IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

VICTORIA BOYD
Claimant

NORDSTROM INC
Employer

APPEAL NO. 08A-UI-08421-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/11/08 R: 12
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Victoria Boyd (claimant) appealed a representative's June 4, 2008 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Nordstrom, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 7, 2008. The claimant participated in the hearing. Peg Heenan of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, (Ms.) Johnnie Walker. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant's appeal timely or are there legal grounds under which it can be treated as timely?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last known address of record on June 4, 2008. The claimant received the decision by approximately June 9, 2008. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 14, 2008, a Saturday. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, June 16. No appeal was received until the claimant faxed an appeal to the Appeals Section on September 19, 2008, which is after the date noticed on the disqualification decision.

The instructions in the body of the representative's decision stated that to appeal the decision, the appealing party must send the appeal to the "Iowa Workforce Development Appeal Section" so that it is either postmarked or received by the Appeals Section by the due date. The further directions on the back side of the representative's decision specify that the party "may appeal to the Iowa Workforce Development Appeals Section by submitting a letter of written Notice of

Appeal by fax or by mail. This written Notice of Appeal must be sent DIRECTLY to the Appeals Section . . ." (Emphasis original.) In a black-bordered box on the back side of the representative's decision, it states, "IF YOU WISH TO APPEAL THIS DECISION, A LETTER OR APPEAL FORM MUST BE FAXED TO 51-242-5144 OR SENT TO APPEALS SECTION, IOWA WORKFORCE DEVELOPMENT, 1000 EAST GRAND AVENUE, DES MOINES, IOWA 50319-0209."

Despite this instruction, relying on advice given to the claimant from someone in Illinois, because the claimant had Iowa wages from employment in Cedar Rapids, Iowa, the claimant sent an appeal to the Workforce Center in Cedar Rapids. She believes this appeal was sent approximately June 13, during the time of flooding in Cedar Rapids. She attempted to follow up with the Cedar Rapids office, but was unable to reach anyone with the office for a period of time, as the Workforce Center had been forced to temporarily relocate due to the flooding. She did speak with someone in early July and was told she could wait and see if her appeal was received or she could refile her appeal. She determined to wait. In early August she spoke with someone in the Appeals Section and learned no appeal had been received, and understood she again could either wait a little while longer to see if it was subsequently received or she could refile her appeal. She waited until about September 9 and then recontacted the Appeals Section; when she learned no appeal had yet been received, she filed new appeal on September 22.

The claimant started working for the employer on June 14, 2006. As of March 3, 2008, she worked full time as sales person in the employer's Oakbrook, Illinois store. Her last day of work was May 10, 2008. The employer discharged her on that date. The reason asserted for the discharge was tardiness.

On April 7, 2008, the employer had given the claimant a written warning for tardiness, as she had been late 13 of the 24 shifts for which she had been scheduled since March 3. Some of the occurrences were due to the claimant not knowing how to use the code she had been given to use an entrance door; however, she had not gone back to her manager, Ms. Walker, to indicate she was having problems with the code or to ask assistance. At least some of the tardies were due to personal business issues. On April 28 the employer gave the claimant a 45-day performance review indicating that the claimant's punctuality still needed improvement; she was advised that if there were a continuation, termination could result.

On May 6 the claimant was one hour late. Although she had been given a printed copy of the schedule and had worked the days prior to May 6, she had misread the schedule as to her listed start time for that day. As a result of this occurrence following the prior discussions, she was discharged.

REASONING AND CONCLUSIONS OF LAW:

If a party fails to make a timely appeal of a representative's decision and there is no legal excuse under which the appeal can be deemed to have been made timely, the decision as to the merits has become final and is not subject to further review. Iowa Code § 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 then 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).

A party does not have a reasonable opportunity to file a timely appeal if the delay is due to Agency error or misinformation or to delay or other action of the United States postal service. 871 IAC 24.35(2). Failing to read and follow the instructions for filing an appeal is not a reason outside the appellant's control that deprived the appellant from having a reasonable opportunity to file a timely appeal. The appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the prescribed time was not due to a legally excusable reason so that it can be treated as timely. The claimant has not established that she mailed a properly addressed appeal to the Appeals Section by the deadline set by the representative's decision, so that its failure to reach the Appeals Section was a result of error on the part of the United States Postal Service. Nor in sending the purported earlier appeal to the Workforce Center in Cedar Rapids had she relied upon incorrect information provided by an Agency representative, so that the delay in having an appeal received by the Appeals Section could be attributable to an error on the part of the Agency. The administrative law judge further concludes that because the appeal was not timely, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal, regardless of whether the merits of the appeal would be valid. See Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

However, in the alternative, even if the appeal were to be deemed timely, the administrative law judge would affirm the representative's decision on the merits. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct

must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). Tardies are treated as absences for purposes of unemployment insurance law. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Tardies due to issues that are of purely personal responsibility are not excusable. Higgins, supra; Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). The claimant's final tardy was not excused and was not due to illness or other reasonable grounds. The claimant had previously been warned that future tardies could result in termination. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's June 4, 2008 decision (reference 01) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. Even treating the appeal as timely, the employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw