

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANE K ANDERSON
Claimant

APPEAL NO: 10A-UI-07859-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 04/11/10
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant appealed a representative's May 12, 2010 decision (reference 01) that disqualified her from receiving benefits and held the employer's account exempt from charge because the claimant had been discharged for disqualifying reasons. A telephone hearing was held on July 14, 2010. The claimant participated in the hearing with her attorney, Gayla Harrison. Scott Walls, attorney at law, represented the employer. Patrick Plaehn, the general manager, testified on the employer's behalf. During the hearing Employer Exhibits Three, Four and Six were offered and admitted as evidence. Employer Exhibit One was offered but not admitted as 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:

Did the claimant file a timely appeal or establish a legal excuse for filing a late appeal?

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on March 11, 2009. The claimant worked part in the garden center. Employees have a badge they must swipe when they report to work and when they check out. If an employee forgets to punch in or the badge does not record the time an employee came to work or leaves, the employee can complete a punch verification form to record or correct times the employee works. (Employer Exhibit Three.)

On October 19, 2009, the claimant received a written warning for failing to punch out when she took a 14-minute break. (Employer Exhibit Six.) After her shift on April 11, 2010, the claimant submitted a punch verification form that indicated she reported to work at 1 p.m. The form also indicated the claimant submitted the form because her badge was not working properly. (Employer Exhibit Three.) After the assistant hardware manager reported she had not seen the claimant until after 1 p.m., Plaehn reviewed the store's video tape. The only time he saw the claimant report to work on April 11 was at 1:55 p.m. when she came in through the exit doors.

(Employer Exhibit Four.) Before Plaehn talked to the claimant he looked at video that started at 12:30 p.m. and at other doors. When Plaehn talked to the claimant he asked her when she reported to work and what door she had come in. After he told the claimant he had not seen her on the video until 1:55 p.m., she commented that she would take a write up for being late.

Instead of giving the claimant another written warning, the employer discharged the claimant on April 13. The employer discharged her for falsifying the time she reported to work on April 11, 2010.

The claimant established a claim for benefits during the week of April 11, 2010. On May 12, 2010, a representative's decision was mailed to the claimant and employer. The decision held the claimant disqualified from receiving unemployment insurance benefits as of April 11, 2010. The decision also informed the parties that the decision was final unless an appeal was filed or postmarked on or before May 22, 2010.

The claimant received the representative's decision sometime around May 12, 2010. About the same time she received the decision; her husband suffered his second heart attack and was hospitalized in Iowa City. The claimant stayed in Iowa City for the two weeks her husband was hospitalized. She did not go home.

The claimant dated her appeal letter on May 17, 2010. The claimant's appeal letter is postmarked May 26 from Des Moines.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's decision is mailed to the parties' last-known address, files an appeal from the decision, the decision is final. Benefits shall then be paid or denied in accordance with the representative's decision. Iowa Code section 96.6-2. 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 Iowa Supreme Court has ruled that appeals from unemployment insurance decisions must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision if a timely appeal is not filed. *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979); *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979). In this case, the claimant's appeal was filed after the May 24 deadline for appealing expired. Since May 22 was a Saturday, the deadline is automatically extended to Monday, May 24, 2010.

The next question is whether the claimant had a reasonable opportunity to file 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 evidence establishes the claimant had a reasonable opportunity to file a timely appeal, but did not. The claimant testified she received the representative's decision on May 12 and typed her appeal letter on May 17. The claimant's assertion that she mailed her appeal letter on May 18 from her home is not credible. Why? The claimant also testified that her husband was hospitalized about the same time she received the representative's decision. During the two weeks he was hospitalized, she stayed in Iowa City with him and did not go home. If this testimony is true, the claimant could not have mailed her appeal letter from her home on May 18. The facts do not establish that the claimant mailed her appeal letter on or before May 24.

The claimant's failure to file a timely appeal was not due to any Agency error or misinformation or delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) would excuse the delay in filing an appeal. The claimant established personal reasons for not filing a timely appeal, but these reasons do not establish a legal excuse for filing a late appeal. Since the claimant did not establish a legal excuse for filing a late appeal, the Appeals Section does not have jurisdiction to make a decision on the merits of the appeal.

In the alternative, assume the claimant filed a timely appeal. The facts establish the employer discharged her for work-connected misconduct.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The claimant admitted she entered the store through the exit doors around 1:55 p.m. as the employer's video camera indicated. The claimant explained that she had gone to her car to get her glasses. Although the claimant asserted she came to work shortly before 1 p.m. on April 11, Plaehn did not observe the claimant enter the store prior to 1:55 p.m. on the video tapes. The video tape in addition to the claimant's comment that she would take a write up for reporting to work late again indicates the claimant's testimony about what time she reported to work that day is not credible. A preponderance of the credible evidence establishes the claimant falsified the punch verification form by reporting she had started her shift at 1 p.m. on April 11 when she did not report to work until 1:55 p.m. that day. Since the employer discharged her for work-connected misconduct, the claimant is not qualified to receive benefits as of April 11, 2010.

DECISION:

The representative's May 12, 2010 decision (reference 01) is affirmed. The claimant did not file a timely appeal or establish a legal excuse for filing a late appeal. The Appeals Section does not have jurisdiction to address the merits of her appeal. However, if the claimant would have filed a timely appeal, the employer discharged for work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of April 11, 2010. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs