IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHELLE L MAHER
Claimant

MOSAIC
Employer

APPEAL NO: 13A-UI-02318-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/13/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Michelle L. Maher (claimant) appealed a representative's February 6, 2013 decision (reference 0`) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Mosaic (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 26, 2013. The claimant participated in the hearing, was represented by Katie Naset, Attorney at Law, and presented testimony from one other witness, Susan Benson. Tom Kuiper of TALX Employer Services appeared on the employer's behalf and presented testimony from three witnesses, Carol Mau, Kathleen Larson, and Brandi Bretthauer. During the hearing, Exhibit A-1 and Employer's Exhibits One through Five were 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?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on February 6, 2013. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 16, 2013. The appeal was not treated as filed until February 27, 2013, which is after the date noticed on the disqualification decision.

On February 14, 2013 the claimant had gone to an Agency office and had completed an appeal form. When subsequently checking on the status of her appeal, she learned that the appeal

had not been received by the Appeals Section. She therefore resubmitted the copy of her appeal on February 27, 2013.

The claimant started working for the employer on February 7, 2011. She worked full time as a direct support associate in the employer's West Des Moines, Iowa group home for persons with intellectual disabilities. Her last day of work was December 8, 2012. The employer suspended her on that date, and discharged her on December 21, 2012. The reason asserted for the discharge was a failure to report a possible ingestion of medication by a client.

The claimant arrived at work on December 7 at about 3:00 p.m. Her coworker needed immediate assistance, so the claimant set her purse down and went to assist. When she returned a short while later, a client had gotten into the claimant's purse and had gotten out a bottle of the claimant's own medication. The client has a proclivity to chew on things, and had chewed on the medication bottle to the point that the bottle was nearly flattened. The top of the bottle had popped off and there were pills lying on the floor, as well as some powdered pills remaining in the bottle. The claimant immediately checked the clients mouth, and while there were pieces of paper from the label on the outside of the bottle on the client's mouth, the claimant saw no sign of either pills or powder in or around the client's mouth. The claimant cleaned up the mess and preceded onto her other duties. She assumed that her manager, Larson, had been aware of what had happened as Larson was in the house at about the time the claimant was interacting with the client regarding the pill bottle. Both the claimant and her coworker concluded while it had been a "close call," no medication had been ingested and so no further action was necessary at that time.

Later that evening the client began to act oddly. At about 7:10 p.m. the claimant called Larson and reported the behavior, and then called 911. The client was taken for medical treatment, which indicated that she must have ingested at least some portion of the medication.

Because the claimant had not affirmatively immediately reported at the time of the incident with the pill bottle that there had been the potential for ingestion even though she did not believe that there had been, the employer discharged the claimant. The claimant had not been subject to any prior disciplinary action.

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 failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error, misinformation, delay, or other action pursuant to 871 IAC 24.35(2). 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 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 the claimant is her failure to report the potential medication ingestion until it became clear that there must have been some ingestion. Under the circumstances of this case, the claimant's failure to report the incident with the pill bottle when she genuinely believed there had been no ingestion was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a

good faith error in judgment or discretion; she promptly reported the matter when it became apparent that there might have in fact been some ingestion. The employer has not met its burden to show disqualifying misconduct. *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 appeal in this case was timely. The representative's February 6, 2013 decision (reference 01) is reversed. 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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