

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLAS E MULLALEY
Claimant

APPEAL NO. 13A-UI-09464-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

GILLESPIE & POWERS INC
Employer

**OC: 03/10/13
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated July 22, 2013, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone hearing was scheduled for and held on October 21, 2013. The claimant participated personally. The employer responded to the hearing notice but was not available when called by the administrative law judge. A detailed message was left on how to participate in the hearing. The employer did not call during the hearing. The record consists of the testimony of Nicholas Mullaley. Official notice is taken of agency records.

ISSUES:

Whether the claimant filed a timely appeal; and
Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, makes the following findings of fact:

On July 22, 2013, a representative issued a decision that held that the claimant was ineligible for unemployment insurance benefits. The decision also states that the decision would become final unless an appeal was postmarked by August 1, 2013, or received by the Appeals Section on that date. The claimant's appeal was filed on August 16, 2013. He did not receive the representative's decision until after the due date for filing the appeal.

The employer is an electrical contractor. The claimant is a union member and was hired from Local 145 of the IBEW. The claimant worked for the employer for a few months. The claimant's last day of actual work was May 28, 2013. He was terminated on May 29, 2013, for excessive absenteeism. The claimant was absent for several weeks due to a serious illness. He brought his employer a doctor's slip and was given warnings concerning his attendance. On May 29, 2013, he was in route to the job site when he was told to report to the office. He was terminated because the employer considered this to be tardiness.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code section 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

The ten calendar days for appeal begins 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 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 an appeal postmarked as timely.

The administrative law judge concludes that failure have the appeal timely postmarked within the time prescribed by the Iowa Employment Security Law was due to error, misinformation, delay, or other action of the United States Postal Service pursuant to 871 IAC 24.35(2) or agency error. The appeal will be accepted as timely.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7)

The claimant is eligible for unemployment insurance benefits. There is no evidence of misconduct in this record. The claimant credibly testified that his absenteeism was due to serious illness. Personal illness properly reported is considered an excused absence under Iowa law. The last incident of tardiness is also not the claimant's fault. He was told to report to the office before his shift started. The claimant reported as required. Any tardiness that might have occurred was due to the employer, not the claimant. Since there is no evidence of misconduct in this case, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The claimant's appeal is deemed timely. The decision of the representative dated July 22, 2013, reference 02, is reversed. Unemployment insurance benefits are allowed, if the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs