IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CLAUDIA R MCKIM
Claimant

KWIK TRIP INC
Employer

APPEAL NO. 08A-UI-05760-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 905/11/08 R: 02
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:

Claudia McKim filed an appeal from the June 9, 2008, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on July 9, 2008. Ms. McKim participated. Debbie Jones, Store Leader, represented the employer. The administrative law judge received Department Exhibits D-1 and D-2 into evidence.

ISSUES:

Whether there is good cause to deem the claimant's late appeal timely. There is.

Whether the claimant 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: The June 9, 2008, reference 02, decision was mailed to Claudia McKim's last-known address of record on June 9, 2008. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 19, 2008. Ms. McKim's address of record is a Post Office Box in Brooklyn, Iowa. Ms. McKim did not receive the June 9, 2008, reference 02, decision at her Post Office Box until June 23, 2008. The decision was most likely delayed in reaching Ms. McKim due to flood-related delays in processing mail at the United States Postal Service. Ms. McKim drafted her appeal on the day she received the decision. Ms. McKim's faxed appeal was received at the Appeals Section on June 23, 2008, the same day Ms. McKim had received her copy of the decision denying benefits.

Ms. McKim was employed by Kwik Trip as a part-time convenience store clerk form August 2007 until May 18, 2008, when Store Leader (manager) Debbie Jones discharged her. The incident that prompted the discharge occurred on or about March 16, 2008. On that date, Ms. McKim purchased a lottery ticket while she was on duty in violation of the employer's established loss prevention policy. Ms. McKim did not ring up the ticket herself or collect the ticket herself, but instead asked a senior clerk to ring up the purchase and provide her with the

ticket. The senior clerk complied and provided Ms. McKim with the ticket. The employer's loss prevention policy prohibited employees from purchasing lottery tickets while on duty. The policy was reviewed with Ms. McKim at the start of her employment. On January 21, 2008, Ms. McKim signed her acknowledgement of the loss prevention policy that included the prohibition against purchasing lottery tickets while at work.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first address the timeliness of Ms. McKim's appeal.

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). See also Pepsi-Cola Bottling Company of Cedar Rapids v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990). 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).

In the present case, the appeal was deemed filed on June 23, 2008, the day the faxed appeal was received by 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).

The evidence in the record establishes that Ms. McKim was denied a reasonable opportunity to file a timely appeal. The evidence further indicates that the delay in filing the appeal was attributable to delay on the part of the United States Postal Service in delivering the decision to Ms. McKim's address of record. There is good cause to deem the late appeal timely. The administrative law judge had jurisdiction to hear Ms. McKim's appeal and rule on the merits of her appeal.

The administrative law judge will now address the issue of whether Ms. McKim was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

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).

The evidence establishes that Ms. McKim purchased a lottery ticket while on duty in violation of the employer's loss prevention policy. The evidence indicates that the incident was an isolated occurrence and that Ms. McKim's conduct was not motivated by a willful or wanton disregard of the employer's interests. The evidence indicates that Ms. McKim made an isolated error in judgment by asking a senior clerk to sell her a lottery ticket while she was on duty. The evidence fails to establish substantial misconduct that would disqualify Ms. McKim for unemployment insurance benefits.

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

DECISION:

The claimant's appeal was timely. The Agency representative's June 9, 2008, reference 02, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs