

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CHRISTINE A SOLIS

Claimant

APPEAL 17A-UI-02977-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEYS MARKETING COMPANY

Employer

OC: 01/29/17

Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 22, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for engaging in conduct not in the best interest of her employer. The parties were properly notified of the hearing. A telephone hearing was held on April 12, 2017. The claimant, Christine A. Solis, participated. The employer, Casey's Marketing Company, participated through Joey Noel, Store Manager; Penny Bodman, Area Supervisor; and Diana Fossum, Area Supervisor. Employer's Exhibit 1 was received and admitted.

ISSUES:

Is the appeal timely?

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a store manager, from February 24, 2007, until January 25, 2017, when she was discharged. On Sunday, January 22, claimant contacted Fossum to notify her that she had received a complaint that Sarah, an employee, was purchasing drugs from another employee. After speaking with upper management about the issue, Fossum instructed claimant to ask Sarah to submit to a drug test. Fossum asked whether claimant would be able to handle this that day and claimant said she would. Fossum testified that assumed, based on claimant's response, that Sarah was working that day. Unbeknownst to Fossum, Sarah was not scheduled that day. Claimant went to Sarah's home and confronted her about the accusation and the drug test request. Later that day, Sarah posted on Facebook, "How do you get fired on your day off?" Noel saw this post, so she contacted claimant to inquire. Claimant told Noel that she had gone to Sarah's home to talk with her, as Sarah's ex-husband had reported that Sarah was using drugs. According to claimant, Sarah got angry, swore at her, and quit her job.

Sarah did not show up for her scheduled shifts the following Monday or Tuesday. Fossum spoke to claimant on Tuesday about Sarah's employment status, as the employer considers two consecutive no-call/no-shows to be a voluntary quit. Fossum asked claimant what time Sarah

had come in on Sunday, as there was no time clock record of her arrival or departure and the employer needed to pay her for any time she was at work. Claimant initially responded that she was there so briefly that it did not matter. She later admitted that Sarah had not come to work that day, but rather she had gone to Sarah's house and they had a conversation in which Sarah quit her job. Fossum discharged claimant for lying about her communications with Sarah and for going to Sarah's home.

Claimant had worked for the employer for ten years, and she had never gone to an employee's home about a work issue in the past. Claimant testified that she went to Sarah's home because she knew Sarah was going to be upset by the request to take a drug test, and she did not want Sarah to be upset at work. Claimant testified that she did not initially tell Fossum about her going to Sarah's home on Sunday because Fossum had not been around.

Claimant believes she received the unemployment insurance decision on March 5 or 6, 2017. She testified that she received the disqualification decision the same day as the overpayment decision, though her testimony indicated she was actually talking about receiving the Notice of Appeal and Telephone Hearing for each decision. Claimant could not clearly recall when she appealed the disqualification decision.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant failed to file a timely appeal. Even if claimant's appeal was timely filed, the administrative law judge finds she was discharged from employment for disqualifying misconduct. Benefits are withheld.

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.

(Emphasis added.) 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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976). Pursuant to rules Iowa Admin. Code r. 871- 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. *Messina v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 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 failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

If claimant's appeal was considered to have been timely filed, the question in this case is whether claimant was discharged from employment for disqualifying misconduct. Iowa Code § 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.

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

Here, the evidence in the record shows that claimant – in her capacity as a manager – went to an employee's home to inform her that the employer wanted her to take a drug test. Any reasonable manager would have understood that this was not appropriate. Further, after taking this action, claimant concealed it from the employer by claiming the employee came in on Sunday (when in fact she did not) and then was a no-call/no-show for two days. The employer has a reasonable expectation that its managers are truthful, and Fossum understandably concluded that she could not trust claimant after what transpired. The employer has established that claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

DECISION:

The February 22, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant's appeal was not timely filed. Even if the appeal was timely filed, claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed