IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MARILYN M YEANAY Claimant **TYSON FRESH MEATS INC** Employer	**APPEAL 20A-UI-01599-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/29/19** **Claimant: Appellant (2R)**

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

STATEMENT OF THE CASE:

The claimant/appellant, Marilyn M. Yeanay, filed an appeal from the February 6, 2020 (reference 02) Iowa Workforce Development ("IWD") unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 10, 2020. The hearing was held jointly with 20A-UI-01600-JC-T.

The claimant participated personally and through Timothy Luce, attorney at law. Claimant's husband, Lawrence Yeanay, also testified. The employer, Tyson Fresh Meats Inc., participated through Lori Direnzo, human resources.

The administrative law judge took official notice of the administrative records. Department Exhibits D-1 through D-4 were admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

Note to claimant: At the time of hearing, the claimant's claim for benefits is also locked due to a failure to report for a reemployment services appointment. (See Reference 05 and Reference 06 decisions).

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: The claimant was employed full-time in production and was separated from employment on December 31, 2019, when she was discharged.

The claimant and her husband began employment together, and attended orientation together. Claimant has limited English proficiency, cannot read English and relies upon her husband for

assistance for interpreting and translating. They were trained on the employer rules and procedures, including the employer's attendance policy, which uses a point system and assigns points to certain attendance infractions. The employer had discretion to label an absence or tardy as "EA", "excused" or unexcused" and that would alter the amount of points given.

Employees were expected to notify management 30 minutes prior to a shift if unable to work, and the employer provided its phone number on the back of id badges for employees to call. Employer could discharge an employee for incurring ten points in a one year period, and management has discretion to remove points upon meeting with employees.

The final absence for the claimant was on December 30, 2019. The claimant and her husband worked opposite shifts. The claimant sent her husband on her behalf to notify her manager of the absence. Mr. Yeanay told the claimant's manager, Casey, that she would not be in due to illness. He reported the "general" supervisor became visibly upset upon him reporting to Casey.

On December 30, 2019, the claimant was experiencing stomach and back pains, and unable to work. She was pregnant and had previously struggled with the employer, who refused to honor the restrictions from her doctor as it related to lifting "guts" and other job duties. The employer reported the claimant was no call/no show for her shift on December 30, 2019 and discharged her.

The claimant had most recently been issued a written attendance warning on December 16, 2019. At that time, her manager had also removed points from her attendance record to bring her to 9.5, just below discharge. Her manager had also done the same reduction when issuing warnings on November 18 and 26, 2019. The claimant had been provided written warnings but could not read English. When she told her manager she didn't know what she was signing, she was directed to sign or be fired, so she signed.

The employer reported the claimant was absent July 10, November 12, 16, December 16, and 17, 2019. The claimant left early November 6, 8, December 4, and14, 2019. The claimant was tardy on August 26, September 4, October 29, 31, November 14, and 23, 2019. The claimant was a no call/no show on September 23, November 18, and 26, 2019. Several of the absences and tardies were deemed "excusable", "EA" or later reduced. The claimant's final three absences on December 16, 17 and 30 were due to illness. The employer was unable to provide reasons for each of the attendance infractions and did not furnish a report or written document at the time of the hearing with a timeline of absences. Based upon the claimant's final absence on December 30, 2019, the employer determined she had "pointed out", did not remove points to drop her back to 9.5 points, as it had done the last three times she was warned, and then discharged her.

Ms. Direnzo did not have first-hand knowledge of the claimant's training, warnings or discharge. Neither the claimant's manager or the general manager participated in the hearing or furnished a written statement in lieu of attending the hearing. Ms. DIrenzo was also unaware that Mr. Yeanay was a (current) employee for the employer, when asked.

At the time of hearing, the claimant was due to give birth to her child the following week.

An initial unemployment insurance decision (Reference 02) resulting in a denial of benefits was mailed to the claimant's last known address of record on February 6, 2020 (Department Exhibit D-1). The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by February 16, 2020 (Department Exhibit D-1). Because February 16 was a Sunday, the final day to appeal was extended to February 17, 2020. The claimant received the

decision within the appeal period. The claimant cannot read English and relies upon her husband to help her. He was also injured on the job in February 2020 and had surgery, which limited his ability to help her. Together, they went to the IWD office in Waterloo and brought the letter for help. The IWD representative stated they would not help the claimant and told her to call Customer Service. The claimant, through her husband, contacted IWD's Customer Service and helped the claimant file the appeal online. (The claimant actually filed three appeals.) The appeal was not filed until February 21, 2020, which is after the date noticed on the disqualification decision (Department Exhibits D-2, D-3, D-4).

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant's appeal is considered timely filed. It is.

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

> Filing – determination – appeal.
> 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.

Iowa Admin. Code r. 871-24.35(2) provides:

> Date of submission and extension of time for payments and notices.
> (2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.
> a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
> b. The division shall designate personnel who are to decide whether an extension of time shall be granted.
> c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
> d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

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).

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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

In this case, the claimant, a non-native English speaker, made a good faith effort to contact Iowa Workforce Development at her local office in Waterloo for guidance in understanding the decision, she was denied help. This Agency error or misinformation contributed to the claimant's delay in filing. The administrative law judge concludes that the claimant's failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law *was due to any Agency error or misinformation or delay or other action of the United States Postal Service* pursuant to Iowa Admin. Code r. 871-24.35(2). Accordingly, the administrative law judge concludes the claimant's appeal shall be accepted as timely.

The next issue to address is whether the claimant's discharge from employment was due to disqualifying job-related misconduct.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*.

Iowa Admin. Code r. 871-24.32(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.

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 employer has the burden of proof in establishing disqualifying job related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to

unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. 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. 871 IAC 24.32(4).

In the case at hand, the claimant appeared personally, provided sworn testimony, answered questions, and subjected herself to possibility of cross-examination. Her husband is a current employee and was a firsthand witness to the final incident, and testified on her behalf. In contrast, Ms. Direnzo's personal knowledge of the claimant's history was limited and reliant mostly upon hearsay evidence. No manager or general who would have spoken to the claimant about her attendance participated in the hearing, nor was any written statement in lieu of participation provided. No written policy, warnings or chronology were provided by the employer for the hearing. In the absence of any other evidence of equal weight either explaining or contradicting the claimant's testimony, it is held that the weight of evidence is established in favor of the claimant.

Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In the specific context of absenteeism, the administrative code provides:

Iowa Admin. Code r. 871-24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred

to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

The claimant's final absence was due to illness and reported directly to the manager from her husband, another employee. While the employer's notification policy directs employees to call the attendance hotline, the administrative law judge is persuaded the claimant's direct contacts on her own behalf (such as discussing her medical restrictions with her pregnancy) had been disregarded previously, so asking her husband to help her, also in light of her limited proficiency, was reasonable and constituted proper reporting of the December 30, 2019 absence. Because the absence was due to illness and properly reported, the final absence would be considered excused.

Based on the evidence presented, the administrative law judge concludes the employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because the last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed, provided she is otherwise eligible.

In the alternative, even if the claimant's final absence was not considered excused due to improper notification, she would remain eligible for benefits. Here, the claimant had three written warnings before discharge. She explained to her manager she could not read English and did not understand them. She was threatened that she would lose her job if she did not sign them. Then for each of the three warnings, the manager reduced the claimant's points even though she was at discharge level, so that she could return to work. The administrative law judge is not persuaded this pattern of forcing the claimant to sign warnings she didn't understand and reducing points to keep her just below discharge level would reasonably warn the claimant that she would lose her job on December 30, 2019 if she reported absent. Reasonably, the claimant could have expected she would have another meeting with her manager, where she would be directed to sign the warning or be fired, and then the points would be reduced below discharge level.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. Based on the employer's pattern, the administrative law judge is not persuaded the claimant could have reasonably anticipated discharge on December 31, 2019. Under this reasoning, the employer has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed, provided she is otherwise eligible.

The issue of whether the claimant is able to and available for work due to the birth of her child is remanded to the Benefits Bureau for an initial investigation and decision.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This

provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The unemployment insurance decision dated February 6, 2020, (reference 02) is reversed. The appeal is timely. The claimant was discharged for no disqualifying reason. The claimant is allowed benefits, provided she is otherwise eligible.

REMAND: The issue of whether the claimant is able to and available for work due to the birth of her child is remanded to the Benefits Bureau for an initial investigation and decision.

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Jennifer L. Beckman
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax 515-478-3528

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Decision Dated and Mailed

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