

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CORBI GAULEY**  
Claimant

**APPEAL NO. 13A-UI-08488-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EXPRESS LLC**  
Employer

**OC: 06/16/13  
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.6-2 – Timeliness of Appeal

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the July 11, 2013, (reference 01) unemployment insurance decision that denied benefits. After due notice was issued a hearing was held on August 27, 2013. Claimant participated. Employer participated through Cladine Schulte, Human Resources Manager, Tom Zuffa, District Manager and was represented by Tom Kuiper of TALX UCM Services Inc. Department's exhibit D-1 was entered and received into the record.

**ISSUES:**

Did the claimant file a timely appeal?

Was the claimant discharged due to job-connected misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a co-manager beginning on August 29, 2005 through June 13, 2013 when she was discharged.

On May 18, 2013 the claimant violated the employer's policy by taking a dress off the rack, removing the tag and wearing it. She did so because she had spilled something on her pants and wanted to change before opening the store. The claimant as manager was responsible for knowing and enforcing all policies. She signed a receipt for the handbook in the fall of 2009. The claimant did not pay for the dress prior to wearing it. Her actions were a violation of store policy and were reported by a sales associate who was working for her that day. The report was made to the employer on May 23 and a loss prevention investigation was begun. The claimant was interviewed on June 7 and admitted that she had worn the dress without paying for it. She did not attempt to pay for the dress prior to the loss prevention investigation beginning. After being told not to attempt to pay for the dress the claimant did attempt to pay for the dress. The claimant did not have the authority to ignore or override the policy. She did not call the district manager for help and said that because her co-manager had done the same thing she believed it was okay. The claimant's reporting the co-manager actions led to an

investigation of the co-manager who resigned before the employer could complete their investigation. The claimant was discharged on June 13 after the investigation was completed. The employer considered the claimant's actions as identical to theft from the employer. The claimant intentionally chose to wear at least one item of clothing from the store without paying for it first. Her action was a violation of the employer's policies.

A disqualification decision was mailed to the claimant's address of record on July 11, 2013. She received the decision on July 17, 2013. The appeal was due to the agency on or before July 22, 2013. The claimant alleges she faxed in the sole copy of her notice of appeal on July 22, 2013. Agency records indicate she did not fax the appeal in until July 23, 2013. The claimant did not provide any credible evidence that she faxed in her appeal in a timely manner. The claimant did not file a timely appeal.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant's appeal is untimely.

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 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 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 record shows that the appellant did 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 not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction 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).

In the alternative, for the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The claimant as a manager was responsible for insuring that employees working under her direction followed the work rules and policies. At least one associate knew that no employee was allowed to wear merchandise without first paying for it, as she reported the claimant's violation of the policy. The claimant is simply not believable when she says that she did not know that she was not to wear merchandise without first paying for it. As a manager she knew or should have known. The claimant did not ask for permission from human resources or from her district manager and despite the fact that she that she could have contacted them. The claimant by her own admission "stretched out" the dress she wore, hardly making it suitable for resale by the employer. The claimant should not have worn merchandise without paying for it first. The mere fact that she had stain on her pants, is not good cause to violate the clear policy without even checking with her supervisor first. The claimant's violation of the employer's policy is sufficient misconduct to disqualify her from receipt of unemployment insurance benefits. In the event the Employment Appeal Board should find the claimant's appeal timely, she was discharge due to job-connected misconduct and benefits are denied.

**DECISION:**

The July 11, 2013, (reference 01) decision is affirmed. The claimant's appeal was not timely. In the alternative, the claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. Inasmuch as no benefits were paid, no overpayment applies.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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