

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARTHA CONTRERAS
Claimant

APPEAL NO: 08A-UI-08578-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 08/17/08 R: 02
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Martha Contreras (claimant) appealed a representative's September 11, 2008 decision (reference 01) that concluded she was not qualified to receive benefits, and the account of Swift & Company (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 9, 2008. The claimant participated in the hearing. Tony Luse, the employment manager, appeared on the employer's behalf. Ike Rocha interpreted the hearing. 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:

Did the claimant file a timely appeal or establish a legal excuse for filing a late appeal?

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on February 1, 2007. The employer's attendance policy informs employees they accumulate points when they do not report to work as scheduled. The employer does access points when employees come back from a break late. The employer may write up an employee for failing to return from a break on time. The employer's policy also states that when an employee receives three written warnings in a year (for any infraction), the employer may discharge the employee.

The employer gave the claimant a written warning on October 24, 2007, for unsatisfactory job performance. On November 19, 2007, the employer gave the claimant a written warning for her repeated failure to timely report back to work after a break, including lunch breaks. Luse received reports from the claimant's supervisor that she repeatedly failed to report back from breaks on time. After the supervisor complained about the claimant's repeated failure to return from a break on time, Luse talked to the claimant on August 15, 2008. Although the claimant

does not remember this conversation, Luse warned her that day that if she returned late from a break one more time, she would be discharged.

On August 19, the claimant left her work station later than other employees. The claimant was in training this day. Since the claimant left a few minutes later than her co-workers, she came back to work a few minutes later. The claimant's supervisor reported she was five minutes late from returning from a break. When Luse talked to the claimant on August 19, the claimant acknowledged she may have been just a few minutes late when she returned from her break. The employer gave the claimant her third written warning for coming back from a break late on August 19. Since this was the claimant's third written warning in less than a year, the employer discharged the claimant in accordance with the employer's disciplinary policy.

The claimant established a claim for benefits during the week of August 17, 2008. On September 11, 2008, a representative's decision was mailed to the claimant and employer. This decision held the claimant was not qualified to receive unemployment insurance benefits.

When the claimant did not receive the decision, she went to her local Workforce office on September 25. On this day she learned she had been denied benefits. The claimant filed an appeal on September 25, 2008.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's decision is mailed to the parties' last-known address, files an appeal from the decision, the decision is final. Benefits shall then be paid or denied in accordance with the representative's decision. Iowa Code section 96.6-2. 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 Iowa Supreme Court has ruled that appeals from unemployment insurance decisions must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979); Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979). In this case, the claimant's appeal was filed after the September 21 deadline for appealing expired.

The next question is whether the claimant had a reasonable opportunity to file 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 evidence establishes the claimant did not have a reasonable opportunity to file a timely appeal because she did not receive the decision. The claimant's failure to file a timely appeal was due to a delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. The claimant established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to make a decision on the merits of the appeal.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or

repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The employer specifically recalled telling the claimant on August 15 that if she were late from returning from a break one more time, she would be discharged. The claimant does not recall this conversation. During the hearing the claimant displayed an attitude that if she was a "little" late from returning from a break, it was not a big deal. On August 19, the claimant testified she left for her break a few minutes later than other employees. Since this was not disputed, the fact she may have returned a few minutes later than her co-workers from a break, does not mean she took a longer break than everyone else or was late since she did not leave as early. The claimant's supervisor did not testify. Therefore, the claimant's testimony as to what happened on August 19 must be given more weight than the employer's reliance on hearsay information.

The employer established business reasons for discharging the claimant. The facts do not, however, establish that the claimant intentionally and substantially disregarded the employer's interests. Therefore, as of August 17, 2008, the claimant is qualified to receive benefits.

DECISION:

The claimant established a legal excuse for filing a late appeal. Therefore, the Appeals Section has legal jurisdiction to make a decision on the merits of this case. The representative's September 11, 2008 decision (reference 01 is reversed. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of August 17, 2008, the claimant is qualified to receive benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs