

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CASANDRA A JOHNSON

Claimant

APPEAL NO. 10A-UI-02758-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC

Employer

OC: 01/17/10

Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Casandra Johnson filed an appeal from the February 8, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 5, 2010. Ms. Johnson participated. Denise Leal, Human Resources Director, represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 10A-UI-02759-JTT. Department Exhibits D-1 and D-2 were received into evidence. Exhibits One through Four were received into evidence.

ISSUES:

Whether there is good cause to deem Ms. Johnson's late appeal timely. There is.

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Casandra Johnson was employed by Good Samaritan Society, Inc., as a full-time certified nursing assistant from November 2008 until January 13, 2010, when the employer discharged her for attendance. Ms. Johnson's immediate supervisor was Sandy Paulson, Director of Nursing.

The final absence that triggered the discharge occurred on January 12, 2010, when Ms. Johnson was absent from work because her dog had died the night before and Ms. Johnson was grieving the loss of her pet. The employer's absence reporting policy required that Ms. Johnson contact the employer at least two hours prior to the start of her shift. Ms. Johnson was aware of the policy and always complied with it. On January 12, Ms. Johnson went to the workplace at 11:30 a.m. to notify Ms. Paulson that she was too upset to work the shift that started at 2:00 p.m. Ms. Paulson told Ms. Johnson she either needed to find her own replacement or report for the shift. Ms. Johnson was unable to find a replacement and did not appear for the shift. When Ms. Johnson appeared for work on January 13, she was discharged from the employment.

In making the decision to discharge Ms. Johnson from the employment the employer considered Ms. Johnson's prior absences, all of which were due to illness and were properly reported to the employer.

On February 8, 2010, Workforce Development mailed a copy of the reference 01 decision to Ms. Johnson's last-known address of record. The decision denied benefits in connection with Ms. Johnson's January 2010 separation from Good Samaritan Society, Inc. (employer account number 064959-000) The decision carried on its face a February 18, 2010 deadline for appeal. On February 10, 2010, Workforce Development mailed a copy of the reference 03 decision to Ms. Johnson's last-known address of record. That decision also denied benefits in connection with the *same* employer, Good Samaritan Society, Inc., but referenced a different employer account number, 064959-004. The employer accounts are linked accounts. The reference 03 decision carried on its face a February 20, 2010 deadline for appeal. February 20, 2010 was a Saturday, so the deadline for appeal was extended by operation of law to Monday, February 22, 2010. Ms. Johnson received both decisions prior to their respective appeal deadlines and within a couple days of each other. Ms. Johnson submitted an appeal by fax on February 22, 2010 and the Appeals Section received her appeal the same day.

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).

Ms. Johnson's appeal from both decisions was filed on February 22, 2010, when the Appeals Section received her faxed appeal. The appeal was on time with respect to the reference 03 decision, but late with respect to the reference 01 decision.

The evidence in the record establishes that more than ten calendar days elapsed between the mailing date and the date Ms. Johnson's appeal from the reference 01 decision 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 record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that Workforce Development contributed to the lateness of Ms. Johnson's appeal from the reference 01 decision by entering two virtually identical decisions concerning the same separation on linked employer accounts, but with different appeal deadlines. The administrative law judge concludes there is good cause to deem Ms. Johnson's late appeal from the reference 01 decision timely. See 871 IAC 24.35(2). Any other conclusion would result in a miscarriage of justice, given Ms. Johnson's timely appeal from the reference 03 decision concerning the same employment and same separation. The administrative law judge has jurisdiction to 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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The administrative law judge need not rule on whether missing work, with proper notice, to grieve the recent loss of a pet constitutes an excused absence or unexcused absence under the applicable law. This is because, even if the administrative law judge concluded the absence was unexcused, the evidence would then establish only a single unexcused absence. A single unexcused absence is not misconduct. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

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

DECISION:

The Agency representative's February 8, 2010, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css