IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

BEVERLY J STIERMAN
1366 SOUTHERN AVE
DUBUQUE IA 52003

WAL-MART STORES INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-10718-RT
OC: 03-21-04 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.6-2 – Initial Determination (Timeliness of Appeal)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated April 8, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Beverly J. Stierman. After due notice was issued, a telephone hearing was held on November 18, 2004 with the claimant participating. Marty Telfrow, former assistant manager at the employer's location in Dubuque, Iowa, participated in the hearing for the employer. Gayle Woodard of TALX UC eXpress testified for the employer concerning the timeliness of the appeal. Department Exhibit 1 and Employer's Exhibits 1 through 3 were admitted into

evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

An initial hearing was scheduled on October 20, 2004 at 10:00 a.m. However, the notice for that hearing did not contain the issue of the timeliness of the appeal and the administrative law judge noted such an issue. Accordingly, the administrative law judge rescheduled the hearing and directed that a new notice with the timeliness of appeal issue setout be sent to the parties. This was done.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit 1 and Employer's Exhibits 1 through 3, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on April 8, 2004, reference 01, determining that the claimant was eligible to receive unemployment insurance benefits because records indicate she was dismissed from work on March 18, 2004 but not for willful or deliberate misconduct. That decision was sent to the employer in care of the employer's representative, TALX UC eXpress. The representative received the decision. The decision indicated that an appeal had to be postmarked or otherwise received by the Appeals Section by April 19, 2004 (the decision actually said April 18, 2004 but, since this was a Sunday, the appeal would be due the next business or working day). On behalf of the employer, the employer's representative appealed that decision on April 19, 2004, as shown at Employer's Exhibit 1. Previously, the representative had protested the claimant's claim on April 5, 2004, also as shown at Employer's Exhibit 1. However, Workforce Development never received the appeal. Since the appeal was not received, nothing more was done and the claimant began receiving benefits. A quarterly statement of charges for the second quarter of 2004 was sent to the representative of the employer on August 9, 2004. The representative and the employer received the quarterly statement of charges and appealed the quarterly statement of charges on August 31, 2004, as shown also at Employer's Exhibit 1. Then, the employer filed a second appeal of the decision on October 1, 2004, as shown at Department Exhibit 1. This appeal was over five months late.

Because the administrative law judge hereinafter concludes that the employer's appeal was timely and, even if not, the employer demonstrated good cause for a delay in the filing of its appeal, the administrative law judge further finds: The claimant was employed by the employer as a deli associate from July 30, 2002 until she was discharged on March 18, 2004. The claimant was discharged for "grazing." Grazing refers to a situation in which an employee eats items of food held for sale by the employer without paying for them. The employer has a policy prohibiting such "grazing" and it is contained in its handbook, a copy of which the claimant received and for which she signed an acknowledgement, as shown at Employer's Exhibit 2. The policy provides that "grazing" is one of the activities for which an employee can be immediately discharged. The policy further states that eating items from the employer that are not paid for, no matter how small, is a violation of its policy. When the claimant was first hired and for approximately four months thereafter, she did occasionally graze. At that time, she did not know that it was prohibited. Further, the claimant only grazed those items of food that were to be discarded. After approximately four months, the claimant learned that such "grazing" was prohibited and ceased the practice and did not graze thereafter. On or about March 18, the claimant was accused of grazing by other coworkers. Management informed the employer's district loss prevention supervisor who interviewed the claimant. The claimant signed a written statement at Employer's Exhibit 3 acknowledging that she had grazed and agreeing to pay the employer back $6.75, also as shown at Employer's Exhibit 3. However, the claimant denied

grazing at any time after the first four months of her employment which ended approximately November 30, 2002. The claimant signed the statement because she had grazed at that time but not thereafter and agreed also to pay the employer back because she had grazed at that time but not thereafter. The claimant received no specific warnings or disciplines for this behavior but was told in a meeting as a group that such "grazing" or eating food without paying for it was prohibited.

Pursuant to her claim for unemployment insurance benefits filed effective March 21, 2004, the claimant has received unemployment insurance benefits in the amount of $4,883.85 which has exhausted her unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

The questions presented in this appeal are as follows:

1. Whether the employer filed a timely appeal of the decision dated April 8, 2004, reference 01, or, if not, whether the employer can demonstrate good for such failure. The administrative law judge concludes that the employer timely appealed that decision and, even if not, the employer has demonstrated good cause for a delay in the filing of its appeal.

2. Whether the claimant's separation from employment was a disqualifying event. It was not.

3. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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 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 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).

(2) The record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that the employer has the burden to prove that its appeal was timely or that it had good cause for a delay in the filing of its appeal. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that its appeal was timely. The employer's witness, Gayle Woodard of TALX UC eXpress, the employer's representative for unemployment insurance matters, credibly testified that the employer did receive the decision dated April 8, 2004 in a timely fashion and appealed it on April 19, 2004, the deadline, as shown at Employer's Exhibit 1. Employer's Exhibit 1 is a copy of certain computer printouts of the representative showing that an appeal was filed on April 19, 2004 by fax to the correct number. Accordingly, the administrative law judge concludes that the employer's appeal was timely even though it was not received or, apparently, not received by Workforce Development. Further, the administrative law judge notes that when the employer learned of the claimant's benefits pursuant to the quarterly statement of charges for the second quarter of 2004, which it received on August 9, 2004, the employer's representative immediately appealed that quarterly statement of charges on August 31, 2004, also as shown at Employer's Exhibit 1. This appeal of the quarterly statement of charges was timely in and of itself because an employer has 30 days from the date of the quarterly statement of charges to file an appeal. Here the employer did so. Ordinarily, that only applies if the employer did not receive a notice of the claim. Here, the employer did receive a notice of the claim and filed a protest timely on April 5, 2004, also as shown at Employer's Exhibit 1. However, the administrative law judge concludes that that 30 day period for an appeal of a quarterly statement of charges is applicable here if the employer's appeal is deemed not to have been filed on April 19, 2004. It would be similar to a situation in which the employer never received a notice and, therefore, did not pursue the claim by filing a protest. Here, the employer and its representative believed that the appeal had

been timely filed and, therefore, did not pursue it until the employer received the quarterly statement of charges. Then, the employer timely appealed the quarterly statement of charges. The employer did not delay in filing its appeal of the quarterly statement of charges. Accordingly, and for all the reasons set out above, the administrative law judge concludes that the employer did appeal the decision on April 19, 2004 and that decision was timely and, as a consequence, the second appeal dated October 1, 2004, as shown at Department Exhibit 1, should be accepted. Even if the appeal was not timely, the administrative law judge would conclude that the employer has demonstrated good cause for a delay in the filing of its appeal and the second appeal should still be accepted. Therefore, the administrative law judge concludes that the employer's appeal was timely or, in the alternative, the employer has demonstrated good cause for a delay in the filing of its appeal and, therefore, its second appeal should be accepted and the administrative law judge has jurisdiction to reach the remaining issues.

871 IAC 24.32(1)a, (8) provide:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

> (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 parties agree, and the administrative law judge concludes, that the claimant was discharged on March 18, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of disqualifying misconduct. It is well established that the employer has the burden to prove a current act of disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for a current act of

disqualifying misconduct. The employer's witness, Marty Telfrow, former assistant manager of the employer's store in Dubuque, Iowa, where the claimant was employed, testified that the claimant was discharged for "grazing" meaning that the claimant ate items of food held for sale by the employer without paying for it. Her testimony implies that the claimant did so immediately prior to her discharge on March 18, 2004. However, Ms. Telfrow could offer no direct evidence that the claimant "grazed" immediately prior to her discharge. Her testimony was all from hearsay from coworkers. The claimant credibly testified that she did not "graze" or eat products of the employer without paying for them at any time after she had been employed for four months or about November 30, 2002. The administrative law judge must conclude on the evidence here that the claimant's direct denial outweighs the employer's hearsay evidence. The claimant concedes that she did "graze" or eat food that was destined to be discarded without paying for it but that she did so only in the first four months of her employment. The claimant credibly testified that this was the reason that she signed a statement at Employer's Exhibit 3 agreeing that she had eaten butt ends of salami and cojack cheese because she had done so in the first four months of her employment. The administrative law judge notes that the statement that the claimant signed does not state when she admits to have eaten the salami and cojack cheese. The claimant also testified that this was the reason she agreed to pay the employer $6.75. Based upon the evidence here, the administrative law judge concludes that the claimant did not "graze" or eat food held for sale by the employer without paying for it after four months of her employment or after approximately November 30, 2002. The issue really becomes whether the claimant can now be discharged for improper "grazing" occurring in her first four months of employment or prior to November 30, 2002 and in the absence of any warnings.

The administrative law judge concludes that the claimant's admitted "grazing" occurring in the first four months of her employment was past conduct. A discharge for disqualifying misconduct cannot be based on past acts. The claimant's acts occurred approximately 16 months before her discharge. The claimant's acts of "grazing" were past conduct. It is true that past conduct can be used to determine the magnitude of a current act of misconduct but, as noted above, there is insufficient evidence of a current act of misconduct.

Further, the administrative law judge notes that the claimant credibly testified that she "grazed" in the first four months of her employment believing that it was acceptable and only did so with food that was to be discarded. When she learned that this was prohibited, the claimant testified that she ceased doing so and did not do so thereafter. The administrative law judge would conclude that the claimant's acts in the first four months of her employment were ordinary negligence in isolated instances or good faith errors in judgment or discretion and are not disqualifying misconduct. There is no evidence that the claimant's acts at that time were deliberate acts or omissions constituting a material breach of her duties and obligations arising out of her worker's contract of employment or that they evinced a willful or wanton disregard of the employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has a right to expect of employees. The more difficult issue is whether the claimant's acts then were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge concludes that they are not. The claimant never received any specific warnings about this behavior. There was evidence that the claimant attended a meeting of a group of individuals where "grazing" was discussed but there is no date when this meeting occurred. The claimant also denies such a meeting. Accordingly, the administrative law judge concludes that claimant's past grazing was not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct but, at most, was an isolated instance of ordinary negligence or a good faith error in judgment or discretion and is not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial current misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code Section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $4,883.85 since separating from the employer herein on or about March 18, 2004 and filing for such benefits effective March 21, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 8, 2004, reference 01, is affirmed. The claimant, Beverly J. Stierman, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct, including a current act of disqualifying misconduct. As a result of this decision, the claimant has not been overpaid any unemployment insurance benefits arising out of her separation from the employer herein. The employer's appeal is timely and, even if not timely, the employer has demonstrated good cause for a delay in the filing of its appeal and, as a consequence, the employer's appeals should be accepted.

tjc/kjf