

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES E CHERRY
Claimant

APPEAL NO. 12A-UI-04283-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDWESTERN TRADING INC
Employer

OC: 01/29/12
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 March 2, 2012, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 8, 2012. Claimant participated. Employer participated by Rick Stickle, the president and owner. The record consists of the testimony of Charles Cherry; the testimony of Rick Stickle and Employer's Exhibits 1-14. 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 March 2, 2012, 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 March 12, 2012, or received by the Appeals Section on that date. The claimant's appeal was filed on April 13, 2012. The claimant had mailed his appeal prior to the due date but that appeal was never received by the Appeals Section. The claimant then went to his local Workforce office to find out about the status of his appeal. When he found out that his original appeal had been lost in the mail, a new appeal was filed at the local Workforce Center.

The employer is in the warehouse business. The claimant was hired on September 4, 2009, as a full-time forklift operator. His last day of work was January 25, 2012. He was terminated on January 25, 2012.

The incident that led to the termination occurred on January 25, 2012. The claimant mis-shipped a load for one of the employer's customers. This error caused embarrassment to the employer and approximately \$5,000.00 to correct the error and ship the correct product. Two weeks previously the claimant had mis-shipped the identical order to the same company. He had been given a written warning at that time and was told that another error would lead to termination. (Exhibits 12 and 13).

The employer attributed these errors to the claimant's recklessness in operating the forklift. The claimant repeatedly drove the forklift at excessive speeds, which resulted in shipping mistakes; damage to the forklift; and complaints from customers. Rick Stickle personally observed the claimant driving the forklift so fast that it came up on one wheel. He would drive fast and the slam on the brakes at the last moment. Mr. Stickle and the claimant's supervisor, Josh, warned the claimant repeatedly about driving too fast.

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 administrative law judge concludes that failure have the appeal timely postmarked within the time prescribed by the Iowa Employment Security Law was due to error, misinformation, delay, or other action of the United States Postal Service pursuant to 871 IAC 24.35(2) The claimant's testimony that he did mail his appeal in a timely manner is accepted. The appeal will be deemed 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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. An employer can reasonably expect that an employee will follow work rules and work in a safe and efficient manner. When there is wanton carelessness that shows a disregard for the employer's interests, misconduct occurs. The employer has the burden of proof to establish misconduct.

The greater weight of the evidence in this case shows that the claimant was terminated due to wanton carelessness on his part. The claimant had been repeatedly warned to slow down and to operate his forklift in a safe manner. The employer had a material interest in operating a safe and efficient warehouse. The claimant knew how to drive a forklift and presumably how to operate it at slow and safer speeds. Despite this knowledge he used excessive speed to the point that a customer complained to the employer. The claimant's carelessness caused two mis-shipments to a good customer and resulted in approximately \$5,000.00 in extra costs of the employer. Two weeks prior to his termination, the claimant had received a final written warning for the exact same thing that caused his termination. The claimant knew his job was in jeopardy and yet he persisted in the same types of behavior. The claimant's actions show a deliberate

breach of his duties to the employer and a disregard of the employer's interest in operating a safe and efficient warehouse. This is misconduct. Benefits are denied.

DECISION:

The decision of the representative dated March 2, 2012, 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