IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DENISE M HUNTER
Claimant

MEDIACOM COMMUNICATIONS CORP
Employer

APPEAL NO. 11A-UI-01835-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/02/11
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Denise M. Hunter (claimant) appealed a representative's February 1, 2011 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Mediacom Communication Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 16, 2011. The claimant participated in the hearing. Sara Blair appeared on the employer's behalf. During the hearing, Exhibit A-1 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 should 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 February 1, 2011. The claimant did not receive the decision until February 15, because it had been misdelivered to another box in the apartment building in which she lived. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 11, 2011. The appeal was not filed until it was faxed on February 16, 2011, which is after the date noticed on the disqualification decision.

The claimant started working for the employer on April 26, 2010. She worked full-time as a customer sales and service representative in the employer's West Des Moines, Iowa call center. Her last day of work was December 21, 2010. The employer suspended her on that date and discharged her on December 29, 2010. The reason asserted for the discharge was multiple inappropriate and unprofessional statements to coworkers.

The employer received complaints alleging that on December 21 there were three incidents involving the claimant. For one, near the end of the shift on December 21 the claimant and two coworkers were waiting to speak with a lead; one of the other coworkers, a man, had his hands in his pocket and was moving his hands up and down, making the claimant uncomfortable. She said to him, "Get your hands out of your pockets. What are you trying to pull?" He responded by laughing and pulling his lighter out of his pocket. The employer provided second-hand testimony that the claimant then made a comment to the effect that she hoped his genitalia was bigger than the lighter. The claimant denied saying anything about his genitalia, but that she had told the other female coworker that the male coworker was "flicking his Bic." The second complaint was that earlier that same day the claimant had belched on the floor, which the claimant conceded she had due to a medical condition. The employer provided second-hand testimony that the claimant then made a comment to the effect of, "That was a good one, the next one is coming out my a - -." The claimant denied saying anything regarding a "next one" coming from anywhere, but that the only thing she had said was "excuse me."

The third complaint was that also earlier in the day on December 21 the claimant had commented on another coworker's perfume by saying that it smelled like she had had sex and had not washed it off. The claimant denied making any comment about anyone's perfume that day and ever making any comparison to someone smelling like she had had sex, although she acknowledged that while visiting off the floor about two weeks prior to December 21 she had commented to the same coworker that her perfume was strong and that she "smelled like a French whore."

The employer had given the claimant three prior warnings for involvement in disturbances on the floor, although there was no evidence that the prior warnings dealt with issues such as inappropriate or unprofessional comments to coworkers such as was alleged to have occurred on December 21. Because the employer accepted the allegation in the various complaints from December 21 as true, and due to the significant number of complaints, 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 the appellant's failure to file a timely appeal 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 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 that 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 that 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 inappropriate or unprofessional comments to coworkers on December 21. The employer relies exclusively on the second-hand account from the various other employees; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether those employees are credible. The claimant's first-hand testimony directly contradicts the employer's second-hand testimony. 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 made the inappropriate or unprofessional comments attributed to her. While the employer may have had a good business reason to rely on the information provided directly to it by its employees and discharge the claimant, it has not met its burden to show disqualifying misconduct for purposes of unemployment insurance eligibility. 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 February 1, 2011 decision (reference 01) is reversed. The appeal in this case is treated as timely. 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

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