

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NOLA J RYAN
Claimant

MEMORIAL SERVICES OF IOWA INC
Employer

APPEAL 19A-UI-09209-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/07/19
Claimant: Respondent (1)

Iowa Code § 96.6(2) - Timeliness of Appeal
Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Memorial Services of Iowa (employer) appealed a representative's July 29, 2019, decision (reference 01) that concluded Nola Ryan (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 17, 2019. The claimant participated personally. The employer participated by Dave Noftsgger, Owner. Exhibit D-1 was received into evidence. The administrative law judge took official notice of the administrative file.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired in January 2012, as a full-time sales person. She previously worked for the employer as an independent contractor. The employer did not have a handbook containing its policies. The employer did not issue her any written warnings during her employment.

The claimant was paid commission on her sales. She did not receive an hourly wage. It was normal for her to work off site when she met with clients. At those meetings, the employer understood she took the confidential files with her to produce sales. Payments occurred during these meetings. The claimant transported the files and the payments back to the employer. No payments or files were ever lost.

As time progressed, co-workers left employment. The employer became more argumentative about normal processes. He hired a young intern and an outside marketing person. For six months the employer would not divulge the name of the marketing person to the claimant. The claimant suspected problems when the owner said to her, "God, Nola. You always upstage me."

In February and March 2019, the employer thought the claimant's tone, language and behavior was not acceptable. In March 2019, he remembers telling the claimant that her behavior was not acceptable in the workplace and sending her home. The claimant has no memory of the two episodes. She does remember the employer bullying her, taking sales away from her, and devaluing her work. The employer had been agitated for unknown reasons for some time.

At 8:30 p.m. on June 27, 2019, the claimant was in the office working on upcoming appointments. The owner walked in from an Altoona, Iowa, visitation. He said, "What are you still doing here?" The claimant said she was processing files and that he was going to want them done because she was booked solid for two weeks. He yelled at her and said she had to leave. The two argued and yelled at each other about why she could not finish her work. The owner pulled the plug out of the claimant's computer and told her to go home.

On Friday, June 28, 2019, the claimant appeared for work. At the end of the day, around 6:00 p.m. the employer told her she was terminated but wanted her to continue working as an independent contractor. The employer did not want her to work anymore in the capacity of a regular employee. The claimant did not want to work as an independent contractor. On Monday, July 1, 2019, she appeared for work again. The owner told her she was terminated as a regular employee and offered her work as an independent contractor. She refused the offer.

A decision was mailed to the employer's last known address of record on July 29, 2019. It did receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by August 8, 2019. A third quarter statement of charges was mailed to the employer on November 8, 2019, and received by the employer on November 11, 2019. The appeal was filed on November 22, 2019, within the time frame for filing an appeal to the statement of charges.

The claimant filed for unemployment insurance benefits with an effective date of July 7, 2019. The employer participated personally at the fact finding interview on July 26, 2019, by Dave Noftsgger.

REASONING AND CONCLUSIONS OF LAW:

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

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 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 employer did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without 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). The employer timely appealed the third quarter statement of charges, which was the first notice of disqualification. Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant was discharged for misconduct. The administrative law judge concludes she was not.

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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. *Casper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer did not provide sufficient evidence of job-related misconduct.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as the employer had not provided any proof of previous warnings about any of the issues leading to the separation, it has not met the burden of proof to establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

In this case, the employer terminated the claimant but wanted to keep her working for the employer as an independent contractor. This shows the employer wanted to keep the claimant connected to the business. The employer did not provide sufficient evidence of job-related misconduct. It did not meet its burden of proof to show misconduct. Benefits are allowed provided the claimant is otherwise eligible.

DECISION:

The July 29, 2019, reference 01, decision is affirmed. The appeal in this case was timely. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/scn