

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHRYN D VARNER
Claimant

APPEAL NO: 10A-UI-00150-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDWEST JANITORIAL SERVICE INC
Employer

OC: 08/30/09
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Kathryn D. Varner (claimant) appealed a representative's December 24, 2009 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Midwest Janitorial Service, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 12, 2010. The claimant participated in the hearing. Rob Byers 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.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it can be treated as timely? Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on December 24, 2009. The claimant received the decision. The claimant provided inconsistent testimony as to when she received the representative's decision; she did not establish that she did not receive the decision until after January 4, 2010. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by January 3, 2010. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, January 4. The appeal was not filed until it was faxed on January 5, 2010, which is after the date noticed on the disqualification decision.

The claimant started working for the employer on February 18, 2004. She worked part time (about 15 hours per week) as a custodian in the employer's commercial account custodial business. Her last day of work was November 30, 2009. The employer discharged her on that date. The stated reason for the discharge was seeking to compete with the employer.

The employer's policies of which the claimant was on notice include a non-compete provision. The claimant had become frustrated with her supervisor and was contemplating leaving the employer and working independently. On November 24 she wrote a letter to one of the employer's business clients on whose account she routinely worked; in the letter she suggested the business client could end its relationship with the employer and she could work directly for the business client. The business client provided this letter to the employer. As a result of the claimant's apparent effort to compete directly with the employer, the employer discharged the claimant.

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 the claimant has failed to establish that her failure to file a timely appeal within the prescribed time was 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's effort to directly compete with the employer 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 December 24, 2009 decision (reference 02) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. In the alternative, the administrative law judge would affirm the decision on the merits. The claimant is disqualified from receiving unemployment insurance benefits as of

November 30, 2009. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs