IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MATTHEW J POJAR
Claimant

MIDWEST COMPLIANCE CONSULTANTS
Employer

APPEAL NO: 14R-UI-03024-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/17/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Midwest Compliance Consultants, Inc. (employer) appealed a representative's December 16, 2013 decision (reference 01) that concluded Matthew J. Pojar (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 14, 2014. The claimant participated in the hearing. Scott Jefferies appeared on the employer's behalf. During the hearing, Exhibit A-1 and Employer's Exhibits One and Two 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 employer'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:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The representative's decision was mailed to the employer's last-known address of record on December 16, 2013. The address is a type of post office box, and the employer occasionally does not receive its mail.[i] The employer received the decision, but not until January 8, 2014. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by December 26, 2013. The appeal was not filed until it was postmarked on January 14, 2014, which is after the date noticed on the disqualification decision.

The claimant started working for the employer on February 11, 2013. He worked full time as a safety consultant at the employer's business client's location. His last day of work was November 13, 2013. The employer discharged him on that date. The reason asserted for the

discharge was creating an uncooperative and unproductive work environment with the client, most recently allegedly making threats of violence toward the client's safety coordinator, reportedly heard by the client's supervisor.

On or about November 13 the employer received a complaint from the client's supervisor regarding the claimant. The complaint cited "several incidents over the past few months," but no specific dates were provided. The complaint asserted that on unspecified occasions the claimant had "repeatedly harassed" the safety coordinator about safety hazards that had not yet been remedied, allegedly calling him "incompetent, unqualified, and in need of different employment." The complaint further asserted that on some unspecified date when the safety coordinator followed the supervisor's instructions to refer the claimant to contact the supervisor, the claimant "became irate screaming at my coordinator telling him it was not his job to contact me and refused to reason with him or talk to me." The complaint makes no reference to any specific incident immediately preceding the complaint, and notably makes no reference to any actual threat of violence, but it was the understanding of Jefferies, the employer's owner/president, and there had been an incident a day or two prior where the claimant had made threats of violence and "screamed and yelled" at the coordinator while the supervisor was on the phone and could hear.

The claimant denied he had ever made demeaning statements or any threats of violence and that he had ever screamed and yelled at any of the client employees. He acknowledged that he had a military background and might come off as very assertive and insistent on getting safety issues addressed. Significantly, the complaint does not demand that the claimant be immediately removed from the facility, as one might expect had actual threats of violence been made, but rather the complaint only requests "a mediation session take place with a third party present." However, because the employer accepted the client's report of threats, screaming, and yelling as correct, the employer discharged the claimant. The claimant had not previously been warned regarding any conduct of this nature; the only "warning" previously given to the claimant was a notation on a performance evaluation in June 2013 that he had been verbally warned about complying with the business clients' computer use policy.

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 employer) 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 error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the employer's control. The employer did file its appeal within ten days of actually receiving the decision. 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 allegedly making threats of violence towards the client's employees, screaming and yelling at the employees, and generally creating an uncooperative and unproductive work environment. Conduct asserted to be disqualifying misconduct must be both specific and current. *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988); *West v. Employment Appeal Board*, 489 N.W.2d 731

(Iowa 1992). The employer has not established any clear, specific, and current events. Further, the employer relies exclusively on the at least second-hand account from the client's supervisor; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the supervisor might have been mistaken or whether the persons who made the allegations were credible. The claimant denied the allegations by his first-hand testimony in the hearing. 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 in fact made any threats of violence or screamed and yelled at any of the business client's employees. 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 is treated as timely. The representative's December 16, 2013 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/css

[i] **NOTE TO EMPLOYER:**

To change the address of record, please access your account at: https://www.myiowaui.org/UITIPTaxWeb/.
Helpful information about using this site may be found at:
http://www.iowaworkforce.org/ui/uiemployers.htm and
http://www.youtube.com/watch?v=_mpCM8FGQoY