

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSH M TEMPLE

Claimant

APPEAL NO: 13A-UI-10387-S

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRIDGESTONE AMERICAS TIRE

Employer

OC: 10/21/12

Claimant: Appellant (1)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.35(2) – Appeal Delay
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed a department decision dated August 23, 2013, reference 01, that held he was discharged for misconduct on July 17, 2013, and benefits are denied. A hearing was held in Des Moines, Iowa on October 15, 2013. The claimant participated. Jim Function, Division HR Manager, and Tom Barragan, HR Section Manager, participated. Claimant Exhibit A and Employer Exhibits 1 and 2 were received as evidence.

ISSUES:

Whether the claimant filed a timely appeal.

Whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record finds: The department mailed the decision to claimant's address of record on August 23, 2013 with an appeal deadline date of September 2. The claimant had moved and he provided his mail forwarding address to the US Postal Service. It did not forward the decision.

Claimant contacted the department about September 11 when he did not receive the decision and it sent one to him. Claimant immediately mailed an appeal letter that is postmarked on September 11, 2013.

Claimant was hired on February 22, 2006 and last worked a full-time third shift utility job on July 17, 2013. He received the cameras in the plant company policy. It prohibits video cameras (including cell phones) to capture, record, or transmit any image taken on plant property without prior employer approval. The policy purpose is to protect the employer from any person taking images of its on floor plant operation and equipment.

On July 17, 2013 an employer supervisor asked claimant for his cell phone while he was working on the floor with a suspicion he had used the camera feature. The phone was given to HR (human resources) representative Barragan who met with claimant to question him about it. Claimant admitted there was a photo on video phone that showed an employee in a moon position with his pants down out on the work production area. The camera dated the phone picture March 4, 2013. Claimant admitted he had seen the photo that denied but denied taking it.

Claimant believed some employee took his phone from the break room and took the picture. He claims he told an un-named supervisor about it and was going to go to the HR department but forgot to follow through. Claimant knew employees were not supposed to have cell phones on the floor but he claims other workers did so and were not questioned. Claimant had no explanation why he did not delete the photo.

The employer took claimant off work after the July 17 incident and investigated the matter. The worker shown in the photo no longer worked for the employer. The employer terminated claimant on July 25 for violation of its camera policy for taking a cell phone picture on the production floor and possessing the phone in an unauthorized area. The official termination letter was sent to claimant on July 29, and there is union grievance pending on whether claimant can save his job.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

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. . . . 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.

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).

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

The administrative law judge concludes claimant filed a timely appeal as the delay beyond the ten-day appeal period is due to the US Postal Service not forwarding the decision. When claimant learned about the decision from a department representative on or near September 11, he filed an immediate appeal.

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 administrative law judge further concludes employer established claimant was discharged for misconduct on July 25, 2013 for violation of the employer camera policy.

Claimant violated the policy by having his cell phone on the work floor. The most credible evidence he took a photo of a co-worker on March 4 displayed in a vulgar position. He kept the photo rather than delete because he wanted to do so. It is not believable he showed the photo to some supervisor who did nothing about it. If someone would have taken his cell phone and

took the picture he claims he did not, a reasonable person would have reported to the HR department when it happened.

Claimant committed a second policy violation by taking the cell phone photo of the co-worker in an unauthorized area and coupled with the other violation job disqualifying misconduct is established.

DECISION:

The department decision dated August 23, 201, reference 01, is affirmed. The claimant filed a timely appeal, and the department decision he was discharged for misconduct on July 25, 2013 remains in force and effect. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css