

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELTON R CARTER
Claimant

APPEAL NO. 12A-UI-11191-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PALMER & COMPANY
Employer

**OC: 07/22/12
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Melton Carter filed an appeal from the August 20, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 11, 2012. Mr. Carter participated and presented additional testimony through Greg Walcott. Hanna Cook represented the employer. Department Exhibits D-1 and D-2 were received into evidence.

ISSUE:

Whether there is good cause to treat the appeal as timely. There is.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On August 20, 2012, Iowa Workforce Development mailed a copy of the August 20, 2012, reference 01 decision to Melvin Carter's last-known address of record. The decision denied benefits. The decision indicated on its face that any appeal needed to be postmarked or received by the Appeals Section no later than August 30, 2012. Mr. Carter did not receive the decision that was mailed to him. On September 17, 2012, when Mr. Carter had still not received a decision, Mr. Carter went to the Sioux City Workforce Development Center to inquire about the status of his claim for benefits. At that time, Mr. Carter learned about the decision denying benefits and immediately completed an appeal form, which he left with the Workforce Development Center staff that same day. The Sioux City Workforce Development Center faxed the appeal form to the Appeals Section, which received the appeal on September 17, 2012.

Mr. Carter was employed by Palmer & Company as a full-time warehouse worker from 2008 until June 25, 2012, when Hanna Cook, Human Resources Manager, discharged him for attendance. The final absence the triggered the discharge occurred on Friday, June 22. On that day, Mr. Carter was absent due to a toothache and properly notified the employer of his need to be absent. Mr. Carter went to the dentist that same day. Mr. Carter returned to work on Monday, June 25. On that day Ms. Cook met with Mr. Carter and asked if he had a doctor's note. When Mr. Carter indicated he did not have a doctor's note, Ms. Cook notified him that he was discharged from the employment for attendance.

If Mr. Carter needed to be absent from the employment, the employer's attendance policy required that he telephone the employer at least an hour prior to the scheduled start of his shift and leave a message with his name, the nature of the absence and the reason for the absence. The policy is contained in the employee handbook and Mr. Carter was aware of the policy.

In making the decision to discharge Mr. Carter from the employment, the employer considered several additional absences going back to October 7, 2011. Prior to the June 25, 2012 absence, the next most recent absence that factored in the discharge occurred on May 8, 2012, when Mr. Carter was late for personal reasons. Mr. Carter had been late for personal reasons many times before that. The employer had issued multiple reprimands for attendance, including one in March 2012 wherein the employer suspended Mr. Carter for three days.

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 appeal in question was filed on September 17, 2012, when Mr. Carter delivered the completed appeal to the Sioux City workforce development center and the Sioux City Workforce Development Center forwarded the appeal to the Appeals Section.

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).

Mr. Carter was denied the opportunity to file an appeal prior to the August 30, 2012 deadline, because he had not yet received the decision that denied benefits. He did not become aware of the decision until September 17, when he inquired at his local Workforce Development Center about the status of his claim. Mr. Carter immediately filed an appeal. The delay in the filing of the appeal was attributable either to Iowa Workforce Development or to the United States Postal Service. Based on that conclusion, the administrative law judge further concludes there is good cause to treat the late appeal as a timely appeal and that the administrative law judge has jurisdiction to rule on the merits of the appeal. See Iowa Admin. Code section 871 IAC 24.35(2); See also Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

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.

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). 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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the

absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The weight of the evidence in the record establishes that the final absence the triggered the discharge was an excused absence under the applicable law. The final absence on June 22, 2012 was due to illness, a toothache, and was properly reported to the employer. Mr. Carter's failure to provide a doctor's note to support his need to be absent did not alter the fact that the absence was due to illness properly reported and was an excused absence under the applicable law. The next most recent absence that factored into the discharge occurred more than a month earlier. The evidence fails to establish a current act of misconduct. In the absence of a current act of misconduct, there is no basis for disqualifying Mr. Carter for unemployment insurance benefits and no reason for the administrative law judge to consider the earlier absences, since the law requires a current act of misconduct before a discharged claimant can be disqualified for benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Carter was discharged for no disqualifying reason. Accordingly, Mr. Carter is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The appeal was timely. The Agency representative's August 20, 2012, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs