

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIGITTE T NAPERKOWSKI
Claimant

APPEAL NO: 06A-UI-08361-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SSA SECURITY INC
SILVERHAWK SECURITY
Employer

OC: 07-02-06 R: 03
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 26, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 6, 2006. Claimant participated. Employer participated through Brenda Shepard. The administrative law judge took judicial notice of the administrative record. Department's Exhibit D-1 was received. Employer's Exhibit 1 was received.

ISSUE:

The issue is whether claimant's appeal is timely and if she was discharged for reasons related to job misconduct.

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to the claimant's address of record on July 26, 2006. The claimant did not receive the decision prior to the appeal deadline.

Claimant was employed as a part-time guard through June 6, 2006 when she was discharged. On May 31, Nate Reiter, Cargill supervisor, reported to employer Brenda Shepard, on-site supervisor for Silverhawk Security that truck driver Dan Yoder complained claimant yelled at him not to "move them fucking cones" and although he admitted he should not have moved the cones, he did not think claimant should have raised her voice at him using offensive language telling him to "shut up" and to give her "the fucking paperwork." (Employer's Exhibit 1) Cargill employee Erin Saner was working in the open livestock barn approximately ten feet from claimant and heard her call Yoder a "bitch." On May 24, she had been given a written warning about using offensive language to an employee David Dimmit outside of the employee restroom after she stopped him and confronted him about someone turning her in after she was warned about placing happy face stickers in the restroom which employer considered graffiti. She told him some "asshole" turned her in to the union. Also on May 24, employer warned her not to

exceed the boundaries of the restroom and was reported to have gone too far over to the males' side. On May 18, employer reprimanded her for placing smile face stickers on the restroom wall as she had been warned not to on May 16.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

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 claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received in a timely fashion. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See, *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472 (Iowa 1973). She filed the appeal within three days of receipt. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

871 IAC 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

"The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. EAB*, 462 N.W.2d 734 (Iowa App. 1990).

Claimant's use of offensive language towards truck drivers at the Cargill site was misconduct even upon the first incident. Benefits are denied.

DECISION:

The July 26, 2006, reference 01, decision is affirmed. The claimant's appeal was timely but she was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/cs