

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTINEA FOLSOM
Claimant

APPEAL NO. 11A-UI-15674-WT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TARGET CORPORATION
Employer

**OC: 7/4/10
Claimant: Appellant (2)**

Section 96.5-2-A – Misconduct
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Claimant filed an appeal from the September 16, 2011, reference 03, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on January 9, 2012. The claimant did participate. The employer participated through Brad Gaskill, Store Team Leader. Exhibit A was admitted to the record.

ISSUES:

The issue is whether the appeal is timely.

The second issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant had filed for benefits in July 2010. A decision was mailed to the claimant's last-known address of record on September 16, 2011. She did not receive the decision. The appeal was not filed until December 8, 2011, which is after the date noticed on the disqualification decision. The reason the appeal was not filed is because she did not receive it.

Claimant was employed by Target as a pharmacy technician beginning in February 2009. She quit on June 27, 2010. The pharmacy manager, Kristin, had told the claimant that she had to pass a test to become certified as a pharmacy technician.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant's appeal was timely.

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 calendar days for appeal begin running on the mailing date. The "decision date" found in the upper right-hand portion of the 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).

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

The record in this case shows 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 not have a reasonable opportunity to file a timely appeal.

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 any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2).

The second issue is whether the claimant was discharged for misconduct.

There is a dispute regarding who initiated the separation. As it turns out, this is the crucial issue in the case as it determines which party bears the burden of proof. If the employer initiated the separation, then the employer bears the burden to prove the claimant committed misconduct. If the claimant voluntarily quit, then she would bear the burden of proof to demonstrate good cause.

The employer claimed that the claimant initiated the separation by turning in a resignation notice which gave no reason for the quit. The employer's witness denied being part of any conversation where the claimant was told that she was required to become certified as a pharmacy technician. The claimant, on the other hand, insisted that the pharmacy manager, repeatedly told her that she needed to become certified and then, at the last moment, told her that her last opportunity to take the test was on June 29, 2010 and, furthermore that she would have to pay for her own test. Claimant indicated there was no way she could get this done and she was given the option of quitting or being discharged.

Unfortunately, this is a very old claim. In the final analysis, neither version of events is well-documented or supported by a great deal of evidence in the record. It is, quite literally, a he-said/she-said case. Because of the lack of supporting documentation, it is very difficult to sort out what happened. There were, however, clearly discussions between the employer and the claimant about the claimant becoming certified as a pharmacy technician prior to June 27, 2010. The claimant's recollection on the subject was superior to the employer's recollection. This event was obviously a huge event in her life while June 27, 2010, was just another day for Mr. Gaskill. The pharmacy manager at the time, unfortunately, did not testify. Ms. Folsom is found to be believable. Thus, while close, it is found that, most likely, claimant was discharged.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The employer has not proven misconduct.

DECISION:

The September 16, 2011, reference 03, decision is reversed. Claimant's appeal was timely. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Joseph L. Walsh
Administrative Law Judge

Decision Dated and Mailed

jlw/css