IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DENISE G MCNEW
Claimant

DOOLITTLE OIL COMPANY INC
Employer

APPEAL NO: 14A-UI-04492-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/26/14
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Denise G. McNew (claimant) appealed a representative's February 17, 2014 decision (reference 03) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment on January 29, 2014 from Doolittle Oil Company, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 3, 2014. The claimant participated in the hearing. A review of the Appeals Section's conference call system indicates that the employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. During the hearing, Exhibits A-1 and A-2 were entered into evidence. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it should be treated as timely?

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

Two representative's decisions were mailed to the claimant's last-known address of record on February 17, 2014. Both cited a separation from employment occurring on January 29, 2014; the reference 01 decision named the employer as "Doc's Stop, Inc.," and the reference 03 named the employer as "Doolittle Oil Co., Inc." The two entities are related, operating different locations, and the claimant had worked at both locations and received wages from both employers' accounts. The claimant received the decisions. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 27, 2014. An appeal to the reference 01 decision naming "Doolittle Oil Co., Inc." as the employer was not treated as filed until May 1, 2014, which is after the date noticed on the disqualification decision.

The claimant did previously file an appeal on February 20, 2014. (Exhibit A-2.) That appeal indicated that the date of the decision the claimant was appealing was "2-17-14," and indicated that the "name of the employer" for the decision being appealed was "Doc's Stop Inc./Doolittle Oil Co." That appeal was received by the Appeals Section on February 20, 2014, and an appeal was set up. However, an appeal was only set up for the reference 01 decision naming Doc's Stop, Inc. as the employer. Under that appeal, 14A-UI-01923-ET, a hearing was conducted before another administrative law judge on April 7, 2014. Cathy Doughty participated in that hearing on behalf of the employer. Upon the conclusion of that hearing, that administrative law judge issued a decision on April 9, 2014 which reversed the decision concluding that the separation was disqualifying.

The claimant assumed that this decision resolved the separation in her favor, particularly since the events at issue occurred at the Doc's Stop location. When she still was not receiving benefits, she inquired further of an Agency representative and learned that the reference 03 naming "Doolittle Oil Co." had not been addressed or included in the April 7 hearing and was still blocking her eligibility. She therefore filed her additional appeal on May 1, 2014.

Since the administrative law judge concludes that the claimant's appeal on February 20, 2014 was sufficient to be a timely appeal of the reference 03 decision naming "Doolittle Oil Co.," and since there was only one separation from the related employer entities, this administrative law judge therefore adopts and incorporates the findings and conclusions of the administrative law judge in 14A-UI-01923-ET regarding the separation as the findings and conclusions in this case, with minor modification as appropriate.

The claimant was employed as a part-time clerk for Doc's Stop and its related entity Doolittle Oil Company from September 15, 2013 to January 29, 2014. She was discharged following a local law enforcement sting operation during which she sold cigarettes to a minor at the Doc's Stop location.

On January 22, 2014, a young man entered the store and asked to buy a pack of cigarettes and the claimant sold him the product without asking for identification or checking his age. The claimant first notified the other store in the area that the police were conducting stings and then reported the incident to Manager Cathy Doughty. She stated she did not ask for the young man's identification because he looked tall and she thought he was old enough to purchase alcohol or tobacco legally. The employer's policy states that any employee caught selling alcohol or tobacco to minor can be discharged. Every two weeks, when employees receive their paychecks, each employee signs a document entitled, "Doc's Stop C-Stores" and contains five paragraphs covering, in order, Fire, Summer is Here – Please remember to check the washer fluid and supply of paper towels at the gas pumps, etc., Remember to ID and Check Stubs, and concludes by stating, "By signing this document, you have read and understand all of the above." The claimant signed it on December 4 and December 18, 2013.

The claimant had been trained regarding asking customers for identification when they purchase alcohol or cigarettes. Before ever being allowed to work on the cash register employees must take two online classes. One is called the Iowa Pledge Retailer Training Program, dealing with the purchase of cigarettes and the other is called Iowa Program for Alcohol Compliance Training dealing with the purchase of alcohol. The claimant completed both classes June 10, 2013.

Ms. Doughty's supervisor was out of town until January 28, 2014. She notified him of the situation January 29, 2014, and the claimant's employment was terminated effective that day. The claimant continued to work between January 22, 2014 and her discharge date of

January 29, 2014. The claimant had not received any warnings for anything while she was employed with the employer.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

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 administrative law judge concludes that failure to treat the claimant's February 20, 2014 appeal as an appeal of the reference 03 decision naming "Doolittle Oil Co." as well as an appeal of the reference 01 decision naming "Doc's Stop, Inc." was due to Agency error or misinformation or delay or other action pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal of the reference 03 decision naming "Doolittle Oil Co." should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

Rule 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.

The employer has the burden of proving disqualifying misconduct. *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 substantial and 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).

While the claimant is guilty of an isolated incident of poor judgment, the evidence does not point to repeated instances or carelessness or negligence. She made a snap judgment regarding the age of the teenager or young man attempting to buy cigarettes, based mostly on his physical appearance, namely his height, and her judgment was incorrect. The claimant had no motive to sell cigarettes to a minor and although she had been trained with regard to asking for identification when customers purchase alcohol or tobacco, on this occasion she failed to do so. She reported the incident to the manager immediately after notifying the other store in the area that local law enforcement was conducting a sting operation but was then allowed to work for another week because of the managers who ranked above Ms. Doughty was out of town. The employer's handbook states that employees who do not comply with this policy can be terminated but the employer states it has a zero tolerance policy and its practice has been to immediately terminate the offending party. If the conduct is so egregious as to require immediate termination why was the claimant allowed to continue working for another week?

In *Higgins* and *Infante*, the courts found the determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. IDJS*, 350 N.W.2d 187, 192 (Iowa 1984). *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). *Higgins* and *Infante* make it clear it is the overall record that is key. While this is not an attendance case the same reasoning applies. Looking at the claimant's overall record, one without any blemishes or warnings for any type of infraction, the administrative law judge must conclude that while the claimant did commit misconduct in selling a pack of cigarettes to a minor, this was an isolated incident of poor judgment and as such does not rise to the level of disqualifying job misconduct at that term is defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The appeal in this case was timely. The representative's February 17, 2014 decision (reference 03) is reversed. The employer discharged the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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