IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

CLYDE M STEWART
Claimant

BAKER'S PRIDE INC
Employer

APPEAL NO. 18A-UI-03903-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/18/18
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) - Discharge
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Clyde Stewart filed an appeal from the March 5, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on the Benefits Bureau deputy's conclusion that Mr. Stewart voluntarily quit on January 4, 2018 without good cause attributable to the employer. After due notice was issued, a hearing was held on April 23, 2018. Mr. Stewart participated. Sandra Gonzales of Insperity Peo Services represented the employer and presented testimony through Wesley Smith. Exhibit A and Department Exhibit D-1 were received into evidence.

ISSUES:

Whether there is good cause to treat Mr. Stewart's late appeal as a timely appeal.

Whether Mr. Stewart separated from the employment for reason that disqualifies him for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On March 5, 2018, Iowa Workforce Development mailed a copy of the March 5, 2018, reference 01, decision to claimant Clyde Stewart's last known address of record. The address of record was 540 South 9th Street in Burlington. Located at that address is a home owned and occupied by Mr. Stewart's aunt. Mr. Stewart's aunt also owns a home located at 544 South 9th Street in Burlington. The two houses are next to one another. At the time Iowa Workforce Development mailed the reference 01 decision to Mr. Stewart on March 5, 2018, Mr. Stewart resided with his cousin at 544 South 9th Street. The March 5, 2018, reference 01, decision stated that the deadline for appealing the decision was March 15, 2018. Mr. Stewart did not receive the March 5, 2018, reference 01, decision at either address. On March 27, 2018, Mr. Stewart contacted the Burlington Workforce Development. At that time, Mr. Stewart learned about the March 5, 2018 reference 01, decision that had disqualified him for benefits. On that same day, Mr. Stewart filed an online appeal from the decision.

Mr. Stewart was employed by Baker's Pride, Inc. as a full-time laborer from July 2017 until January 12, 2018, when Richard McCoy, Director of Operations, discharged him from the employment for attendance. Mr. Stewart's work days were Monday through Thursday. Depending on business needs, the employer sometimes had Mr. Stewart begin his workday at 4:30 a.m. and work to 3:30 p.m. and sometimes had Mr. Stewart work from 10:30 a.m. to 9:00 p.m. Foreman Roger Brockett was Mr. Stewart's immediate supervisor. Mr. Brockett reported to Wesley Smith, Production Manager.

Mr. Stewart last performed work for the employer on Thursday, January 4, 2018. Mr. Stewart completed his shift that day and was next scheduled to report for work at 4:30 a.m. on Monday, January 8, 2018. As Mr. Stewart walked to work in the dark that day, he slipped and fell on ice. Mr. Stewart injured his hip. Mr. Stewart did not report for work that day. About four hours into the shift, Mr. Stewart telephoned the workplace and reported to the receptionist his need to be absent that day due to injury. The employer's written attendance policy requested notice two hours prior to the start of the shift, if possible. The employer had provided Mr. Stewart with a copy of the attendance policy. On January 8, it was not possible for Mr. Stewart to provide a two-hour notice of his need to be absent. On that day, Mr. Stewart gave notice of his need to be absent as soon as he could under the circumstances of his injury.

Mr. Stewart reported for work as scheduled on Tuesday, January 9, 2018. When Mr. Stewart arrived, he encountered Mr. Smith, the Production Manager. Mr. Smith saw that Mr. Stewart was limping badly and was in obvious pain. Mr. Smith told Mr. Stewart that he could not work until he went to a doctor and obtained a release to return to work. Mr. Stewart told Mr. Smith that he would not have money to go to the doctor until payday that coming Friday. Mr. Smith nonetheless placed Mr. Stewart off work. Mr. Stewart is a veteran and has access to free health care through the Veterans Administration Hospital in Iowa City. Mr. Stewart lived in Burlington and lacked an independent means to get to the VA in Iowa City. Mr. Stewart had to pay others, such as his aunt, to transport him to Iowa City. Based on Mr. Smith's directive, Mr. Stewart did not appear for work on Wednesday, January 10 or Thursday, January 11. Mr. Stewart did not make contact with the employer on those days and the employer did not make contact with him.

Friday, January 12 was one of Mr. Stewart's regular days off. It was also payday. Mr. Stewart reported to the workplace to collect his paycheck so he would have money to pay for the trip to the VA in Iowa City. When Mr. Stewart arrived to collect his paycheck, Mr. McCoy, Director of Operations, summoned Mr. Stewart to a meeting that also included Mr. Smith. At that meeting, Mr. McCoy told Mr. Stewart that Mr. Stewart had been a no-call/no-show for two days and therefore had quit pursuant to the employer's attendance policy. Mr. Stewart attempted to plead his case by bringing up Mr. Smith's directive to not return to work until he saw a doctor. Mr. McCoy did not change his mind. The employer's written attendance policy deemed two consecutive no-call/no-show absences to be job abandonment.

REASONING AND CONCLUSIONS OF LAW:

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, subsections 10 and 11, 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 ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See Iowa Administrative Code rule 871-24.35(1)(a). See also *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See Iowa Administrative Code rule 871-24.35(1)(b).

The evidence in the record establishes 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 Mr. Stewart did not have a reasonable opportunity to file an appeal by the March 15, 2018 deadline because he had not received the decision. Mr. Stewart learned of the decision on March 27, 2018 and filed his appeal the same day. The weight of the evidence establishes a late appeal that was made late by Iowa Workforce Development and/or the United States Postal Services. Accordingly, there is good cause to treat the appeal as a timely appeal.

See Iowa Administrative Code rule 871-24.35(2). The administrative law judge has jurisdiction to enter a decision based on the merits of the appeal.

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. *See Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See Iowa Administrative Code rule 871-24.25.

Iowa Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.,* 494 N.W.2d 660 (1993).

Mr. Stewart was discharged by the employer and did not voluntarily quit. Mr. Stewart never conveyed to the employer an intention to leave the employment. Mr. Stewart's absence on January 10 and 11 was based on Mr. Smith's directive to not return until he saw a doctor and was released to return to work. Mr. Stewart reasonably relied upon that directive. Mr. Smith said nothing to Mr. Stewart at the time he sent him off work on January 9 to indicate an expectation that Mr. Stewart call in each day to report his absence while he waited to be seen by a doctor. Mr. Stewart had specifically told Mr. Smith that he would not have money to see a doctor until payday on January 12.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board,* 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See Iowa Administrative Code rule 871-24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See Iowa Administrative Code rule 871-24.32(4).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires

consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The evidence in the record establishes a discharge triggered by absences that were excused absences under the applicable law. On Tuesday, January 9, Mr. Stewart appeared for work on time and ready to work despite his injured condition. Mr. Smith suspended Mr. Stewart from the employment, based on Mr. Stewart's injury, until Mr. Smith saw a doctor and was released by a doctor to return to work. Mr. Stewart told Mr. Smith he would not have the funds to see a doctor until payday on Friday, January 12. Mr. Smith said nothing about a requirement that Mr. Stewart continue to call in while he waited to acquire the funds to see a doctor. Mr. Stewart reasonably relied upon Mr. Smith's directive to stay away until he had been released by a doctor. It was unreasonable under the circumstances for Mr. Smith to assume that Mr. Stewart would see a doctor right away and return to work that same week. Mr. Stewart was continuing to comply with the employer's directive when he appeared on Friday, January 12 to collect his check so he could pay someone to transport him to Iowa City to see the doctor.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Stewart was discharged for no disqualifying reason. Accordingly, Mr. Stewart is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The claimant's appeal was timely. The March 5, 2018, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The discharge date was January 12, 2018. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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