

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARINA G MCCOLLOM
Claimant

APPEAL NO. 17A-UI-11719-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 10/15/17
Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Marina McCollom filed an appeal from the November 2, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that Ms. McCollom was discharged on October 10, 2017 for dishonesty in connection with her work. After due notice was issued, a hearing was held on December 5, 2017. Ms. McCollom participated personally and was represented by attorney Dave Brick. David Williams of Equifax represented the employer. Exhibit A and Department Exhibit D-1 were received into evidence.

ISSUE:

Whether the appeal was timely. Whether there is good cause to treat the appeal as timely.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Marina McCollom established an original claim for unemployment insurance benefits that was effective October 15, 2017. At the time, Ms. McCollom established the claim she provided a mailing address for the purpose of receiving correspondence from Iowa Workforce Development. That mailing address was in West Des Moines. On November 1, 2017, Ms. McCollom participated in a fact-finding interview that addressed her separation from the employment. During the fact-finding interview, the claims deputy told Ms. McCollom that a decision regarding her eligibility for benefits would be mailed within two to three business days. While Ms. McCollom now asserts that she was not residing at the same address as of November 1, 2017, she did not mention a change of address to the claims deputy during the fact-finding interview. While Ms. McCollom asserts that she has since filed a change of address with the United States Postal Service, she cannot recall when she might have done that. Until the December 5, 2017 appeal hearing, Ms. McCollom had not provided Iowa Workforce Development with an updated mailing address.

On November 2, 2017, Iowa Workforce Development mailed a copy of the November 2, 2017, reference 01, decision to claimant Marina McCollom at her last-known address of record. The decision disqualified Ms. McCollom for benefits and relieved the employer's account of liability

for benefits, based on the claims deputy's conclusion that Ms. McCollom was discharged on October 10, 2017 for dishonesty in connection with her work. The decision stated that an appeal from the decision must be postmarked by November 12, 2017 or be received by the Appeals Bureau by that date. The decision also stated that if the appeal deadline fell on a Saturday, Sunday or legal holiday, the appeal deadline would be extended to the next working day. November 12, 2017 was a Sunday. The next working day was Monday, November 13, 2017. The back side of the decision contained clear and concise appeal instructions. The weight of the evidence establishes that Ms. McCollom received the decision on November 4, 2017. Ms. McCollom then took no steps to appeal the decision by the November 13, 2017 extended appeal deadline. On November 14, 2017, Ms. McCollom learned that a former coworker had been granted unemployment insurance benefits. On November 14, Ms. McCollom submitted an online appeal. The Appeals Bureau received the appeal on November 14, 2017. In the appeal, Ms. McCollom indicated that she had received the November 2, 2017, reference 01, decision on Saturday, November 4, 2017. The online appeal process solicited a reason for the late filing of the appeal, if applicable. In the space provided, Ms. McCollom wrote: "I was unaware that my fellow co-worker had received unemployment until today. Please consider my appeal." In the appeal, Ms. McCollom set forth no other basis for the late filing of the appeal. In the online appeal, Ms. McCollom provided the same West Des Moines mailing address that she had provided at the time she established the original claim.

REASONING AND CONCLUSIONS OF LAW:

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, subsections 10 and 11, 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-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See Iowa Administrative Code rule 871-24.35(1)(a). See also *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. Iowa Administrative Code 871-24.35(1)(b).

Ms. McCollom's appeal was filed on November 14, 2017. That was the day she completed the online appeal and the day the Appeals Bureau received the appeal.

The evidence in the record establishes 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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The evidence in the records establishes that Ms. McCollom had a reasonable opportunity to file an appeal by the extended November 13, 2017 appeal deadline. The weight of the evidence establishes that Ms. McCollom received the decision on November 4, 2017, as she indicated in the November 14, 2017 online appeal. From the time Ms. McCollom received the decision, she had nine days in which to file an appeal by the extended appeal deadline. The weight of the evidence establishes that Ms. McCollom elected not to take action on the matter until November 14, 2017, the day on which she learned that a former coworker had been deemed eligible for unemployment insurance benefits. In her appeal, Ms. McCollom provided this specific reason as the sole basis for the late filing of the appeal. The weight of the evidence establishes that Ms. McCollom has more recently elected to fabricate an alternative basis for the

late filing of the appeal. Ms. McCollom now asserts she was not residing at her address of record when the decision was mailed to that address and received at that address in a timely manner. Ms. McCollom now asserts that she was residing at a different address in the Des Moines metropolitan area. Ms. McCollom now asserts that she had separated from her husband and that she elected not to return to the marital home to retrieve the time-sensitive correspondence until November 14, 2017. Such information is conspicuously absent from the online appeal and not credible.

Ms. McCollom's failure to file an appeal within the time prescribed by the Iowa Employment Security Law was due to Ms. McCollom's decision to defer action on the matter, not due to any Workforce Development error or misinformation or delay or other action of the United States Postal Service. Accordingly, there is not good cause to treat the late appeal as a timely appeal. See Iowa Administrative Code rule 871-24.35(2). Because the appeal was untimely, the administrative law judge lacks jurisdiction to enter a decision on the merits pertaining to Ms. McCollom's separation from the employment. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The November 2, 2017, reference 01, decision is affirmed. The claimant's appeal from the decision was untimely. The decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the claims deputy's conclusion that the claimant was discharged on October 10, 2017 for dishonesty in connection with her work, remains in effect.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs