IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MORGAN P SWANSON Claimant	**APPEAL 16A-UI-10480-DL-T** **ADMINISTRATIVE LAW JUDGE DECISION**
AMERICAN HOME SHIELD CORP Employer	
	OC: 07/31/16 **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 25, 2016, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on October 10, 2016. Claimant participated. Employer participated through human resource manager Amy Platt and supervisor Karen Janning. Department's Exhibit D-1 was received.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant did not receive the August 25, 2016, (reference 01) decision. She filed an appeal within ten days of receiving the related overpayment decision.

Claimant was employed as a full-time customer service agent through August 2, 2016. She was primarily responsible for incoming calls but occasionally had the need to make outgoing calls. An audit of all associates was conducted on August 2 and covered July 14 and 15. The employer fired her because it believed she made outgoing calls to Sears without a business reason in order to fill her time and increase performance statistics without handling incoming calls. Higher performance statistics affects merit increases in pay, which claimant received in April 2016, and perks such as gift cards and items. She did not make a voice tree choice and then hung up prior to the company answering. When confronted claimant ultimately admitted she was making unnecessary phone calls to achieve her occupancy goal of 70 percent of time spent on the phone with a customer and then moving to the next call. Claimant did not tell the employer they were misdials, which would have resulted in an quick hang-up and then dialing the next number. Employees are instructed to try to stay on the phone and finish notes with the claimant on the line but if the customer hangs up there is a phone button that may be pushed to hold incoming calls while completing notes. This would negatively impact the occupancy

percentage. Others were also fired for similar conduct as revealed by the audit. The employer had not previously warned claimant her job was in jeopardy for any similar reasons.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether claimant's appeal is timely. The administrative law judge determines it is.

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 claimant did not have an opportunity to appeal the unemployment insurance decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). She timely appealed the overpayment decision, which was the first notice of disqualification. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5(2)a provides:
> **Causes for disqualification.**
> 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Claimant's deliberate manipulation of the phone system to avoid calls yet improve or maintain her performance statistics, which could, and possibly did, result in additional pay and rewards was contrary to the best interests of the employer and is misconduct even without prior warning.

DECISION:

The August 25, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant's appeal was timely. She was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/rvs