IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RAEANN M BARBAGLIA
Claimant

GOOD SAMARITAN SOCIETY INC
Employer

APPEAL NO: 09A-UI-15854-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/04/09
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Raeann M. Barbaglia (claimant) appealed a representative's October 9, 2009 decision (reference 04) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Good Samaritan Society, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on December 3, 2009. The claimant participated in the hearing and was represented by Ryan Beattie, attorney at law. Lori Welch appeared on the employer's behalf and presented testimony from two other witnesses, Gwen Musick and Alisa Mujdzic. During the hearing, Exhibit A-1 and Claimant's Exhibit A was 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.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it can be treated as timely? Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on October 9, 2009. The claimant did not timely receive the decision due to errors on the part of the United States Postal Service. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by October 19, 2009. The appeal was not filed until it was faxed on October 21, 2009, which is after the date noticed on the disqualification decision. She submitted her appeal on the day she received the decision.

The claimant started working for the employer on September 10, 2008. She worked full time as a licensed practical nurse (LPN) in the employer's skilled and long-term care nursing facility. She normally worked evening shifts. Her last day of work was September 3, 2009. The employer discharged her on that date. The reason asserted for the discharge was lack of documentation, failure to administer medication, and failure to notify the physician that medication had not been given.

A resident had received care in the hospital but had been discharged back to the facility at about 1:44 a.m. on August 29. The discharge orders from the physician included that the resident should receive a diuretic, lasix, at 8:00 a.m. and 5:00 p.m. The claimant was not on duty when the resident came back into the facility; she was not scheduled until 2:15 p.m. Prior to the claimant's coming on shift, the medication had not been administered as scheduled by other care providers as there was no lasix in stock other than in an emergency kit. Ms. Mujdzic was the RN charge nurse for that shift, and had not deemed the situation severe enough to access the emergency kit. Rather, the facility was awaiting a delivery from a pharmacy.

The delivery arrived at approximately 2:30 p.m., at about the time of the shift change over. The claimant became aware that the resident had not received the lasix as ordered. She questioned whether the physician should be contacted for further instruction since the dosage schedule was off. She understood from Ms. Mujdzic that she did not need to, that Ms. Mujdzic would follow up on that. Ms. Mujdzic believed that the claimant was going to take care of the physician contact and the medication administration. It was not until the next shift came on that it was discovered that neither of them had contacted the physician or administered the drug.

When the employer was reviewing the situation on August 31, it also found concerns as to how well the claimant had documented her assessment of the resident that evening. She did note some bruising and lower edema, but there were no notations as to consciousness and other vitals. The claimant had not received any prior warnings for patient care or documentation issues. She had been given some warnings for attendance, including a final warning on July 14, 2009, for incurring 12 absences. As a result of the August 29 incident with the resident and the documentation issues related to the incident, the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

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).

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

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 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. IDJS, 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. IDJS, 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. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

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 error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

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 incident with the resident on August 29. It is clear that the primary problem regarding the failure to timely administer the medication occurred well prior to the claimant's involvement in the situation. Even after she began her shift, she was not alone in responsibility for ensuring that the problem be rectified. Under the circumstances of this case, the claimant's failure to be more proactive and her failure to more thoroughly document in the nursing assessment was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. 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 representative's October 9, 2009 decision (reference 04) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs