

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GARANG D DENG**

Claimant

**APPEAL NO. 10A-UI-12257-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**

Employer

**OC: 09/20/09**

**Claimant: Appellant (2)**

Section 96.5(2)(a) – Discharge  
Section 96.6(2) – Timeliness of Appeal

**STATEMENT OF THE CASE:**

Garang Deng filed an appeal from the June 4, 2010, reference 03, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on October 19, 2010. Mr. Deng participated. The employer provided a telephone number for the hearing and the name of a person who would represent the employer at the hearing: Eloise Baumgartner at 515-465-9759. But, the employer representative was not available at that number at the scheduled start of the hearing. The hearing in this matter was consolidated with the hearing in Appeal Number 10A-UI-12258-JTT. Department Exhibits D-1 and D-2 were received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

**ISSUES:**

Whether there is good cause to treat the claimant's late appeal as a timely appeal. There is.

Whether Mr. Deng separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Deng participated in the June 3, 2010 fact-finding interview regarding his separation from Tyson Fresh Meats. The Workforce Development deputy told Mr. Deng that he could expect to receive a decision within a week or two. On June 4, 2010, Workforce Development mailed a copy of the June 4, 2010, reference 03, decision to Mr. Deng's last known address of record. The decision contained a warning that any appeal must be filed by June 14, 2010. Mr. Deng did not receive the decision. Despite the fact that Mr. Deng did not receive a decision within the one- to two-week time frame the Workforce deputy had mentioned, Mr. Deng continued to make his weekly report to the Agency.

Mr. Deng went to the Des Moines Workforce Development Center at the end of July 2010, when he still had not received a decision regarding his benefits. A Workforce representative notified

Mr. Deng at that time that a decision had been entered that denied benefits and that the deadline for appeal had passed. The Workforce representative told Mr. Deng that an appeal filed at such a late date after entry of the decision would not be accepted. However, the Workforce representative provided Mr. Deng with a telephone number he could call to further pursue the matter. Mr. Deng attempted to call the number twice, but languished on hold and eventually gave up on pursuing his appeal of the decision denying benefits.

On August 17, 2010, Workforce Development mailed a reference 04 overpayment decision to Mr. Deng. That decision carried an August 27, 2010 deadline for appeal. On August 27, Mr. Deng delivered his completed appeal form and attached letter to the Des Moines Workforce Development Center. The Appeals Section received the appeal materials on September 1, 2010.

Mr. Deng was employed by Tyson Fresh Meats as a full-time production worker from 2008 and last performed work for the employer on April 23, 2010. On that day, Mr. Deng left work at the end of his eight-hour shift. Mr. Deng was assigned to the second shift and his work hours were 3:45 p.m. to 12:15 a.m. Toward the end of the workday on April 23, 2010, a supervisor announced that the production workers, including Mr. Deng, would have to stay and work a 10-hour shift instead of the usual eight-hour shift. Mr. Deng needed to prepare for his school finals and left work. Mr. Deng told a supervisor about his need to leave and the supervisor approved his departure. When Mr. Deng appeared for work the next day, a different supervisor confronted him about the fact that he left work after eight-hours the prior day and did not stay for the extra two hours of production. Mr. Deng explained why he had needed to leave and that another supervisor had approved his departure. The supervisor to whom Mr. Deng was then speaking directed Mr. Deng to go home and come back the next day. The employer then discharged Mr. Deng from the employment.

The employer's policy regarding extending work hours required that the employer provide at least three hours' notice to employees. The employer had provided Mr. Deng with 10 to 15 minutes' notice. When Mr. Deng pointed this out to the supervisor on April 24, the supervisor replied that he did not care about the policy and would make the decision.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. 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. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1,

paragraphs "a" through "h". 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. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The appeal in this case was submitted on August 27, 2010.

The evidence in the record establishes 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 evidence indicates that the claimant did not have an opportunity to file a timely appeal because he had not received the decision in a timely manner. The weight of the evidence further establishes that the claimant's further delay in filing an appeal was due in part to advice a Workforce Development representative gave him about the futility of filing a claim and the claimant's inability to get through to the Agency on the number that Workforce representative directed him to use. The administrative law judge finds good cause, attributable to the United States Postal Service and to Workforce Development, to treat the appeal as a timely appeal. See 871 IAC 24.35(2). The administrative law judge further he has jurisdiction to consider and rule on the merits of the 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 employer has the burden of proof in a discharge matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The administrative law judge notes that the employer failed to participate in the hearing and thereby failed to present any evidence to establish a voluntary quit or a disqualifying discharge.

A single unexcused absence is not misconduct. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence establishes that the employer discharged Mr. Deng based on a single incident of alleged insubordination and a single incident of alleged early departure from work without authorization. Insofar as the discharge was based on an allegedly unexcused early departure, the evidence in the record establishes that Mr. Deng left at the end of his regular scheduled shift and did so with a supervisor's authorization. There was no early departure and no absence. Insofar as the alleged insubordination is concerned, the employer's last-minute directive that Mr. Deng stay beyond his regularly scheduled shift and work into the early hours of the morning was unreasonable. Mr. Deng's decision to leave at the end of his regularly scheduled workday so that he could attend to other responsibilities was reasonable. The conduct did not involve misconduct and the conduct was isolated in nature.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Deng was discharged for no disqualifying reason. Accordingly, Mr. Deng is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Deng.

**DECISION:**

There is good cause to treat the claimant's appeal as a timely appeal. The Agency representative's June 4, 2010, reference 03, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw