IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JUNE M MCGHGHY
Claimant

AMERICAN BAPTIST HOMES OF MIDWEST
Employer

APPEAL NO: 13A-UI-04910-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/27/13
Claimant: Respondent (1)

Section 96.6-2 – Timeliness of Protest
Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

American Baptist Homes of Midwest (employer) appealed a representative's April 26, 2013 decision (reference 03) that concluded June M. McGhghy (claimant) was qualified to receive unemployment insurance benefits and the employer's account might be charged because the employer's protest was not timely filed. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 3, 2013. The claimant participated in the hearing. Amy Spangler appeared on the employer's behalf and presented testimony from one other witness, Jackie Livengood. During the hearing, Exhibits A-1 and A-2 and Employer's Exhibits One and Six were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision affirming the representative's decision and allowing the claimant benefits.

ISSUES:

Should the employer's protest be treated as timely? Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant established a claim for unemployment insurance benefits effective January 27, 2013. A notice of claim was mailed to the employer's last-known address of record, its corporate office in Eden Prairie, MN, on January 29, 2013. The employer provided second-hand information suggesting that the employer did not receive the notice. However, no first-hand testimony was provided as to how the mail would have been handled by the employer during the period of time at which the notice would have been mailed and received. There is no record of the notice being returned as undeliverable to the Agency. The notice contained a warning that a protest must be postmarked or received by the Agency by February 8, 2013.

The protest was not filed until the employer protested the resulting charges on April 24, 2013, which is after the date noticed on the notice of claim.

The claimant started working for the employer on April 30, 2007. She worked full time as a consumer support staff person in the employer's program providing residential services to persons with intellectual disabilities. Her last day of work was January 25, 2013. The employer discharged her on that date. The reason asserted for the discharge was the claimant's handling of a situation on January 23, along with documentation of that day.

On January 23 the claimant had interaction with a client who had been scratching herself. The claimant indicated to the client that she was concerned about how much the client was scratching herself and that it might be necessary for the claimant to report the matter to persons such as the client's doctor. The claimant ultimately did report the concern to the supervisor on duty.

The employer provided second hand information indicating that the claimant had been yelling at the client and had been, in essence, unnecessarily torturing the client with threats of calling people so as to scare the client; the employer concluded this was a failure to treat the client with dignity and respect. The claimant denied yelling at the client or otherwise making threats to scare her, but only expressed her own bona fide concerns that the scratching should be reported to persons such as the client's doctor or mother.

When the allegations were reported to Livengood, the program director, on January 24, Livengood went to the residence to retrieve the contact notes for the client for January 23. The contact notes the claimant would have made were not in the binder as required. The claimant acknowledged that when she finished her shift on the morning of January 24 she had failed to put the contact notes in the binder, but rather she had left them on top of a medicine closet. She further indicated that when she finished her shift on the morning of January 25 she had retrieved the contact notes and put them into the binder. Livengood did not recheck the binder after January 24 to see if the notes had been inserted into the binder. The claimant had previously been given a final written warning on September 14, 2012 regarding documentation; however, this was for a complete failure to write up contact notes for 15 days.

REASONING AND CONCLUSIONS OF LAW:

The law provides that all interested parties shall be promptly notified about an individual filing a claim. The parties have ten days from the date of mailing the notice of claim to protest payment of benefits to the claimant. Iowa Code § 96.6-2. Another portion of Iowa Code § 96.6-2 dealing with timeliness of an appeal from a representative's decision states an appeal must be filed within ten days after notification of that decision was mailed. In addressing an issue of timeliness of an appeal under that portion of this Code section, the Iowa court has held that this statute clearly limits the time to do so, and compliance with the appeal notice provision is mandatory and jurisdictional. *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979).

The administrative law judge considers the reasoning and holding of the *Beardslee* court controlling on the portion of Iowa Code §96.6-2 which deals with the time limit to file a protest after the notice of claim has been mailed to the employer. Compliance with the protest provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), protests are considered filed when postmarked, if mailed. *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983).

The question in this case thus becomes whether the employer was deprived of a reasonable opportunity to assert a protest 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 employer did have a reasonable opportunity to file a timely protest.

871 IAC 24.35(2) provides in pertinent part:

> 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 department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

A presumption of receipt exists for a properly addressed and mailed protest. *Eves v. IESC*, 211 N.W.2d 324 (1973). 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 established that the notice was not in fact received at the employer's corporate office and then misplaced once in the employer's possession. The employer has not shown that the delay for not complying with the jurisdictional time limit was due to department error or misinformation or delay or other action of the United States Postal Service. Since the employer filed the protest late without any legal excuse, the employer did not file a timely protest. Since the administrative law judge concludes that the protest was not timely filed pursuant to Iowa Code § 96.6-2, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the protest and the reasons for the claimant's separation from employment, regardless of the merits of the employer's protest. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979); *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979) and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

However, in the alternative, even if the protest were to be deemed timely, the administrative law judge would affirm the representative's decision on the merits. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the alleged incident on January 23, 2013. The employer relies on the second-hand account from the claimant's coworker; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the coworker might have been mistaken, whether she actually observed the entire time, or whether she is credible. 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 in fact handled the situation with the client appropriately. Under the circumstances of this case the employer has not established that the claimant's placing of the contact notes for the day on top of the medicine closet rather than into the notebook until the next day was substantial misbehavior, as compared to inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or a good faith error in judgment or discretion. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The April 26, 2013 (reference 03) decision is affirmed. The protest in this case was not timely, and the decision of the representative remains in effect. Benefits are allowed, provided the claimant is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs