

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY N NEHLS
Claimant

APPEAL NO. 12A-UI- 02847-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE CHEESECAKE FACTORY REST INC
Employer

OC: 09/27/09
Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Ashley Nehls filed an appeal from the August 11, 2011, reference 09 decision that denied benefits. After due notice was issued, a hearing was commenced on April 5, 2012 and concluded on April 18, 2012. Ms. Nehls participated. Rich Gauthier, General Manager, represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 12A-UI-02848-JTT. Exhibits One, Two, A and Department Exhibits D-1 and D-2 were received into evidence.

ISSUE:

Whether Ms. Nehls' appeal from the August 11, 2011, reference 09 decision is timely.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On August 11, 2011, Iowa Workforce Development mailed a copy of the August 11, 2011, reference 09, decision to Ashley Nehls' last-known address of record. Ms. Nehls received the decision in a timely manner, prior to the deadline for appeal. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by August 21, 2011. Ms. Nehls had already decided not to further pursue her claim for benefits and did not read or respond to the decision that was mailed to her. Ms. Nehls discarded the correspondence from Workforce Development.

Ms. Nehls later established a new claim for benefits that was effective March 4, 2012. On March 14, 2012, a Workforce Development representative mailed to Ms. Nehls a March 14, 2012, reference 03 decision that denied benefits based on an Agency conclusion that Ms. Nehls' June 2011 separation from The Cheesecake Factory had been adjudicated in connection with the earlier claim and that the earlier decision remained in effect. In response to the decision she received in March 2012, Ms. Nehls went to her local Workforce Development Center on March 19, 2012, completed an appeal form and delivered the completed appeal form to the Workforce Development Center staff. The Appeals Section received Ms. Nehls appeal on

March 22, 2012 and treated it as an appeal from both the August 11, 2011 and March 14, 2012 decisions.

REASONING AND CONCLUSIONS OF LAW:

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, 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 ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The evidence in the record establishes that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme 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 weight of the evidence in the record shows that the Ms. Nehls did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that the failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service. See 871 IAC 24.35(2). The administrative law judge found not credible Ms. Nehls' testimony that a Workforce Development representative had advised Ms. Nehls prior to the entry of the August 11, 2011, reference 09, decision that she should disregard or discard subsequent correspondence from the agency.

The administrative law judge concludes that the appeal was not timely filed pursuant to Iowa Code section 96.6(2), and the administrative law judge lacks jurisdiction to disturb the decision or to make a determination with respect to the nature of the appeal. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The Agency representative's August 11, 2011, reference 09, decision is affirmed. The appeal in this case was not timely, and the decision of the representative that denied benefits in connection with the June 2011 separation remains in effect.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs