

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JESSICA L FORD

Claimant

AMERICAN WINDOW CLEANING QC INC

Employer

APPEAL NO. 21A-UI-13772-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/15/20

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a late appeal from the March 30, 2021, reference 02, decision that disqualified her for benefits and that held the employer's account would not be charged for benefits, based on the deputy's conclusion that the claimant was discharged on February 18, 2021 for failure to perform satisfactory work despite the ability to perform satisfactory work. After due notice was issued, a hearing was held on August 13, 2021. Claimant participated. The employer did not provide a telephone number for the appeal hearing and did not participate. Exhibits A through C were received into evidence. The administrative law judge took official notice of the reference 02 and reference 03 decisions, as well as the Agency's record of benefits paid to the claimant (DBRO).

The hearing in this matter was consolidated with the hearing in Appeal Number 21A-UI-13773-JTT. The undersigned administrative law judge took on the hearing as a last-minute substitute and, therefore, did not have the usual opportunity to prepare for the hearing. In setting about to write the decisions in these matters, the administrative law judge discerned that the overpayment decision at issue in 21A-UI-13773-JTT is unrelated to the March 30, 2021, reference 02, decision on appeal in the present matter.

ISSUES:

Whether the appeal was timely. Whether there is good cause to treat the appeal as timely. Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by American Window Cleaning QC, Inc. as a full-time office assistant from March 2020 until February 18, 2021, when the employer discharged her from the employment. On February 18, 2021, the employer sent a text message to the claimant in which the employer discharged the claimant from the employment. The employer wrote:

After seeing your Facebook post today that you are looking for other job opportunities, it is clear that your head is not in this game. I have no ill will toward you and I wish you the best. Its [sic] just not the right fit for either of us. I will have your final check ready Tuesday by 11am. If you want to come in then and pick it up with your things, please just bring your office keys with you.

The claimant made the Facebook post in question on her Facebook page. The claimant wrote that that she was looking for other employment opportunities. The claimant did not name or disparage the employer.

The employer had met with the claimant February 15, 2021 to discuss what the employer deemed performance issues. The employer made reference to the meeting in the February 18, 2020 discharge text message, but cited the claimant's Facebook post as the catalyst for the discharge.

On March 30, 2021, Iowa Workforce Development mailed the March 30, 2021, reference 02, decision to the claimant's Davenport last-known address of record. The reference 02 decision disqualified the claimant for benefits and held the employer's account would not be charged for benefits, based on the deputy's conclusion that the claimant was discharged on February 18, 2021 for failure to perform satisfactory work despite the ability to perform satisfactory work. The decision stated that the decision would become final unless an appeal was postmarked by April 9, 2021 or was received by the Appeals Bureau by that date. The claimant did not file an appeal from the reference 02 decision by the April 9, 2021 deadline. The claimant did not receive the reference 02 decision and was unaware of the decision.

On June 11, 2021, the claimant filed a timely appeal from what turns out to be an unrelated reference 03 overpayment decision that harkens back to a 2020 separation from a different employer, Annwich, Inc. The claimant erroneously associated the overpayment decision with her recent separation from American Window Cleaning QC, Inc. and reference the separation from American Window in the appeal form. The claimant mailed her appeal. The appeal is postmarked June 11, 2021. The Appeals Bureau treated the appeal as an appeal from both March 30, 2021, reference 02, disqualification decision pertaining to the American Window employment and an appeal from the June 2, 2021, reference 03, unrelated overpayment 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, subsections 10 and 11, 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 Iowa Administrative Code rule 871-24.35(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 Iowa Administrative Code rule 871-24.35(1)(b).

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 in the record establishes that the claimant did not receive the March 30, 2021, reference 02, when it was mailed and therefore did not have a reasonable opportunity to file an appeal by the April 9, 2021 appeal deadline. Because the late filing of the appeal is attributable to the United States Postal Service not delivering the decision to the claimant, there is good cause to treat the late appeal as a timely appeal. See Iowa Administrative Code rule 871-24.35(2). The administrative law judge has jurisdiction to make a determination on the merits. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

Iowa Code section 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 disqualification shall continue 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 of proof in this 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 Iowa Administrative Code rule 871-24.32(4).

The evidence in the record establishes a February 18, 2021 discharge for no disqualifying reason. The employer did not participate in the hearing and did not present any evidence to meet its burden of proving a discharge for misconduct in connection with the employment. The evidence indicates instead that the employer was displeased when the employer learned the claimant was seeking other employment. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The claimant's appeal from the March 30, 2021, reference 02, decision is timely. The decision is reversed. The claimant was discharged on February 18, 2021 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.



James E. Timberland
Administrative Law Judge

August 19, 2021
Decision Dated and Mailed

jet/mh