicates it was mailed to the employer on August 19, 2014. The employer faxed the employer's appeal on August 25.

REASONING AND CONCLUSIONS OF LAW:

The law states that an unemployment insurance determination is final unless a party appeals the determination within ten days after the determination was mailed to the party's last known address. Iowa Code § 96.6(2). The Iowa Supreme Court has ruled that appeals must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision if a timely appeal is not filed. *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979); *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979). In this case, the appeal was filed after the August 16 deadline for appealing expired.

The next question is whether the employer had a reasonable opportunity to file a timely appeal. *Hendren v. IESC*, 217 N.W.2d 255 (Iowa 1974); *Smith v. IESC*, 212 N.W.2d 471, 472 (Iowa 1973). The evidence establishes the employer did not have an opportunity to file a timely appeal because the employer did not receive a copy of the determination until August 23, 2013.

The employer's failure to file a timely appeal was due to an Agency error or misinformation or delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. The employer established a legal excuse for filing a late appeal on August 25, 2014. The Appeals Bureau has legal authority to make a decision on the merits of the appeal.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. 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 Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

The law defines misconduct as:

> 1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
>
> 2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
>
> 3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

This case is troublesome because after Niles became the administrator in late June, the claimant was discharged less than a month later. The evidence indicates he was considered a very good employee and his job was not in jeopardy until mid-July 2014 when a family member of a resident complained about the claimant's failure to interact with her mother, a resident. Even though the claimant explained to the director of nursing why he felt uncomfortable interacting with this particular resident, the director of nursing's response did not address his legitimate concerns. After this incident, the employer then asked the claimant to sign the written counseling he had received in March.

The claimant understood the employer did not allow employees to have cell phones on their person while working. On July 21 the claimant used poor judgment when he failed to let management know about the seriousness of his child's medical condition and his need to know the status of his child's health. While feeding a resident, the claimant looked at his cell phone to see if his wife left him any messages about their son. Even though this took just less than a minute, another employee saw him do this and reported this to the employer. The claimant should not have kept his cell phone on his person or looked at it while feeding a resident, but did on this day.

Based on the employer's policy, the employer established business reasons for discharging the claimant. Based on the facts in this case, the claimant did not commit work-connected misconduct. He used poor judgment when he checked his cell phone for messages about the status of his child's health while feeding a resident, but this one incident does not rise to the level of work-connected misconduct. As of July 20, 2014 the claimant is qualified to receive benefits.

DECISION:

The representative's August 6, 2014 (reference 01) determination is affirmed. The employer filed a late appeal, but established a legal excuse for filing a late appeal. The Appeals Bureau has legal jurisdiction to address the merits of the claimant's appeal. The employer discharged the claimant for reasons that do not constitue work-connected misconduct. As of July 20, 2014 the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account is subject to charge.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

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