

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATTHEW A OTTAWAY
Claimant

APPEAL NO: 09A-UI-11254-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEARS ROEBUCK & CO
Employer

OC: 02/01/09
Claimant: Appellant (1)

Section 96.5-2-a - Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed a department decision dated March 10, 2009, reference 01, that held he was discharged for misconduct on January 27, 2009, and benefits are denied. A telephone hearing was held on August 21, 2009. The claimant participated. Jerry Loomer, Loss Prevention Manager, participated for the employer. Claimant Exhibit A was received as evidence.

ISSUE:

Whether the claimant filed a timely appeal.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant worked for the employer as a full-time sales clerk in the automotive department from November 8, 2005 to January 26, 2009. The claimant was discharged for employee dishonesty when the employer discovered he wrote up false tire repair tickets for the auto techs, so they could make money on road hazard tire repairs. The claimant signed a statement admitting his dishonesty, and he paid the employer restitution of about \$40.00.

The claimant provided the department an address of record that is his grandparents though he was living with a girlfriend. The department mailed the disqualification decision to his address of record on March 10, and the overpayment decision on May 15. The claimant admits he received an overpayment statement dated June 16, 2009, but he denies receiving the decisions. The claimant excuses the delay in submitting an appeal on August 4, 2009, because he waited for his local Workforce Center to send him an appeal or set up an appeal by his telephone request.

REASONING AND CONCLUSIONS OF LAW:

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. 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 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).

(1) The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes the claimant failed to file a timely appeal.

The law requires the department decisions to be mailed to the claimant's address of record. If the claimant did not receive the decisions, it was due to him not living at his address of record. The claimant's statement that the department would send him an appeal form or set up an appeal is not credible, because it is not the department practice to do so. The manner in which the claimant appealed on August 4 is department practice. The claimant offered no good cause for the three to four months he delayed his appeal.

DECISION:

The department decision dated March 10, 2009, reference 01, is affirmed. The claimant failed to file a timely appeal. The claimant was discharged for misconduct on January 26, 2009.

Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css