

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PRIETO, ROSANA, P
Claimant

APPEAL NO. 13A-UI-00331-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

REMBRANDT ENTERPRISES INC
Employer

**OC: 11/25/12
Claimant: Appellant (2)**

Iowa Code Section 96.5(2) - Discharged for Misconduct
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Rosana Prieto filed an appeal from the December 19, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was started on February 11, 2013, and was completed on the February 25, 2013. Ms. Prieto participated. Sally Breecher represented the employer and presented additional testimony through Cory Hawkins and Charo Marcos. Spanish-English interpreter Stephen Rhodes assisted with the hearing. Exhibits One, A and B and Department Exhibits D-1 and D-2 were received into evidence.

ISSUES:

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

Whether Ms. Prieto was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Rosana Herrera de Prieto's native language is Spanish. Ms. Prieto has very limited English skills. On December 19, 2012, Iowa Workforce Development mailed a copy of the December 19, 2012, reference 01 decision to Ms. Prieto's last-known address of record: 230 W. 9th St., Storm Lake, IA 50588. The decision carried a warning that an appeal must be postmarked by December 29, 2012, or be received by the Appeals Section by that day. Ms. Prieto resides in a duplex. The address of the residence in the other half of the duplex is 228 W. 9th St., Storm Lake, IA 50588. The United States Postal Service misdirected the decision to the mailbox for the neighbor at 228 W. 9th St., instead of 230 W. 9th St. On or about January 9, 2013, the neighbor provided Ms. Prieto with the December 19, 2012, reference 01 decision. On January 11, 2013, Ms. Prieto faxed an appeal to the Appeals Section. The Appeals Section received the appeal on January 11, 2013.

Ms. Prieto was employed by Rembrandt Enterprises, Inc., as a full-time breaker candler. Ms. Prieto's employment involved candling eggs. Ms. Prieto's usual work hours were from 6:00 a.m. to 3:30 p.m. or whenever the work was done. Ms. Prieto's immediate supervisor was Eliza Rivera, Production Supervisor.

On November 28, 2012, Ms. Prieto fainted in the parking lot of the workplace at the end of her shift. Ms. Prieto suffers from migraine headaches and is a diabetic. Sally Breecher, Human Resources Manager, responded to the parking lot and transported Ms. Prieto to an Emergency Room several miles away. During the ride Ms. Prieto told Ms. Breecher that Ms. Rivera had disregarded her request for help earlier in the shift when Ms. Prieto went to Ms. Rivera and indicated she was not feeling well and had a bad headache. Ms. Prieto was evaluated at the Emergency Room and was then transported home by the employer. Ms. Breecher told Ms. Prieto she could stay home the next day if she did not feel well enough to work. Ms. Prieto called in an absence due to illness next day.

The employer had started an investigation into whether Ms. Rivera had indeed disregarded Ms. Prieto's request for help during the shift on November 28. The employer reviewed video surveillance that showed Ms. Rivera doing some of the heavier work associated with Ms. Prieto's duties. Even though Ms. Prieto had been granted November 29 off due to illness, the employer contacted Ms. Prieto with the assistance of an interpreter and arranged for Ms. Prieto to be transported to the workplace by taxi so that he could interview Ms. Prieto. Ms. Prieto had indicated she was well enough to make the trip. During the interview, Ms. Prieto reiterated her assertion that Ms. Rivera had disregarded her request for help the previous day. Based on the employer's review of the surveillance video that showed Ms. Rivera performing some of the more difficult duties Ms. Prieto would usually perform, the employer concluded that Ms. Prieto had intentionally misrepresented events from November 28. The employer discharged Ms. Prieto from the employment for making a false allegation against the supervisor. The employer suspected that Ms. Prieto's statement about Ms. Rivera not helping her was in retaliation for the employer denying Ms. Prieto's request earlier in the day on November 28 for January 1 off and part of a prior personality conflict between Ms. Prieto and Ms. Rivera.

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 January 11, 2013. This was beyond the December 29, 2012 appeal deadline. 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 indicates that Ms. Prieto was denied the opportunity to file an appeal prior to the December 29, 2012 deadline and at any point prior to January 9, 2013, because she had not yet received the decision that she needed to appeal. Ms. Prieto's appeal was late because United States Postal Service misdirected the December 19 decision and delayed Ms. Prieto's receipt of the decision. Ms. Prieto filed an appeal within two days of receiving the decision. The delay caused by the United States Postal Service provides good cause to treat the late appeal as a timely appeal. See 871 IAC 24.35(2). The administrative law judge has jurisdiction to rule on the merits of Ms. Prieto's appeal.

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).

Testimony from Ms. Rivera was conspicuously absent from the hearing. The purported video surveillance was also conspicuously absent from the hearing. The employer had the ability to present testimony from Ms. Rivera and presumably had the ability to preserve and submit the surveillance record for the hearing. If the employer did not preserve the surveillance record, that only serves to call into question what exactly was on the record that the employer failed to preserve. The record indicates that on November 28, 2012, Ms. Prieto lost consciousness in the employer's parking lot subsequent to notifying the employer that she was suffering from a migraine headache. Ms. Prieto's illness, prior to and including the loss of consciousness, may well have been a factor in her perception of what took place on November 28. If her perception on the day of the incident was flawed due to her illness, a reasonable person would not expect her memory of the incident to have improved the next day. In the absence of testimony from Ms. Rivera, and in the absence of the video surveillance, the administrative law judge cannot conclude that Ms. Prieto intentionally misrepresented events of November 28, 2012. The weight of the evidence fails to establish misconduct in connection with the employment. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Prieto was discharged for no disqualifying reason. Accordingly, Ms. Prieto is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claimant's appeal was timely. The agency representative's December 19, 2012, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for unemployment insurance benefits provided she meets all other eligibility requirements. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs