IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MONIQUE L SMITH
Claimant

SCOTTISH RITE PARK INC
Employer

APPEAL NO. 07A-UI-09514-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/26/07 R: 02
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Monique L. Smith (claimant) appealed a representative's September 24, 2007 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Scottish Rite Park, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 24, 2007. The claimant participated in the hearing. Nicole Hammer appeared on the employer's behalf. During the hearing, Exhibit A-1, Employer's Exhibit One, and Claimant's Exhibit A were entered into evidence. Based on the evidence, the arguments of the parties, 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? Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last known address of record on September 24, 2007. The claimant received the decision on September 25, 2007. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by October 4, 2007. The appeal was not filed until it was hand-delivered on October 10, 2007, which is after the date noticed on the disqualification decision.

The representative's decision issued on September 24 was based upon a fact-finding interview held on September 21. The claimant had not participated in the fact-finding interview because the Agency representative used the wrong telephone number in attempting to contact the claimant. The claimant sought to reach the fact-finding representative to provide her input on both September 21 and September 24; the September 24 attempt included going to the local Agency office and speaking to another staff person who also left a message for the fact-finding representative to contact the claimant. Through this effort, the fact-finding representative did make contact with the claimant, did acknowledge he had used the wrong number when he

attempted to call her on September 21, and agreed to conduct a separate fact-finding with the claimant on September 27, which in fact did occur, although the employer was not recontacted or notified of this additional interview. During that interview the fact-finding representative indicated to the claimant that he was probably not inclined to change the outcome from his initial decision based upon the information she presented; however, he did not advise her that no additional decision would be issued to acknowledge he had considered her information and he did not advise her that the appeal period from the September 24 decision was still running and that she would need to appeal by the deadline stated in that decision. The claimant assumed that she would be receiving some form of new decision, and when she had not received one by October 9, she returned to the local Agency office, who advised her there was no new decision that had been issued or was pending. She then completed and returned her appeal form on October 10, 2007.

The claimant started working for the employer on February 20, 2007. She worked full time as a certified nursing aide (CNA) in the employer's retirement center. Her last shift actually worked was a shift that began at 10:30 p.m. on August 11 and ended at 7:00 a.m. on August 12. She was scheduled to work a similar shift from the night of August 12 to the morning of August 13 and again from the night of August 13 to the morning of August 14. When the claimant had gotten off work on August 12 she did not have transportation home, so she walked home. This caused her to suffer leg pain so that on the night of August 12 she called in to report that it would cause her too much pain to walk to work and that she did not have transportation to work unless someone gave her a ride. The employer attempted to find someone to give the claimant a ride to work but then called the claimant back to indicate that someone had come in to cover the shift.

Again on the evening of August 13 the claimant called in trying to find a ride to work or to find someone else who could cover her shift because she had no transportation and could not walk to work. The nurse on duty initially told the claimant that she was not going to allow the claimant to call off, but then indicated that the claimant would have to speak directly to the director of nursing (DON) and gave the claimant the DON's phone number. The claimant made a number of attempts to reach the DON before she was successful; the DON then told the claimant that she would see that the shift was covered but that the two of them would have to talk the next day regarding the claimant's attendance.

On the morning of August 14 the claimant made a number of attempts to contact the DON before she was successful in reaching her to try to arrange a time to come in to talk. When they did connect by phone, the DON indicated that the purpose of meeting was to review the claimant's attendance with likely termination. She could not meet with the claimant that day, and the claimant could not meet on August 15, so the meeting did not take place until August 16. At that time the DON gave the claimant the termination notice which indicated as the "statement of the problem: High absenteeism and tardiness," and noted that in the six-month period of the claimant's employment there had been at least ten days of absence and 12 instances of tardiness. The claimant had previously been given a written warning on her attendance on April 13, 2007. Of the ten absences, all but the last two had been for medical reasons, but the last two were due to a lack of transportation. While the employer asserted that the claimant was also a no-call, no-show for a shift on the night of August 14 to the morning of August 15, and that this played a major role in the discharge decision beyond the general attendance issue, the administrative law judge specifically finds that this was not the case.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision.

Iowa Code Section 96.6-2 provides in pertinent part:

> 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. . . . 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.

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 record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa 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 record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal 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 v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979), and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer

has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

Iowa Code section 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.

871 IAC 24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Absences due to issues that are of purely personal responsibility, including transportation, are not excusable. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). The claimant's final two absences were not excused and were not due to illness or other reasonable grounds outside her control. The claimant had previously been warned that future absences could result in termination. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's September 24, 2007 decision (reference 01) is affirmed. The appeal in this case is treated as timely. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of August 16, 2007. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is then otherwise eligible. The employer's account will not be charged.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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