IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SAM GABRIEL
Claimant

LUTHER CARE SERVICES
Employer

APPEAL NO. 11A-UI-08556-WT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/22/11
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated June 16, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 29, 2011. Claimant participated personally. Employer participated by Stacey Brand, assistant director of nursing. Exhibits A through G were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds as follows: Claimant began working for the employer on March 16, 2009. He worked as a full-time CNA.

On the morning of May 13, 2011, a co-worker named Tayla Farrell reported Mr. Gabriel for sleeping on the job. (Ex. A). Ms. Farrell was the floor nurse who had supervisory authority over the claimant. Claimant was discharged on May 27, 2011 by employer for allegedly loafing/sleeping on the job. (Ex. B). At this time, the claimant was taken off the schedule and effectively suspended without pay. (Ex. B). An investigation followed once the director of nursing, Dot Donaldson, returned on May 23, 2011. The meeting with the claimant occurred on May 27, 2011. (Ex. G). Prior to that meeting, the director of nursing had reviewed the videotapes. (Ex. D). After reviewing the videotapes, Ms. Donaldson determined that Mr. Gabriel had been sleeping on the job and terminated him.

Mr. Gabriel received the June 16, 2011, fact-finding decision prior to June 26, 2011. He wrote up an appeal letter and took it to the Des Moines Iowa*WORKS* office at 430 East Grand Avenue immediately after receiving the decision. He asked to have the appeal letter faxed to the Appeals Bureau. On June 28, 2011, he called Iowa Workforce to find out what occurred with the appeal. He was told on that date that no appeal was on file. On the same date, he took a

new appeal letter, dated June 28, 2011, which he hand-delivered directly to the Appeals Bureau at 1000 East Grand Avenue. The Appeals Bureau has no record of the prior appeal.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs “a” through “h”. Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten calendar days for appeal begin 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).

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 Supreme 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 administrative law judge concludes that the claimant did timely appeal the June 16, 2011 fact-finding decision. Prior to June 26, 2011, he went to the Iowa*WORKs* center at 430 East Grand Avenue, in Des Moines, Iowa. He gave them an appeal letter and believed that the staff there had forwarded the letter to the Appeals Bureau. For whatever reason, the Appeals Bureau did not receive this letter, or, if it did, it was lost. When the claimant followed up and learned that the appeal was not on file, he hand-delivered a new appeal the very same day. The claimant is found to be credible.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such 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. On the other hand 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(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate

> the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

It is undoubtedly true that sleeping on the job can be found to be misconduct when the proof demonstrates an intentional, willful act. It is the employer's burden to prove, by a preponderance of the evidence, that the claimant actually committed the conduct of which he was accused. In this case, the greater weight of evidence fails to establish that claimant was discharged for an act of misconduct. The claimant testified live and under oath regarding the exact events which occurred on May 13, 2011. His accuser did not. The employer did not enter the videotapes into evidence, which it claims corroborates Ms. Farrell's testimony.

Mr. Gabriel testified that he was sitting down resting when his supervisor, Ms. Farrell, walked in the room where he was sitting. He testified that an alarm was not going off as his accuser claimed in her written statement. He testified that he had an ongoing dispute with Ms. Farrell and that he had previously caught her sleeping on the job. Without the live, sworn testimony of Tayla Farrell, or the corroborating videotapes, combined with the plausible, credible and sworn testimony of the claimant, the employer simply did not meet its burden of proof.

DECISION:

The fact-finding decision dated June 16, 2011, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Joseph L. Walsh
Administrative Law Judge

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Decision Dated and Mailed

jlw/kjw