IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DESTINY M BYRD
Claimant

UNITED STATES CELLULAR CORP
Employer

APPEAL NO. 17A-UI-03807-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/26/17
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:

Destiny Byrd filed an appeal from the March 15, 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. Byrd was discharged on February 3, 2017 for excessive unexcused absences. After due notice was issued, a hearing was held on May 1, 2017. Ms. Byrd participated. The employer did not register a telephone number for the hearing and did not participate. The employer provided written notice on April 28, 2017, that the employer waived its participation in the appeal hearing. Exhibit A was received into evidence. The administrative law judge took official notice of the March 15, 2017, reference 01, decision.

ISSUES:

Whether there is good cause to treat Ms. Byrd's late appeal as timely.
Whether Ms. Byrd was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Destiny Byrd was employed by United States Cellular Corporation (U.S. Cellular) as a part-time Retail Wireless Consultant from May 2016 until February 3, 2017, when the employer discharged her from the employment. Ms. Byrd's immediate supervisor was Manager Laura Randall. On February 3, 2017, Ms. Randall and another manager notified Ms. Byrd that she was being discharged for attendance. Ms. Byrd has a son who suffers from autism and who requires specialized childcare. On one or more occasions, Ms. Byrd had been late for work, with proper notice to the employer, in connection with her need to secure specialized childcare for her son. In addition to these absences, the employer had also considered absences that occurred when Ms. Byrd suffered injury in connection with a motor vehicle collision.

On March 15, 2017, Iowa Workforce Development mailed a copy of the March 15, 2017, reference 01, decision to Ms. Byrd at her last-known address of record. The decision disqualified Ms. Byrd for benefits and relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that Ms. Byrd was discharged on February 3, 2017 for

excessive unexcused absences. The decision stated that an appeal from the decision must be postmarked by March 25, 2017 or received by the Appeals Bureau by that date. Because March 25, 2017 was a Saturday, the deadline was extended by operation of law to Monday, March 27, 2017.

Ms. Byrd did not receive the decision that was mailed to her on March 15, 2017. On March 31, 2017, Ms. Byrd inquired about the status of her claim. At that time, Ms. Byrd learned of the disqualification decision and that the appeal deadline has passed. The Workforce Development representative provided Ms. Byrd with appeal instructions. On April 5, 2017, Ms. Byrd accessed the Workforce Development website and submitted an online appeal. The Appeals Bureau received the appeal at the time it was submitted.

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).

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 Ms. Byrd did not have a reasonable opportunity to file an appeal from the decision by the March 27, 2017 deadline because she had not received the decision. Ms. Byrd learned of the decision on March 31, 2017 and filed an appeal on April 5, 2017.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to error either upon the part of Iowa Workforce Development or the United States Postal Service. See 871 IAC 24.35(2). Accordingly, there is good cause to treat the April 5, 2017 appeal as a timely appeal from the March 15, 2017, reference 01, decision.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in a discharge 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 evidence in the record fails to establish unexcused absences. The employer elected to waive its participation in the appeal hearing and did not present any evidence to establish absences that would be unexcused under the applicable law. Based on the evidence in the

record and application of the appropriate law, the administrative law judge concludes that Ms. Byrd was discharged for no disqualifying reason. Accordingly, Ms. Byrd is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The March 15, 2017, reference 01, decision is reversed. The claimant's appeal was timely. The claimant was discharged on February 3, 2017, for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs