

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SIERRA H GEARHART
Claimant

APPEAL NO. 14A-UI-13499-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 11/30/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Sierra Gearhart filed a late appeal from the December 16, 2014, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that she had been discharged on November 28, 2014 for misconduct in connection with the employment. After due notice was issued, a hearing was started on January 27, 2015 and completed on January 28, 2015. Ms. Gearhart participated and presented additional testimony through Scott Vulgamott. Bruce Burgess of Corporate Cost Control represented the employer and presented testimony through Mike Kueny and Denise Pattison. Exhibits One through Eight and Department Exhibits D-1 and D-2 were received into evidence.

ISSUES:

Whether there is good cause to treat Ms. Gearhart's late appeal as a timely appeal. There is.

Whether Ms. Gearhart was discharged for misconduct in connection with the employment that disqualifies her for benefits and that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sierra Gearhart established a claim for benefits that was effective November 30, 2014. At the time Ms. Gearhart applied for benefits, she provided Workforce Development an address for purposes of receiving correspondence from the agency. That address was 4333 Parkridge Avenue, Pleasant Hill, Iowa 50327. A mobile home park is located at that street address. Ms. Gearhart resides in trailer number 13. Ms. Gearhart omitted the trailer number when she provided her address to Workforce Development. The omission of the trailer number sometimes created problems with regard to Ms. Gearhart's receipt of correspondence from

Workforce Development. For example, the appeal hearing notice mailed to Ms. Gearhart on January 8, 2015, was returned to the Appeals Section for “insufficient address—unable to forward.” The Postal Service was inconsistent in its actions and sometimes delivered correspondence to Ms. Gearhart despite the lack of a trailer number. Prior to January 12, 2015, Ms. Gearhart had not updated her address to include the trailer number.

On December 15, 2014, Ms. Gearhart participated in a fact-finding interview to determine her eligibility for benefits and Hy-Vee's liability for benefits based on her separation from the employment. At the time of the fact-finding interview, the claims deputy notified Ms. Gearhart that she could expect to receive a decision within three to five business days.

On December 16, 2014, Iowa Workforce Development mailed a copy of the December 16, 2014, reference 01, decision to Ms. Gearhart at her last-known address of record. The decision disqualified Ms. Gearhart for benefits and relieved the employer of liability for benefits, based on an Agency conclusion that Ms. Gearhart had been discharged on November 28, 2014 for misconduct in connection with the employment. The decision contained a warning that an appeal from the decision must be postmarked by December 26, 2014 or received by the Appeals Section by that date.

Ms. Gearhart did not receive the December 16, 2014, reference 01, decision mailed to her on that date. When Ms. Gearhart had not received a decision by December 22, 2014, she telephoned Workforce Development to inquire about the decision. At that time, Ms. Gearhart learned that a decision had been entered, that the decision disqualified her for benefits, and that she would have to appeal the decision if she disagreed with it. The Workforce Development representative who spoke with Ms. Gearhart on December 22, 2014, agreed to mail another copy of the decision to Ms. Gearhart. Ms. Gearhart waited for that decision to arrive and for the appeal instructions contained thereon. Ms. Gearhart again did not receive the decision. On December 31, 2014, Ms. Gearhart telephoned Workforce Development and asked for instructions to file an appeal. On that same day, Ms. Gearhart transmitted an appeal to the Appeals Section by e-mail. The Appeals Section received the appeal that same day.

Ms. Gearhart was employed by Hy-Vee as a full-time cashier from 2012 until November 28, 2014, when Mike Kueny, Store Director, discharged her from the employment for theft of company time. Ms. Gearhart worked at the employer's free-standing wine and spirits store. The incident that triggered the discharge occurred on November 24, 2014. On that day, Ms. Gearhart was scheduled to work the evening shift, from 5:00 p.m. to 9:00 or 9:30 p.m. Ms. Gearhart and one other employee were the only two Hy-Vee employees working at that store that evening. The employer's policy is to staff at least two employees, primarily for safety purposes. At 7:30 p.m., Ms. Gearhart exited the store and entered a purported customer's vehicle in front of the wine and spirits store. Ms. Gearhart remained in the vehicle for 39 minutes, smoking and conversing with the purported customer. At the start of Ms. Gearhart's employment, she signed her acknowledgement of Hy-Vee's policy prohibiting smoking anywhere on the employer's property, whether she was on or off the clock. Ms. Gearhart also acknowledged the employer's policy that designated the employee break room as the place where employees were to take breaks. During the five or five and a half-hour shift, Ms. Gearhart was entitled to one 20-minute paid break under the employer's break policy. After Ms. Gearhart reentered the store at 8:09 p.m., she again exited the store at 8:24 p.m. and reentered the purported customer's vehicle, where she smoked and conversed for 14 minutes before she reentered the store. Once Ms. Gearhart was in the vehicle, the driver backed up to a parking spot further away from the store. The employer learned about the conduct when the

coworker complained to a supervisor about being uncomfortable with Ms. Gearhart repeatedly leaving the store. The employer reviewed surveillance video that documented Ms. Gearhart's conduct. The employer had a written policy that prohibited engaging in non-work related activities while on the clock. Ms. Gearhart was aware of the policy. Ms. Gearhart had not clocked out for either trip outside the store.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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. Gearhart's appeal was filed on December 31, 2014, the day the Appeals Section received Ms. Gearhart's emailed appeal.

The evidence in the record establishes 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).

Ms. Gearhart did not have a reasonable opportunity to file an appeal because she did not receive the December 16, 2014, reference 01, decision or the appeal instructions contained thereon prior to the December 26, 2014 appeal deadline. She never received the decision. Ms. Gearhart contributed to the mail problem by not providing Workforce Development with the trailer number when she filed her claim for benefits. The United States Postal Service was inconsistent in its handling of the correspondence that lacked the trailer address. Ms. Gearhart made a good faith effort to exercise her appeal rights by contacting Workforce Development to inquire about the decision twice, on December 22 and on December 31, 2014. When Ms. Gearhart received the instructions for filing an appeal on December 31, she filed the appeal the same day. Because the administrative law judge concludes that the United States Postal Service contributed to the appeal being filed late, the administrative law judge concludes there is good cause to treat the late appeal as a timely appeal and that the administrative law judge has jurisdiction to rule on the merits of the appeal.

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).

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).

The evidence in the record establishes that Ms. Gearhart acted with wanton and willful disregard of the employer's interests when she elected to violate the employer's written break policy and smoking policy twice on November 24, leaving the employer's liquor store without appropriate staff. The administrative law judge found not credible Ms. Gearhart's assertion that a manager had approved the conduct that violated multiple employer policies. Ms. Gearhart hung that assertion on an event that had allegedly occurred two months earlier. Whatever that incident was, the weight of the evidence does not support Ms. Gearhart's assertion that she had manager approval for her conduct in November 24, 2014. Regardless, Ms. Gearhart was fully aware that the conduct violated the employer's written policies.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Gearhart was discharged for misconduct. Accordingly, Ms. Gearhart is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

There is good cause to treat the late appeal as a timely appeal. The December 16, 2014, reference 01, decision is affirmed. The claimant was discharged for misconduct. Accordingly, Ms. Gearhart is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs