

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SCOTT CARPENTER**

Claimant

**APPEAL NO: 12A-UI-01474-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KELLY SERVICES INC**

Employer

**OC: 03/27/11**

**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

Section 96.6-2 – Timeliness of Appeal

**STATEMENT OF THE CASE:**

Scott Carpenter (claimant) appealed a representative's January 31, 2012 decision (reference 07) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Kelly Services, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 1, 2012. The claimant participated in the hearing. Kris Kolbe appeared on the employer's behalf. 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 discharged for work-connected misconduct?

**OUTCOME:**

Affirmed. Benefits denied.

**FINDINGS OF FACT:**

The representative's decision was mailed to the claimant's last-known address of record on January 31, 2012. The claimant received the decision on or about February 1, 2012. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 10, 2012, a Friday. The appeal was not filed until it was hand-delivered to a local Agency office on February 13, 2012, which is after the date noticed on the disqualification decision.

The claimant had come to his local Agency office on or about Tuesday, February 7 to inquire about how to make an appeal. He was given an appeal form. When he indicated he was not sure how to fill it out, the Agency representative to whom he was speaking told him to do the best he could and then turn it in. The claimant asked if he could take it with him and have someone assist him, and then return it, and was told he could. The claimant did not tell the

Agency representative that he was unable to read or understand the form and did not ask that representative to assist him. The claimant took the form home. He did not have someone assist him with the form until about February 12. He then brought the form back into the local Agency office on February 13.

The employer is a temporary employment firm. The claimant's first and only assignment with the employer began on December 5, 2011. He worked full time as an assembly worker for the employer's Iowa City, Iowa business client. His last day on the assignment was December 20, 2011. The assignment ended because the employer discharged him on that date. The stated reason for the discharge was falsification of his job application.

The claimant completed his job application on November 10, 2011. The application had asked two questions regarding any prior criminal record, one asking if there had been any misdemeanor convictions within the last seven years, and one asking if there had been any felony convictions within the last seven years. To the first question the claimant marked "yes," and to the second question the claimant marked "no." When he was further questioned about the misdemeanor conviction, he indicated he had a driving under the influence (DUI) conviction in July 2010. He was instructed to bring in his documentation on that conviction for review, which he did; upon review of the documentation, the employer concluded that the DUI conviction would not bar the claimant from being placed into the assignment.

The employer subsequently ran a background check on the claimant and learned that he had a second misdemeanor conviction for domestic battery in June 2006. When confronted, the claimant acknowledged that he was aware of the additional June 2006 misdemeanor conviction. He indicated that his failure to report the second conviction was an error on his behalf. Had the employer known of the additional 2006 conviction, it would not have placed the claimant into the assignment without at least performing a review of the paperwork for the 2006 conviction.

#### **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 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 which 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 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. 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).

The claimant did provide falsely incomplete information on his job application. However, that does not end the inquiry. The false information must endanger the health, safety or morals of the applicant or others or result in exposing the employer to legal liabilities or penalties or result in placing the employer in jeopardy. The Iowa court has ruled that a misrepresentation on a job application must be materially related to job performance to disqualify a claimant from receiving unemployment insurance benefits. *Larson v. Employment Appeal Board*, 474 N.W.2d 570 (Iowa 1991). Although the court did not define materiality, it cited *Independent School District v.*

*Hanson*, 412 N.W.2d 320 (Minn. App. 1987), which stated that a misrepresentation is not material if a truthful answer would not have prevented the person from being hired. Here, if the claimant had provided fully truthful information, he would not been hired at least until the information regarding the other conviction could be reviewed and accepted. Therefore, the administrative law judge concludes that the claimant's act of falsification on his application was misconduct and, as a consequence, he is disqualified for unemployment insurance benefits. The claimant's failure to provide a fully truthful response shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

**DECISION:**

The representative's January 31, 2012 decision (reference 07) is affirmed. The appeal was not timely. Alternatively, the employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of December 20, 2011. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he 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

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