

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SAYEE MCCARTHY

Claimant

APPEAL NO: 13A-UI-11105-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PRAIRIE MEADOWS RACETRACK & CASINO

Employer

OC: 08/25/13

Claimant: Appellant (1)

Section 96.5-2-a – Discharge

Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Sayee McCarthy (claimant) appealed a representative's September 19, 2013 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Prairie Meadows Racetrack & Casino (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 23, 2013. The claimant participated in the hearing. Pam Anderson 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 should be treated as timely? 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 September 19, 2013. The claimant did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by September 29, 2013. The appeal was not filed until it was faxed to and received by the Appeals Section on October 1, 2013, which is after the date noticed on the disqualification decision.

The claimant started working for the employer on April 1, 2013. She worked full time as a seasonal dish machine operator. Her last day of work was August 13, 2013. The employer suspended her that day and discharged her on August 20, 2013. The stated reason for the discharge was failing to properly report criminal convictions which would have prevented her from being hired.

The employer can only hire persons who can be licensed by the state commission. When the claimant began the application process for employment, she completed an on-line form which asked if she had any criminal convictions. If she had answered "Yes," the application process would have been terminated at that point. When the claimant answered "No," she was allowed to complete the rest of the application, and she was subsequently hired.

The claimant completed her application for a gaming license with the state commission on March 29, 2013; the commission was unable to finish processing all of the seasonal applications until early August 2013, and the claimant was working under a provisional license. When the state commission processed the claimant's application, it found several criminal convictions in 2008 and 2010 in Georgia and North Carolina, and additional convictions in 2010 and 2011 in Minnesota. The claimant denied knowledge of these convictions, although she acknowledged that she had been in those states during those periods, and acknowledged that there had been a proceeding under which she had been required to "pay a fine." The administrative law judge concludes that it is more likely than not that at least some if not all of the information the employer received from the state commission regarding the prior criminal convictions was correct, particularly since the claimant provided no concrete evidence even that the "fine" she had been required to pay was from something short of a conviction.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. 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 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 that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or

delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

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).

For a false statement on a job application to constitute misconduct, the false statement 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. Since the employer was legally prohibited from employing a person with criminal convictions, the liability or jeopardy of the employer is obvious. Further, the Supreme 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, a truthful answer would have prevented the claimant from being hired. Therefore, the administrative law judge concludes that the claimant's act of falsification on her application was misconduct and, as a consequence, she is disqualified for unemployment insurance benefits. The claimant's failure to truthfully answer 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 appeal in this case is treated as timely. The representative's September 19, 2013 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of August 13, 2013. 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/css