

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

FRANK SYLALOM
Claimant

SPRING VALLEY RADIO INC
Employer

APPEAL 18A-UI-04327-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/20/16
Claimant: Appellant (1)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 27, 2017, (reference 05) unemployment insurance decision that denied benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on May 1, 2018. Claimant participated. Employer participated through district manager Trevor Heintz. Department's Exhibit D-1 was received.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant filed a claim with an effective date of November 20, 2016, based on a separation from a former employer, Cellular Advantage. Claimant then became employed with employer and was separated on September 20, 2017. Claimant reopened his claim for unemployment insurance benefits on October 8, 2017.

On November 1, 2017, a reference 02 decision was issued denying claimant benefits based on his separation from employment with employer. Claimant received the decision shortly thereafter, within the appeal period. On November 1, 2017, the agency issued a reference 03 decision stating he was eligible for benefits based on his separation with Cellular Advantage based on the fact he earned ten times his weekly benefit amount since the separation from employment. On November 1, 2017, a reference 04 summary decision was also issued explaining that despite the two decisions, the bottom line was that claimant was disqualified from receiving benefits from September 20, 2017, going forward until he earned ten times his weekly benefit amount. Claimant did not file an appeal of any of the decisions and continued filing weekly claims, not receiving benefits.

On November 26, 2017, claimant filed a new claim as his claim year expired. On November 27, 2017, a reference 05 decision was issued denying claimant benefits based on his separation from employment with employer. Claimant received the decision shortly thereafter, within the appeal period. Claimant did not timely appeal the decision.

On December 6, 2017, a reference 02 decision was issued finding the issue of whether claimant was allowed benefits based on his separation from employer had been previously adjudicated and stating the denial decision remained in effect. Claimant received the decision shortly thereafter, within the appeal period. Claimant did not timely appeal that decision.

For some unknown reason, claimant's new claim was not locked and he began receiving benefits. Claimant continued filing weekly continued claims. By March 29, 2018, the agency caught the error and a reference 05 decision was issued finding claimant overpaid benefits for the 17 weeks ending March 24, 2018. Claimant filed an appeal on April 5, 2018.

Claimant began working for employer on December 28, 2016. Claimant last worked as a full-time team leader/manager. Claimant was separated from employment on September 20, 2017, when he was terminated.

Employer has a policy stating that employees can be terminated for theft from the company. Claimant was aware of the policy.

As team leader/manager claimant was required to deposit the cash or checks at the bank twice per week. Claimant was aware he was the person ultimately responsible to make sure the money made it to the bank.

On July 5, 2017, employer had cash/check receipts of \$72.00. That amount was never deposited into the bank.

On July 19, 2017, employer had cash/check receipts of \$154.60. That amount was never deposited into the bank.

In early August 2017, employer gave claimant a verbal warning regarding the missing deposits and deducted the missing amount from his paycheck. Employer informed claimant that if it happened again he could be terminated.

On September 9, 2018, employer's accountant sent claimant an email informing him of missing deposits for July 28 and August 2, 8, 13, and 25, 2017. By September 19, 2017, claimant had come up with the money to cover the money from the first three dates, but not the last two dates. However, on September 20, 2017, employer learned claimant had not deposited any cash receipts for September 1, 2, 5, and 9, 2017. Employer gave claimant until the end of the day to come up with the missing money. Claimant did not do so and was terminated.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant's appeal is untimely.

Iowa Code section 96.6(2) provides, in pertinent part:

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. . . . 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.

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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

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 Supreme Court has declared that there is a mandatory duty to file appeals from unemployment insurance 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

The record shows that the appellant did have a reasonable opportunity to file a timely appeal. Claimant asserts he believed he was allowed benefits based on a November 1, 2017, decision that allowed him benefits based on employment with another employer. However, a summary decision came the same day explaining he was ultimately denied benefits despite what could have been confusing, conflicting decisions. Claimant never received benefits for the weekly claims he filed before the 2016 benefit year expired. Then claimant received the current decision denying benefits based on a separation from employer and an additional decision in December denying benefits based on his separation from this employer. He appealed neither. The claimant either knew or should have known by that point that he needed to appeal the decisions denying him benefits based on his separation from employer.

The administrative law judge concludes that failure to follow the clear written instructions to file a timely appeal within the time prescribed by the Iowa Employment Security Law *was not due to any Agency error or misinformation or delay or other action of the United States Postal Service* pursuant to Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

Even if claimant's appeal is considered timely, the employer has established claimant's separation disqualifies him from receiving benefits.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

Here, claimant either lost or stole many days' worth of cash/check receipts from the store he managed after being warned. Either way, his actions amount to misconduct and disqualifies claimant from receiving unemployment insurance benefits.

DECISION:

The November 27, 2017, (reference 05) unemployment insurance decision is affirmed. The appeal is not timely, and the decision denying benefits remains in full force and effect.

Christine A. Louis
Administrative Law Judge
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Decision Dated and Mailed

cal/scn