IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CLIFFTON M EASLEY
Claimant

MARKETLINK INC
Employer

APPEAL NO. 17A-UI-04685-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/02/17
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the April 20, 2017, reference 03, decision that allowed benefits to claimant Cliffton Easley provided he met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that Mr. Easley was discharged on March 29, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on May 22, 2017. Mr. Easley did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Margaret Ussery represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record indicates that no benefits have been disbursed to the claimant in connection with the April 2, 2017 original claim. Exhibits 1 and 2 and Department Exhibit D-1 were received into evidence.

ISSUES:

Whether there is good cause to treat the employer's late appeal as a timely appeal.

If a timely appeal was established, was the claimant discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On April 20, 2017, Iowa Workforce Development mailed a copy of the April 20, 2017, reference 03, decision to employer at the employer's last known address of record. Though the employer address on record at Workforce Development is c/o Sandy Dunn, Suite 20, 3600 Army Post Road, Des Moines, Iowa 50321, the employer's suite number is actually Suite 200. Ms. Dunn is the company's Controller. The April 20, 2017, reference 03, decision allowed benefits to claimant Cliffton Easley provided he met all other eligibility requirements and held Marketlink's account could be charged for benefits, based on the claims deputy's conclusion that Mr. Easley was discharged on March 29, 2017 for no disqualifying reason. The decision contained a warning that an appeal from the decision must be postmarked by April 30, 2017 or received by the Appeals Bureau by that date. On May 3, 2017, the employer filed an online appeal from the

decision. The online appeal reflects that it was submitted by Kim Passick. Ms. Passick is a regional call center manager. The online appeal included a return email address of soverturf@marketlinc.com. That email address is for Sarah Overturf. Ms. Overturf is the head of Marketlink human resources. In the online appeal, the employer—or the employer's human resources personnel asserted that the employer had just received the decision April 20, 2017 decision on May 2, 2017. Ms. Dunn would have been the initial recipient of the decision. Ms. Dunn would then have needed to forward the decision to the employer's human resources department for submission of an appeal.

Claimant Cliffton Easley was employed by Marketlink, Inc. as a full-time telephone sales representative from March 7, 2017 until March 29, 2017, when the employer's human resources discharged him from the employment in response to receiving information from a third-party that performed a background check on Mr. Easley. The employer witness is not certain what the background check revealed about Mr. Easley.

Mr. Easley established an original claim for unemployment insurance benefits that was effective April 2, 2017. Mr. Easley's base period for purposes of the claim consists of the four quarters of 2016. Marketlink, Inc. is not a base period employer for purposes of the claim.

REASONING AND CONCLUSIONS OF LAW:

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 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 employer's appeal was filed online on May 3, 2017, three days after the appeal deadline had expired. The employer has presented insufficient evidence to establish that the employer received the April 20, 2017, decision in anything other than a timely manner. Employer witness Margaret Ussery was not involved in receiving the decision or filing the appeal. Ms. Ussery could testify only to the employer's standard practice in routing unemployment insurance decisions from the controller to the human resources staff, but she lacked knowledge of when the company initially received the decision. A reasonable person would conclude that use of Suite 20, the address on record, rather than Suite 200, would not likely have caused delay in the employer's receipt. In other words, the weight of the evidence in the record establishes that Marketlink received the decision in a timely manner, regardless of when the decision was internally routed to the human resources department. The address to which the decision was directed was in all other respects accurate and the correspondence was directed to the Ms. Dunn at Marketlink. The employer elected not to present testimony from Mr. Dunn or any human resources personnel regarding receipt of the decision, internal routing of the decision, or processing an appeal from the decision.

The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the 10-day 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 employer had presented insufficient evidence to establish that the employer was denied a reasonable opportunity to file a timely appeal.

The weight of the evidence in the record establishes an untimely appeal. The weight of the evidence indicates that delay in filing the appeal was attributable to the employer's internal operations and not due to Workforce Development error or misinformation or delay or other action of the United States Postal Service. See 871 IAC 24.35(2). Because the appeal was not timely filed pursuant to Iowa Code section 96.6(2), the administrative law judge lacks jurisdiction to disturb the April 20, 2017, reference 03 decision. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

In the event that employer appeals this decision and obtains reversal of this decision regarding the timeliness of the appeal, the administrative law judge will also address the claimant's discharge from the employment.

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:
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> 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.

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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s) alone. The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

Iowa Administrative Code rule 871 IAC 24.32(6) provides as follows:

> False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer.

The employer presented insufficient evidence, and insufficiently direct and satisfactory, evidence to establish misconduct in connection with the employment. The employer witness does not know what the background check revealed about Mr. Easley. The employer witness speculated that the check may have revealed a felony conviction. The employer witness speculates that Mr. Easley may have falsely answered a question on a job application. However, the employer witness did not review the job application and cannot say even whether it was an online application or a paper application. The employer elected not to present testimony from persons with personal knowledge of the matter upon which the discharge was based. Accordingly, the administrative law judge concludes that Mr. Easley was discharged on March 29, 2017 for no disqualifying reason. Mr. Easley is eligible for benefits, provided he meets all other eligibility requirements. Because Marketlink is not a base period employer, Marketlink has not been charged, and would not be charged for benefits paid to the claimant in connection with the claim year that started on April 2, 2017 and that will end on March 31, 2018. However, if the claimant establishes a claim beyond that date and is deemed eligible for benefits, Marketlink's account may be assessed for benefits if the employer is at that point a base period employer for purposes of that future claim year.

DECISION:

The April 20, 2017, reference 03, decision is affirmed. The employer's appeal was untimely. The decision that allowed benefits to the claimant provided he meets all other eligibility requirements and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that Mr. Easley was discharged on March 29, 2017 for no disqualifying reason, remains in effect.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/scn