

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THEODORE M FUHS

Claimant

APPEAL NO: 14A-UI-07291-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

LIFE CONNECTION LLC

Employer

OC: 06/08/14

Claimant: Respondent (2)

Section 5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment
871 IAC 24.10 – Employer Fact Finding Participation
871 IAC 26.14(7) – Claimant Request to Re-Open Record
871 IAC 24.35(2) – Appeal Delay
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer appealed a department decision dated June 27, 2014, reference 01, that held it failed to establish misconduct in the discharge of the claimant on June 11, 2014, and benefits are allowed. A hearing was held on August 7, 2014. The claimant did not participate. Chrissa Auestad, HR Director; Moon Eich, CEO; and Jordan Lawson, Counselor, participated for the employer. Employer Exhibit 1 was received as evidence.

ISSUES:

Whether the employer filed a timely appeal.

Whether claimant was discharged for misconduct in connection with employment.

Whether employer participated at department fact finding.

Whether claimant has a good cause to reopen the record.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record finds: The department mailed the decision to the employer's representative address of record on June 27, 2014 with an appeal deadline date of July 7. The employer received the decision and it faxed a July 2 appeal letter to UI Appeals. It received a confirmation receipt. When the employer called UI Appeals on July 17 it was told the appeal had not been received. UI Appeals gave the employer miss-advice about its right to have an in-person hearing, but it waived that request in this matter.

Claimant worked as a behavior counselor supervisor from March 28, 2013 to June 8, 2014. He was suspended pending an investigation and discharged on June 11 for violating the sexual harassment policy.

On June 1 claimant was coaching female employee Lawson about a client reference that she was attractive. He told Lawson she needed to wear baggy clothes, shop for them at the Salvation Army, not wear make-up and make her appearance un-attractive. Claimant objected to the coaching comments and filed a grievance that started the employer investigation. Claimant admitted making the coaching comments but minimized his conduct. The coaching comments about claimant's appearance are not related to any employer dress code violation.

Claimant has received unemployment benefits totaling \$879 for the four weeks ending July 5, 2014. He committed no act of fraud or misrepresentation to obtain these benefits. The employer participated in department fact finding and it offered information as to why claimant was discharged.

Claimant was called for the hearing at the phone number he had provided and he did not respond until 11:21 a.m. for the 10:00 a.m. hearing. He states he was unavailable when called because he was in a meeting.

REASONING AND CONCLUSIONS OF LAW:

Iowa Admin. Code r. 871-26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

At issue is a request to reopen the record made after the hearing had concluded. The request to reopen the record is denied because the party making the request failed to participate by reading and following the instructions on the hearing notice.

The administrative law judge concludes claimant's request to re-open the record is denied. He called UI Appeals at 11:21 a.m. stating he was in Syracuse, New York at a meeting and he could not make himself available for the hearing at 10:00 a.m. This is not a good cause to re-open the record.

Iowa Code section 96.6(2) provides, in pertinent part:

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. . . . 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.

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 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.

The administrative law judge concludes the employer filed a timely appeal. The appeal delay was due to department error for failing to timely receive and process 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.

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).

The administrative law judge further concludes the employer established claimant was discharged for misconduct in connection with employment on June 11, 2014 for violation of the sexual harassment policy.

Claimant's coaching comments are more than just bad judgment. He should have known that telling a subordinate employee to go shop for baggy clothes at a Salvation Army because she is attractive is offensive and a serious violation of the employer sexual harassment policy.

Iowa Code section 96.3(7) provides, in pertinent part:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5. . . .

871 IAC 24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The administrative law judge further concludes claimant is overpaid unemployment benefits \$879 for the four weeks ending July 5, 2014 due to the disqualification imposed in this decision.

Although claimant committed no act of fraud or misrepresentation to obtain the benefits, the employer participated at department fact finding there is no relief from the overpayment.

DECISION:

The department decision dated June 27, 2014 reference 01 is reversed. The employer filed a timely appeal. The employer established claimant was discharged for misconduct on June 11, 2014. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible. Claimant is overpaid benefits \$879.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css