

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHANTE M MCMULLEN
Claimant

APPEAL NO. 17A-UI-05715-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SOFA MART LLC
Employer

OC: 04/16/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Shante McMullen filed an appeal from the May 1, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that Ms. McMullen was discharged on June 16, 2016 for dishonesty in connection with the employment. After due notice was issued, a hearing was held on June 15, 2017. Ms. McMullen participated. Sandra Linsin of Employer's Edge represented the employer and presented testimony through Kevin Wormwood and Timothy Scott. Exhibits A and B and Department Exhibit D-1 were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On May 1, 2017, Iowa Workforce Development mailed the May 1, 2017, reference 01, decision to claimant Shante McMullen at her last known address of record. The decision disqualified Ms. McMullen for benefits and that relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that Ms. McMullen was discharged on June 16, 2016 for dishonesty in connection with the employment. The decision stated that an appeal from the decision must be postmarked by May 11, 2017 or be received by the Appeals Section by that date. Ms. McMullen received the decision in a timely manner, prior to the deadline for appeal. On May 10, 2017, Ms. McMullen logged in to the Workforce Development website. Ms. McMullen did not complete or transmit an appeal to Workforce Development at that time. Though the online appeal information includes a statement that the appellant will receive a confirmation email upon filing the appeal, Ms. McMullen did not receive a confirmation email. Ms. McMullen took no further action on the matter until June 2, 2017, when she contacted the Appeals Bureau to inquire about the status of her appeal. The Appeals Bureau staff correctly told Ms. McMullen that the Appeals Bureau had not received an appeal from Ms. McMullen. After the contact with the Appeals Bureau, Ms. McMullen went to the Waterloo Workforce Development center on June 2, 2017. Ms. McMullen completed an appeal form and hand delivered the appeal form

and her appeal letter to the Center staff. The Appeals Bureau received the appeal on June 2, 2017 by fax.

REASONING AND CONCLUSIONS OF LAW:

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-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).

Ms. McMullen's appeal was filed on June 2, 2017, the day she delivered her appeal to the Waterloo Workforce Development personnel and the day the Appeals Bureau received the appeal by fax. The evidence in record establishes that Ms. McMullen did not complete or

transmit an appeal on May 10, 2017. If she had, she would have received the confirmation email referenced in the online appeal materials. Had Ms. McMullen completed and transmitted an appeal on May 10, 2017, the Appeals Bureau would have docketed an appeal at that time and would have promptly sent notice of an appeal hearing. During Ms. McMullen's testimony, the administrative law judge found multiple reasons to discount the reliability of Ms. McMullen's testimony. Ms. McMullen could not say when she received the lower decision. Ms. McMullen could not say with certainty when she purportedly took steps toward filing an online appeal and guessed that it was May 10, 2017 because she had logged into the system that day. The biggest reason to discount the reliability of Ms. McMullen's testimony on the timeliness issues occurred when she gave patently false testimony regarding bogus medical notes submitted to the employer on her behalf.

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 record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that Ms. McMullen's failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Workforce Development error or misinformation or delay or other action of the United States Postal Service. See 871 IAC 24.35(2). Because the appeal was not timely filed pursuant to Iowa Code section 96.6(2), and the administrative law judge lacks jurisdiction to disturb the lower decision. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The May 1, 2017, reference 01, decision is affirmed. The claimant's appeal was untimely. The decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that the claimant was discharged on June 16, 2016 for dishonesty in connection with the employment, remains in effect.

In the event this decision regarding the timeliness of appeal is reversed upon further appeal, there is sufficient evidence in the record for a ruling on the merits without need for further hearing.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn