IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SADE L MCALLISTER
Claimant

APAC CUSTOMER SERVICES INC
Employer

APPEAL NO. 15A-UI-07501-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/26/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Sade McAllister filed an appeal from the June 11, 2015, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Ms. McAllister was discharged on April 20, 2015 for excessive unexcused absences and tardiness. After due notice was issued, a hearing was held on August 10, 2015. Ms. McAllister participated. Turkessa Newson represented the employer. Exhibits One through Four and Department Exhibits D-1 and D-2 were received into evidence.

ISSUES:

Whether there is good cause to treat the late appeal as a timely appeal. There is.

Whether Ms. McAllister was discharged for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On June 11, 2015, Iowa Workforce Development mailed a copy of the June 11, 2015, reference 01, decision to Sade McAllister at her last-known address of record. The decision disqualified Ms. McAllister for benefits and relieved the employer of liability for benefits, based on an Agency conclusion that Ms. McAllister was discharged on April 20, 2015 for excessive unexcused absences and tardiness. The decision contained a warning that an appeal from the decision must be postmarked by June 21, 2015 or received by the Appeals Section by that date. Ms. McAllister did not file an appeal by the deadline because she had not received the decision that was mailed to her. On June 29, 2015, Ms. McAllister went to the Davenport Workforce Development Center to inquire about the status of her claim and at that time learned that a decision disqualifying her for benefits had been entered. While Ms. McAllister was at the Workforce Development Center, she completed an appeal form and delivered the completed appeal form to the Center staff. The staff documented receipt of the appeal on June 29, 2015. The Davenport Workforce Development Center faxed the appeal to the Appeals Section on July 1, 2015.

Ms. McAllister was employed by APAC Customer Services, Inc., as a full-time customer service representative from September 2014 until, April 20, 2015, when Team Lead Cheryll Wadden and Kristen Barnes, Operations Manager, discharged her for attendance. The final incident that triggered the discharge occurred sometime in April 2015 when Ms. McAllister was ten minutes late for work due to transportation issues. The employer has a no-fault attendance policy and discharged Ms. McAllister for accruing too many attendance points. If Ms. McAllister needed to be absent from or late for her shift, the employer required that she notify the employer no later than the end of the scheduled shift. If Ms. McAllister needed to be absent for a planned absence, the employer required that Ms. McAllister request the time off at least a week in advance. These requirements were reviewed with Ms. McAllister at the beginning of her employment.

The employer considered additional absences and reprimands in making the decision to discharge Ms. McAllister from the employment. Ms. McAllister's mother had passed away on January 9, 2015 and the loss of her mother factored in her absences. On February 2, 2015, Ms. McAllister was absent and did not notify the employer of her need to be absent. On February 19, 2015, Ms. McAllister was absent and notified the employer. Ms. McAllister attributes that absence to her grieving and to depression related to her mother's passing. Ms. McAllister was absent or late on March 11, 2015. Ms. McAllister was absent for part of her shift on March 12, 2015.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 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 871 AC 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. See 871 IAC 24.35(1)(b).

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).

The record shows that Ms. McAllister did not have a reasonable opportunity to file an appeal by the June 21, 2015 deadline because she had not received the decision. Ms. McAllister learned of the decision on June 29, 2015 and filed an appeal the same day. There is good cause to treat the late appeal as a timely appeal. The administrative law judge had jurisdiction to rule on the merits of the appeal.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not

alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The employer has presented insufficient evidence and insufficiently direct and satisfactory evidence to establish a current act of misconduct. The employer witness lacked personal knowledge of the absence that triggered the discharge, including the date of the final absence. The claimant conceded that the absence that triggered the discharge occurred sometime in April 2015. In the absence of evidence to establish a current act of misconduct, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. In the absence of proof of a current act of misconduct, the administrative law judge need not consider the earlier absences that factored in the discharge. The administrative law judge notes that employer witness lacked personal knowledge of those earlier absences. Thus, even if the evidence had establish a current act, the evidence would still not have been sufficient to establish excessive unexcused absences.

The claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The June 11, 2015, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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