IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MINDY M MERRILL
Claimant

CARE INITIATIVES
Employer

APPEAL NO: 12A-UI-01293-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/11/11
Claimant: Appellant (2)

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

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's January 11, 2012 determination (reference 01) that disqualified her from receiving benefits and held the employer's account exempt from charge because the claimant had been discharged for disqualifying reasons. The claimant participated in the hearing, with her witness, Roy Grey. David Pitlor, the claimant's boyfriend, represented her. David Williams, a TALX representative, appeared on the employer's behalf. Katie Hanigan, the administrator, Neva Summerfield, the director of nursing, Ginny Malone, the business manager, and Mary Anne Nepel, a charge nurse, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge finds the claimant qualified to receive benefits.

ISSUES:

Did the claimant file a timely appeal or establish a legal excuse for filing a late appeal?

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in July 2006. She worked as a full-time CNA. Part of the claimant's job duties required her to train other employees. The employer's policy informs employees they are not to use profanity at work. During the course of her employment, the claimant has heard co-workers and supervisors use profanity at work. She did not report any inappropriate comments to management.

During the claimant's employment she has not received any warnings for using profanity at work. But, she has received her warnings for her conduct. The most recent warning for a conduct issue was in March 2010. The claimant has not received any written warning since March 2010. On her yearly evaluations, the employer usually notes that she needs to improve her attitude but does not indicate how she needs to make this improvement or what specifically she needs to improve.

Prior to December 12, 2011, the claimant's job was not in jeopardy. In late November 2011, the employer implemented a new documentation procedure that allows the employer to go paperless. The new procedure requires employees to wear a headset and then state what services were provided. The services are then recorded. On December 12, around 10:00 a.m. the claimant was frustrated with her headset because the system would not record her information. In frustration, the claimant went to the nurse's station, took off the headset, and put or threw it on the nurse's station counter. Nepel was at the station when the claimant said, "I'm done with this shit." The claimant then walked away and answered some call lights. Malone was in the restroom and overheard the claimant's remark. Malone did not say anything to either the claimant or Nepel.

After 5 to 15 minutes, Nepel approached the claimant in the hallway. Nepel asked the claimant if she was now ready to sit down and work with this new system. The claimant was still frustrated and said, "I'm sure as fuck not." After Nepel left, the claimant put her headset back on. The claimant had her headset off for a short time. During the time she did not have her headset on, she made written notes about services she provided.

Nepel went to Malone about the claimant's conduct. They decided to talk to Hanigan. The employer decided to discharge the claimant for using profanity at work in an area where residents and guests could have heard her comments and for the claimant's inappropriate conduct – taking off her headset. No residents or guests reported hearing any profanity.

When the employer talked to claimant on December 13, she admitted she swore and apologized for doing so. The claimant understood the policy. The employer discharged the claimant for her December 12 conduct and comments.

The claimant established a claim for benefits during the week of December 11, 2011. On January 11, 2012, a representative's determination was mailed to the claimant and employer. The determination held the claimant disqualified from receiving benefits as of December 11, 2011. The determination also informed the parties that an appeal had to filed or postmarked on or before January 21, 2012.

The claimant mailed her appeal letter and documents from a UPS store on January 23, 2012. The claimant's appeal letter was returned to her for insufficient postage. She took her appeal letter back to the UPS store on January 30, 2012. The UPS manager indicated that due to UPS's equipment malfunction, the postage was not clearly stamped on the claimant's first appeal letter. The record indicates the claimant's second appeal letter was postmarked on February 1, 2012.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's determination is mailed to the parties' last-known address, files an appeal from the determination; it is final. Benefits shall then be paid or denied in accordance with the representative's determination. Iowa Code § 96.6(2). 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 Iowa Supreme Court has ruled that appeals from unemployment insurance determinations must be filed within the time limit set by statute and the administrative law judge has no authority to review a determination if a timely appeal is not filed. *Franklin v. IDJS,* 277 N.W.2d 877, 881 (Iowa 1979); *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979). In this case, the

evidence indicates the claimant mailed her appeal twice, first on January 23 and second on January 31 or February 1, 2012. The appeal letter the Appeal's Section received was postmarked on February 1, 2012. The second appeal was filed after the January 23, 2012 deadline to appeal expired. Since January 21 was a Saturday, the deadline to appeal was automatically extended to Monday, January 23, 2012.

Even though it is unusual for a UPS machine to malfunction without anyone noticing this, the undisputed evidence indicates the claimant mailed her first appeal from a UPS store on January 23. The claimant's failure to file a timely appeal was due to the action of the United States Postal Service agent, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. In this case, the claimant established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to make a decision on the merits of the appeal.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The employer established justifiable business reasons for discharging the claimant. Based on the claimant's demeanor at the hearing, the claimant had an attitude that could frustrate supervisors. On December 13, the claimant acknowledged she was wrong in expressing herself as bluntly as she had the day before. Since the facts indicate other employees sometimes used profanity at work, the claimant had not received any warnings about using profanity at work before and no residents or guests of residents complained or even reported overhearing the claimant's December 12 remarks, the facts do not establish the claimant committed work-connected misconduct. She used poor judgment when she lost her temper and made comments out of frustration. But her comments and conduct on December 12 do not rise to the level of work-connected misconduct. Therefore, as of December 11, 2011, the claimant is qualified to receive benefits.

DECISION:

The representative's January 11, 2012 determination (reference 01) is reversed. The claimant did not file a timely appeal, but she established a legal excuse for filing a late appeal. The Appeals Section has jurisdiction to address the merits of her appeal. The employer discharged the claimant for justifiable business reasons, but the claimant did not commit work-connected misconduct on December 12, 2011. As of December 11, 2011, the claimant is qualified to

receive benefits, provided she meets all other eligibility requirements. The employer's account is subject to charge.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/css