IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ELISHA J MCKINNEY
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 10A-UI-00567-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/06/09
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge
Iowa Code Section 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

Elisha McKinney filed an appeal from the December 30, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on February 22, 2010. Ms. McKinney participated. The employer submitted written notice that it was waiving its right to participate in the appeal hearing, did not provide a telephone number for the hearing, and did not participate. Department Exhibits D-1 and D-2 were received into evidence.

ISSUES:

Whether Ms. McKinney's appeal was timely. It was.

Whether Ms. McKinney was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On December 30, 2009, Workforce Development mail a copy of the reference 01 decision to Elisha McKinney's last-known address of record. The decision denied benefits based on an Agency conclusion that Ms. McKinney had been discharged for excessive unexcused absences. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by January 9, 2010. That date was a Saturday. The decision indicated that the appeal period would be extended to the next working day if the appeal deadline fell on the weekend. The next working day was Monday, January 11, 2010. Ms. McKinney received the decision on January 2 or 4, 2010. On January 4, 2010, Ms. McKinney drafted her appeal. Ms. McKinney did not date the appeal she drafted and submitted. On Wednesday, January 6, 2010, Ms. McKinney's husband mailed the appeal in Sergeant Bluff, Iowa. The Sioux City Post Office affixed a postmark that is not entirely clear, but appears to read January 8, 2010. The Des Moines Post Office affixed a postmark that is not entirely clear, but appears to read January 12, 2010. The Appeals Section received the appeal on January 13, 2010.

Elisha McKinney was employed by Wal-Mart from 1994 until December 3, 2009, when two assistant managers discharged her for attendance. Ms. McKinney was a full-time customer service manager.

The final absences that triggered the discharge occurred on November 30, 2009 and December 1, 2009. On both days, Ms. McKinney was absent due to illness and properly reported the absences to the employer by calling the designated toll-free number at least an hour before the scheduled start of her shift. Prior to those dates, Ms. McKinney has most recently been absent on November 23 and 24. Ms. McKinney was absent because she had fallen and had suffered injury that did not require hospitalization. On each day, Ms. McKinney properly reported the absences to the employer. Prior to those absences, the next most recent absence had been during the week of October 26, 2009, when Ms. McKinney was temporarily without daycare for her four-month-old and her four-year-old because a person in the in-home childcare provider had been diagnosed with the H1N1 flu. Ms. McKinney got the message about the lack of daycare as she was preparing for work on October 26, 2009.

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).

The evidence indicates that the appeal was filed on or before January 8, 2010. January 8, 2010 is the date that appears as the somewhat fuzzy Sioux City postmark date on the document. If the administrative law judge were to disregard that date because of its fuzzy appearance, the appeal filing day would be even earlier. The evidence establishes a timely appeal. 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 this 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

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 employer waived its participation in the hearing and, thereby, failed to present any evidence whatsoever to support an allegation that the claimant was discharged for misconduct. The weight of the evidence indicates that Ms. McKinney's absences on November 23, 24, 30 and December 1, 2009 were each for illness properly reported to the employer and were excused absences under the applicable law. One has to go back to the week of October 26 to find an absence where there is any question as to whether it was an excused or unexcused absence. The evidence fails to establish a current act of misconduct. See 871 IAC 24.32(8). Because the evidence fails to establish a current act of misconduct, the administrative law judge concludes that Ms. McKinney was discharged for no disqualifying reason. Accordingly, Ms. McKinney is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. McKinney. Because there was no current act of misconduct, the administrative law judge need not further consider whether the absence back in October involved an excused absence.

DECISION:

The claimant's appeal was timely. The Agency representative's December 30, 2009, 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css