IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANGELA WARNER
Claimant

EMBASSY REHAB & CARE CENTER INC
Employer

APPEAL NO: 12A-UI-01552-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/01/12
Claimant: Respondent (5)

Section 96.5-2-a – Discharge
871 IAC 24.32(9) – Suspension or disciplinary layoff
Section 96.6-2 – Timeliness of Protest

STATEMENT OF THE CASE:

Embassy Rehab & Care Center, Inc. (employer) appealed a representative's February 7, 2012 decision (reference 02) that concluded Angela Warner (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 6, 2012. The claimant participated in the hearing. Leslie Hugen appeared on the employer's behalf. 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 employer's protest timely or are there legal grounds under which it should be treated as timely? Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge or suspension for misconduct?

FINDINGS OF FACT:

The claimant established a claim for unemployment insurance benefits effective January 1, 2012. A notice of claim was mailed to the employer's last-known address of record on January 17, 2012. The employer received the notice. The notice contained a warning that a protest must be postmarked or received by the Agency by January 27, 2012. The protest was not filed until it was postmarked on January 30, 2012, which is after the date noticed on the notice of claim.

The employer's administrator, Hugen, attempted to fax the protest to the Agency at the designated fax number about ten times on January 24 and about five times on January 25. When Hugen was unable to get through on the fax machine, on January 25 she called a voice number for the Agency and left a message inquiring whether the fax machine was not working and asking for further instructions. When she did not receive a further response, on January 26 she placed the completed protest form into the outgoing mail to be picked up from the

employer's Sergeant Bluffs, Iowa facility on January 27; the notice was then postmarked by the United States Postal Service on January 30 in Sioux Falls, South Dakota.

The claimant started working for the employer on November 29, 2010. She worked full time as a licensed practical nurse (LPN). Her last day of work was May 5, 2011. She was suspended from work on that date by the employer's director of nursing. The reason asserted for the suspension was having too many errors in her work. However, no details were available or provided as to what errors would have lead to the May 5 suspension.

The claimant would have been scheduled to return from the suspension on May 15. However, she declined to return from the suspension, as she had been told that after the suspension the DON would discharge her for the next error of any kind, and the claimant felt that the DON would be looking for and would find some reason to discharge her.

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.

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 not have a reasonable opportunity to file a timely protest.

The administrative law judge concludes that failure to have the protest postmarked or received within the time prescribed by the Iowa Employment Security Law within the time prescribed by the Iowa Employment Security Law was due to Agency 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 employer's control. The administrative law judge, therefore, concludes that the protest should be treated as timely filed pursuant to Iowa Code § 96.6-2.

A claimant is not qualified to receive unemployment insurance benefits if an employer has suspended or 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 suspended or discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a. For purposes of unemployment insurance eligibility, a suspension is treated as a temporary discharge and the same issue of misconduct must be resolved. 871 IAC 24.32(9). The separation therefore was the suspension on May 5, 2011; the claimant's subsequent determination not to return from that suspension does not create a new separation.

In order to establish misconduct such as to disqualify an 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 or suspending the claimant is having too many errors. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra. Conduct asserted to be disqualifying misconduct must also be both specific and current. *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988); *West v. Employment Appeal Board*, 489 N.W.2d 731 (Iowa 1992). The employer has not provided any evidence of any specific or current errors which could have amounted to misconduct, and has thus not met its burden to show disqualifying misconduct. *Cosper*, supra. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's February 7, 2012 decision (reference 02) is modified with no effect on the parties. The protest in this case is treated as timely. The employer suspended and effectively discharged 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