IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RENEE L NODLAND
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL NO. 17A-UI-04605-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/12/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Renee Nodland filed a late appeal from the April 7, 2017, reference 03, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that Ms. Nodland was discharged on March 13, 2017 for excessive unexcused tardiness. After due notice was issued, a hearing was held on May 16, 2017. Ms. Nodland participated. Tammy Harding represented the employer and presented additional testimony through Amber Mills. The hearing in this matter was consolidated with the hearing in Appeal Number 17A-UI-04606-JTT. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 2 through 7, 9, A-F and Department Exhibits D-1 through D-3 were received into evidence.

ISSUE:

Whether there is good cause to treat Ms. Nodland's late appeal as a timely appeal.

Whether Ms. Nodland was discharged for misconduct in connection with the employment that disqualifies her for benefits and 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: Renee Nodland was employed by Casey's Marketing Company as a part-time pizza delivery driver from February 2016 until March 12, 2017, when Amber Mills, Assistant Manager, and Tammy Harding, Store Manager, discharged her for tardiness. Ms. Harding was Ms. Nodland's immediate supervisor. Ms. Mills also had supervisory authority over Ms. Nodland's employment. Ms. Mills work hours were 4:00 p.m. to 9:00 p.m., Thursday through Sunday. These were the busiest pizza delivery nights at the Casey's store.

The final absence that triggered the discharge occurred on March 12, 2017. On that day Ms. Nodland overslept and was an hour and a half late for her 4:00 p.m. shift. An hour into the shift, Ms. Nodland called the Casey's store and spoke with Ms. Mills. Ms. Nodland told Ms. Mills that her clothes drying in the dryer. Ms. Nodland had felt drowsy at noon, set her phone alarm

for 2:00 p.m., and then slept through the phone's brief alarm cycle. Ms. Nodland woke in response to one of Ms. Mills' phone calls to her. Because Ms. Nodland had not appeared for her shift, Ms. Harding had to report to the store and fulfill Ms. Nodland's delivery driver duties until she found a replacement. When Ms. Nodland finally arrived for the shift, Ms. Mills notified her that she was discharged. Ms. Nodland had been seven minutes late on the previous evening because she was running late. Ms. Nodland had also been two hours late for her shift on March 3. On that day, Ms. Nodland had taken a nap in the afternoon, had set her phone alarm, and then had slept through the phone's brief alarm cycle. On that day, Ms. Harding had to report to the store to fulfill Ms. Nodland's duties. When Ms. Nodland arrived for the shift, Ms. Mills issued a written reprimand and suspended her for three days.

In making the decision to discharge Ms. Nodland from the employment, Ms. Mills also considered an absence on September 2, 2016. On that day, Ms. Nodland notified Ms. Mills that she would be absent from her shift because she needed to study. Ms. Nodland was at that time studying to become a certified medical assistant. Ms. Nodland was aware that the employer required that she provide notice of her need to be absent from a shift prior to the scheduled start of the shift and preferably at least an hour prior to the shift. On September 2, Ms. Nodland located a replacement and notified Ms. Mills a couple hours prior to the shift. Ms. Mills deemed the replacement inadequate. On September 5, Ms. Mills issued a written reprimand to Ms. Nodland in response to the absence.

In October 2016, Ms. Nodland was diagnosed with thyroid cancer and underwent removal of a portion of her thyroid. Ms. Nodland believes that her illness contributed to her daytime sleepiness. During the string of late of arrivals toward the end of the employment, Ms. Nodland was sleeping six to seven hours per night, but would become drowsy in the midday. Toward the end of the employment, Ms. Nodland was dealing with the breakdown of an abusive marriage. Ms. Nodland had been the victim of abuse perpetrated by her husband. On the day after Ms. Nodland was discharged from the employment, she sought medical evaluation of her sleepiness. At that time, she was given a primary diagnosis of depression with anxiety. The nurse practitioner started Ms. Nodland on anti-depression medication. The medical record from that visit references secondary diagnoses of hypothyroidism, fatigue, and papillary thyroid carcinoma. At the time of the visit, Ms. Nodland obtained a written memo from her nurse practitioner that stated as follows:

> This letter is to inform you of the following information regarding Renee L Nodland. Renee was seen in my office today 3/13/2017 for trouble which caused her to be late yesterday to work. Please excuse her at this time.

On March 14, 2017, Ms. Nodland received a letter from her doctor regarding her thyroid medication. That letter includes the following:

> Your recent thyroid labs show you need a little more suppression. Finish your current bottle of the 125 mcg then switch over to the 137 mcg tablets, take one daily. Please recheck these levels again a few days before your next visit.

Ms. Nodland established a claim for unemployment insurance benefits that was effective March `12, 2017. On April 7, 2017, Iowa Workforce Development mailed a copy of the April 7, 2017, reference 03, decision to Ms. Nodland at her last known address of record. Ms. Nodland's address of record is a United States Postal Service Post Office box in Haverhill. The reference 03 decision disqualified Ms. Nodland for benefits and relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that Ms. Nodland was discharged on March 13, 2017 for excessive unexcused tardiness. The reference 03 decision

contained a warning that an appeal from the decision must be postmarked by April 17, 2017 or be received by the Appeals Bureau by that date. The decision contained a telephone number Ms. Nodland could use to reach Workforce Development customer service personnel if she had any questions about the decision. The back side of the decision contained clear and concise instructions for filing an appeal from the decision. The weight of the evidence in the record establishes that Ms. Nodland received the April 7, 2017, reference 03, decision in a timely manner, prior to the deadline for appeal, but took no action on the matter at that time.

On April 11, 2017, Iowa Workforce Development mailed a copy of the April 11, 2017, reference 05, decision to Ms. Nodland at the same last known address of record in Haverhill. The reference 05 decision stated that Ms. Nodland had been overpaid $425.00 in unemployment insurance benefits for the three weeks between March 12, 2017 and April 1, 2017, based on earlier decision that had disqualified Ms. Nodland for benefits in connection with her separation from Casey's. The reference 05 decision contained a warning that an appeal from the decision must be postmarked by April 21, 2017 or be received by the Appeals Bureau by that date. The decision contained a telephone number Ms. Nodland could use to reach Workforce Development customer service personnel if she had any questions about the decision.. The back side of the decision contained clear and concise instructions for filing an appeal from the decision. The weight of the evidence establishes that Ms. Nodland received the April 11, 2017, reference 05, decision in a timely manner, prior to the deadline for appeal, but took no action on the matter at that time.

On April 18, 2017, Workforce Development mailed an Overpayment Statement to Ms. Nodland requesting $300.00 in repayment of benefits. Ms. Nodland further delayed action on the matter because she was busy with other matters.

On May 1, 2017, Ms. Nodland went to the Marshalltown Workforce Development Center, completed an appeal form to appeal from the reference 03 disqualification decision, and delivered the completed appeal form to the Center staff. The Appeals Bureau received the appeal by fax on May 1, 2017. In the appeal, Ms. Nodland wrote as follows:

> I never received the unemployment decision. I only received the overpayment letter, enclosed. I am appealing because I feel that I was wrongfully terminated. I don't feel like I own the 300.00 overpayment of unemployment as well. Thank you.

Ms. Nodland enclosed with her appeal a copy of the Overpayment Statement that was mailed to her on April 18, 2017. Ms. Nodland also enclosed medical records from March 13 and 14, 2017. Ms. Nodland did not enclose a copy of the reference 03 disqualification decision or the reference 05 overpayment decision. The Appeals Bureau received the appeal by fax on May 1, 2017.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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, subsection 10, 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 871 AC 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 871 IAC 24.35(1)(b).

Ms. Nodland's appeal from both decisions was filed on May 1, 2017, when she delivered the appeal to the staff at the Marshalltown Workforce Development Center.

The evidence in the record establishes that more than ten calendar days elapsed between the mailing date of the April 7, 2017, reference 03, decision and the May 1, 2017 appeal. 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 weight of the evidence in the record establishes that Ms. Nodland did have a reasonable opportunity to file a timely appeal. Ms. Nodland's testimony regarding whether and when she

received the April 7, 2017, reference 03, decision was internally contradicting and unreliable. At one point, Ms. Nodland testified that she received the decision in the mail. At another point, she testified that she did not see the decision until staff at the Marshalltown Workforce Development Center printed it for her on May 1, 2017. Ms. Nodland provided similarly internally contradictory testimony regarding her receipt of the April 11, 2017, reference 05, decision. The administrative law judge notes that the idea of two decisions, mailed four days apart, not reaching their intended destination is a highly improbable scenario. A much more straightforward and plausible scenario would be that Ms. Nodland received both decision in a timely manner and ignored both until she received and review the Overpayment Statement that demanded prompt repayment of benefits.

The weight of the evidence in the record establishes that Ms. Nodland's failure to file an appeal from the April 7, 2017, reference 03, decision by the April 17, 2017 appeal deadline was attributable to Ms. Nodland, not Workforce Development or the United States Postal Service. The evidence fails to establish good cause to treat the late appeal as a timely appeal. See 871 IAC 24.35(2). Because the appeal was untimely, the administrative law judge lacks jurisdiction to disturb the April 7, 2017, reference 03, decision See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

In the event the ruling regarding timeliness of Ms. Nodland's appeal is reversed upon appeal to the Employment Appeal Board, the administrative law judge will also address Ms. Nodland's separation from the employment.

Iowa Code § 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 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 871 IAC 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 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

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 871 IAC 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 871 IAC 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 based on four unexcused absences. Three of those unexcused absences occurred within nine days of one another. The September 2016 absence was due to Ms. Nodland's desire to spend the four hours that evening studying instead of working. Ms. Nodland's need to study was a matter of personal responsibility. Regardless of the notice she provided to the employer and her act of finding a replacement, the absence was unexcused under the applicable law. Ms. Nodland's substantially late arrivals on March 3 and 12 were due to oversleeping and were unexcused absences. In connection with each

absence, Ms. Nodland elected to take a nap without using an appropriate alarm clock, woke up late, and was substantially late in reporting for work. The weight of evidence does not establish that Ms. Nodland's illness caused her to be late. In any event, Ms. Nodland failed to provide notice to the employer of her need to be late. The late arrival on March 11, was attributable to Ms. Nodland simply running behind. The evidence fails to support Ms. Nodland's assertion that the weather caused her to be late. Ms. Nodland's absences prompted progressive discipline. Ms. Nodland's unexcused absences, especially those at the end of the employment, were excessive and demonstrated a substantial disregard of the employer's interests.

Thus, in the event the ruling on timeliness is reversed as part of a further appeal, the evidence in the record establishes a discharge for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant would have to meet all other eligibility requirements. The employer's account would not be charged for benefits.

DECISION:

The April 7, 2017, reference 03, decision is affirmed. The claimant's appeal was untimely. Even if the appeal had been time, the claimant was discharged on March 12, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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