

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JIMMY MURPHY

Claimant

APPEAL NO. 13A-UI-13300-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HEALTH SERVICES – IOWA CORP

Employer

OC: 09/29/13

Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated October 29, 2013, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 27, 2014. Claimant participated. Employer participated by Julie Anfinson, Director of Human Resources, and Joe Conlon, Security Director. The record consists of the testimony of Julie Anfinson; the testimony of Joe Conlon; the testimony of Jimmy Murphy; and Employer's Exhibit 1. Official notice is taken of agency records.

ISSUES:

Whether the claimant filed a timely appeal; and

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

On October 29, 2013, a representative issued a decision that held that the claimant was ineligible for unemployment insurance benefits. The decision also states that the decision would become final unless an appeal was postmarked by November 8, 2013, or received by the appeal section on that date. The claimant's appeal was filed on December 3, 2013. The claimant had faxed in his appeal on November 8, 2013, but the appeal notice was apparently lost and not recorded by the Appeals Bureau.

The employer is a hospital located in Sioux City, Iowa. The claimant was hired on September 7, 2010, as a security officer. He was a part-time employee at the time of his termination. The claimant's last day of work was September 15, 2013. He was suspended on September 16, 2013. He was terminated on September 30, 2013.

The incident that led to the claimant's termination occurred on September 13, 2013. The claimant was arrested for disorderly conduct at an elementary school. The arrest made the

local evening news and the employer found out first about the arrest from those news reports. The employer has a written policy, of which the claimant was aware, that the employer be notified immediately upon being charged with a crime. (Exhibit 1, p. 2) The claimant did not notify the employer about his arrest and worked on September 14, 2013, and September 15, 2013. The employer contacted the claimant about the arrest and asked him to come in for a meeting.

The first meeting was held on September 17, 2013. The claimant was told that he needed to provide some written documentation of the charges so that the situation could be further assessed. On September 23, 2013, Joe Conlon had a telephone conversation with the claimant and his attorney and again asked for some written documentation. On September 24, 2013, the claimant said that he had an envelope for Mr. Conlon that contained a letter from his attorney about the charges. Mr. Conlon asked the claimant to open the letter and read it to him. The claimant refused to do so. The claimant did not have a letter from his attorney even though he said that he did. On September 26, 2013, the claimant met with Julie Anfinson and said that he could not provide what he did not have. The employer repeated its request a final time on September 30, 2013. The claimant still did not provide any documentation. The claimant was then terminated.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code section 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 have a reasonable opportunity to file an appeal postmarked as timely.

The administrative law judge accepts the claimant's testimony that he did fax his appeal to the Appeals Bureau on November 8, 2013. The claimant's appeal will be treated as timely.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990) The employer has the burden of proof to show misconduct.

The claimant is not eligible for unemployment insurance benefits. The evidence showed that the claimant violated known employer policy by not immediately notifying the employer about his arrest on September 13, 2013. The claimant is a security officer and one of his main duties is to maintain order. The employer had a definite need to know about a security officer being arrested for disorderly conduct. The claimant's excuse that the security office was not open over the weekend is not reasonable. The employer is a hospital and operates all the time, including weekends. The claimant surely could have contacted someone to report his arrest. Even after the claimant had a meeting with the employer after his arrest, he continued to defy reasonable requests from the employer for information about the arrest. The most glaring example was the claimant's statement that he had a letter addressed to Joe Conlon from his attorney when in fact he had no such letter. He never provided a single thing to the employer despite numerous opportunities to do so. The claimant's conduct is insubordination. This is misconduct. Benefits are denied.

DECISION:

The claimant's appeal is deemed timely. The decision of the representative dated October 29, 2013, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css