

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTINA M JOLLEY
Claimant

APPEAL NO. 08A-UI-05538-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MILLARD REFRIGERATED SERVICES INC
Employer

**OC: 11/04/07 R: 03
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the November 30, 2007, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on July 9, 2008. The claimant did not provide a telephone number where she could be reached and, therefore, did not participate in the hearing. The employer participated through Sharon McKnight, Unemployment State Specialist; Kevin Van Asten, General Manager; and Tammy Ash, Office Manager.

ISSUE:

The issue is whether the employer filed a timely appeal and if so whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on December 8, 2002, as a full-time human resources manager/assistant office manager. The claimant and her husband both worked for the employer. The office manager and her husband both worked for the employer.

On November 2, 2007, the office manager confronted the claimant about the claimant seeing the office manager's husband. The office manager told the claimant she could not work with her any longer. The claimant asked to discuss the matter after her vacation. The claimant had a planned vacation from November 2 through 9, 2007. The office manager said they could not work together. Later the general manager talked to the claimant about working nights away from the office manager and her husband. On November 9, 2007, the general manager said that would not work and she should not return to work.

A disqualification decision was mailed to the employer's last-known address of record on November 30, 2007. The employer did receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by December 10, 2007. The appeal was filed postmarked on December 10, 2007, but the Appeals Section did not

receive it. The employer filed a request for investigation on June 9, 2008, when it received a statement of charges dated May 9, 2008, and a hearing was scheduled.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the appeal was filed in a timely manner.

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 an appeal was filed within ten calendar days but the department did not receive that appeal. The administrative law judge concludes the employer effected a timely protest within the time period prescribed by the Iowa Employment Security Law, but the delay in receipt was due to other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was timely filed pursuant to Iowa Code section 96.6-2, and the administrative law judge has

jurisdiction to make a determination with respect to the nature of the appeal. See Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

The issue becomes whether the claimant was discharged for misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer did not provide sufficient evidence of misconduct at the appeal hearing. The claimant's separation was not voluntary and cannot be considered as such. The claimant was not discharged for misconduct. Benefits are allowed.

DECISION:

The November 30, 2007, reference 01, representative's decision is affirmed. The appeal in this case was timely. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css