IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRITTNAY MCINTIRE
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 13A-UI-10961-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/21/13
Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Brittnay McIntire filed a timely appeal from the August 29, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 18, 2013. Ms. McIntire participated. Alice Smolsky of Equifax Workforce Solutions represented the employer and presented testimony through Kathy Grossnickle, Dianne Rollins, Lisa Myers, and Jodi Burns-Lennon. The hearing in this matter was consolidated with the hearing in Appeal Number 13A-UI-10962-JTT. Exhibits One through Six and Department Exhibits D-1, D-2, and D-3 were received into evidence. The administrative law judge took official notice of the agency's administrative record (DBRO) of benefits disbursed to the claimant.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether there is good cause to treat the claimant's late appeal from the August 29, 2013, reference 01, decision as a timely appeal.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On August 29, 2013, Workforce Development mailed a copy of the August 29, 2013, reference 01 decision to claimant Brittnay McIntire at her last-known address of record. The decision contained a warning that an appeal from the decision must be postmarked by September 8, 2013 or received by the Appeals Section by that date. Ms. McIntire did not receive the August 29, 2013, reference 01, decision that disqualifies her for unemployment insurance benefits and, therefore, did not file an appeal by the September 8, 2013 deadline. On September 18, 2013, Iowa Workforce Development mailed a copy of the September 18, 2013, reference 02, overpayment decision to Ms. McIntire's address of record. That decision contained a September 28, 2013 deadline for appeal. Ms. McIntire received the overpayment

decision on or about September 22, 2013. On September 26, 2013, Ms. McIntire went to her local Workforce Development center and completed an appeal form. Ms. McIntire delivered her completed appeal form to a Workforce representative on that day. On September 27, 2013, the Appeals Section received the appeal form by fax.

Ms. McIntire was employed by Care Initiatives as a part-time dietary aide until July 14, 2013, when the employer suspended her from the employment following an accident with a beverage cart. Ms. McIntire had been pushing the cart rather than pulling the cart and because she could not see where she was going, had run into a nursing home resident sitting in a stationary wheelchair. Ms. McIntire had not paid any attention to the resident's loud howls of pain after she hit the resident's arm with the beverage cart. A nurse who was further away than Ms. McIntire heard the resident's howls and told Ms. McIntire she had just hit the resident with the cart. The employer subsequently decided to discharge was McIntire from the employment. Beginning on July 18, 2013, the employer tried to reach Ms. McIntire to notify her that she was discharged. The employer finally reached Ms. McIntire on July 24, 2013 and notified her that she was discharged from the employment.

In making the decision to discharge Ms. McIntire from the employment, the employer considered prior incidents and associated reprimands, all dating from February 2013. On February 6, 2013, the employer reprimanded Ms. McIntire for refusing a nurse's request that she assist with caring for a resident who was not one of Ms. McIntire's assigned residents. On the same day, the employer reprimanded Ms. McIntire for taking a smoke break outside the building without notifying anyone that she was doing so in violation of the employer's policy. Ms. McIntire knew the break policy, but failed to comply with it. On February 21, 2013, the employer reprimanded Ms. McIntire for failing to place a sensor alarm on a resident when she put the resident to bed. At that time in the employment, Ms. McIntire was working as a certified nursing assistant. Ms. McIntire knew she was required place the alarm on the resident for the resident's safety and to prevent a fall. Ms. McIntire had forgotten to put the alarm on the resident.

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-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The appeal in question was filed on September 26, 2013, at the time it was delivered to the Workforce Development Center staff.

The evidence in the record establishes 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 record shows that the appellant did not have a reasonable opportunity to file a timely appeal from the August 29, 2013 decision because she did not receive the decision prior to September 8, 2013 deadline for appeal. The evidence indicates the claimant filed an appeal within four days of receiving the overpayment decision that was her first notice that she had been disqualified for unemployment insurance benefits. It appears as if the late appeal was attributable to problems either within Workforce Development or within the Postal Service. Accordingly, there is good cause to treat the late appeal as a timely appeal. See 871 IAC 24.35(2). The administrative law judge has jurisdiction to rule on the merits of the appeal.

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.
>
> 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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly

be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record establishes that Ms. McIntire was indeed careless in connection with the accident on July 14, 2013. The weight of the evidence suggests that Ms. McIntire heard the resident's howls but ignored them until the nurse intervened. In other words, Ms. McIntire was negligent in failing to properly respond to the injured resident after she had caused injury to the resident. Rather than pulling the beverage cart so she could see where she was going and avoid hitting residents and staff, Ms. McIntire elected to push the cart, knowing that she could not see around the cart. The evidence indicates that Ms. McIntire was also negligent on February 6, 2013, when she took an outdoors smoke break without notifying anyone she was doing so. Ms. McIntire made in error in judgment on February 6, 2013, when she refused the supervising nurse's request that she assist with a resident. Ms. McIntire thought it was more important to attend to or assigned residents. Ms. McIntire was negligent on February 21, 2013, when she failed to place the safety alarm on the resident when she put the resident to bed.

There is sufficient evidence in the record to establish misconduct in connection with the employment. The weight of the evidence indicates two separate acts of carelessness/negligence on July 14, 2013. The first was hitting the resident with the cart. The second was ignoring the resident's howls of pain. These two acts of negligence followed two acts of negligence in February 2013. Both February incidents impacted resident safety. There is sufficient evidence to establish a pattern of disregard for the employer's interests and the interests of the residents in the employer's care.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. McIntire was discharged for misconduct. Accordingly, Ms. McIntire is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The agency representative's August 29, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/pjs