IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

STEPHEN R WILSON
Claimant

GAZETTE COMMUNICATIONS INC
Employer

APPEAL NO: 09A-UI-08826-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/03/09
Claimant: Appellant (2)

Section 96 .5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Stephen R. Wilson (claimant) appealed a representative's June 4, 2009 decision (reference 01) that concluded he was not qualified to receive benefits, and the account of Gazette Communications, Inc. (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 7, 2009. The claimant participated in the hearing with his attorney, Ryan Sawyer. Cathy Terukina, the human resource director, Mike Coleman, Matt Thiessen, and Will Hatchel appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did the claimant file a timely appeal or establish a legal excuse for filing a late appeal?

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on January 19, 2009. The employer hired the claimant to work full-time as a manager. Coleman supervised the claimant. At the time of hire, the employer went over the employer's harassment policy and told the claimant to read the policy and understand it. The employer has zero tolerance for harassment.

During his employment, the claimant did not receive any written warnings. Some employees complained that the claimant made them feel uncomfortable because he was too aggressive, especially when he touched people on the arm. Coleman talked to the claimant once to let him know an employee had complained about the claimant promising too much.

During his employment, the claimant had no idea any of his remarks offended anyone. When the claimant started his employment, office morale was very low and he worked so employees would feel better about themselves and their work environment. The claimant considered W.H. a valued employee. The claimant believed that if he offended W.H. at any time, W.H. would let him know that something the claimant had said offended him.

In March during a meeting, the claimant congratulated W.H. on a project that he had done very well. M.T. was at this meeting and got the impression the claimant made innuendos that W.H. had given special favors to get the praise he was receiving from the claimant. M.T. felt embarrassed for W.H., but he did not talk to W.H. to find out if the claimant's comments had offended him. M.T. did not immediately say anything to anyone about his perceptions as to what the claimant meant.

On April 20, M.T. saw the claimant become excited because a meeting or a project was going exceptionally well. M.T. was embarrassed for a female employee after the claimant made a motion as though he were going to lift up his shirt and then asked the female employee if she ever felt like doing that. M.T. did not talk to the female to find out if she had been offended or embarrassed by the claimant's actions. The claimant denied making such a gesture or comment on April 20, 2009.

On April 21, M.T. overheard parts of a conversation the claimant was having with two other employees. M.T. did not know the claimant was talking about how to trim a beaver hat. When M.T. overhead the claimant say shave the beaver, he was personally offended by the comment because he understood the claimant was making a sexual remark. M.T. reported what he considered the claimant's inappropriate behavior to the employer on April 21.

After investigating M.T.'s complaint on April 22, the employer discharged the claimant for his inappropriate comments in violation of the employer's harassment policy.

The claimant established a claim for benefits during the week of May 3, 2009. The claimant participated in a fact-finding interview on June 3. At the end of the interview, the fact-finder indicated a decision would be issued in the near future. On June 4, 2009 a representative's decision was mailed to the claimant and employer. This decision indicated the claimant was not qualified to receive unemployment insurance benefits as of May 3, 2009.

When the claimant did not receive a decision, he asked his neighbors if they received any of his mail. They indicated they had not. The claimant called his local Workforce office on June 18 and learned the decision had been issued and it held him disqualified from receiving benefits. The claimant filed his appeal on June 19, 2009.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's decision is mailed to the parties' last-known address, files an appeal from the decision, the decision is final. Benefits shall then be paid or denied in accordance with the representative's decision. Iowa Code § 96.6-2. 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 Iowa Supreme Court has ruled that appeals from unemployment insurance decisions must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision if a timely appeal is not filed. *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979); *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979). In this case, the claimant's appeal was filed after the June 15 deadline for appealing expired.

The next question is whether the claimant had a reasonable opportunity to file 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 evidence establishes the claimant did not have a reasonable opportunity to file a timely appeal because he did not receive the June 4 decision.

The claimant's failure to file a timely appeal was due to an Agency error or misinformation or delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. Since the claimant established a legal excuse for filing a late appeal, the Appeals Section has jurisdiction to make a decision on the merits of the appeal.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v Employment Appeal Board,* 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good-faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

M.T. was obviously offended or embarrassed by some of the claimant's comments. Even though M.T. found some of the claimant's offensive, other employees may not. Since the employer has zero tolerance for offensive comments or inappropriate behavior, the employer established a justifiable business reason for discharging the claimant. The evidence, however, shows the claimant did not intentionally violate the employer's policy. The claimant did not even realize he had offended anyone with his remarks. The claimant may have used poor judgment when he made some comments, but he did not intentionally violate the employer's policy or try to offend or embarrass any employee. The claimant did not commit work-connected misconduct. As of May 3, 2009, the claimant is qualified to receive benefits.

The employer is not one of the claimant's base period employers. During his current benefit year, the employer's account will not be charged.

DECISION:

The representative's June 4, 2009 decision (reference 01) is reversed. The claimant did not file a timely appeal, but established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to address the merits of his appeal. The employer discharged the claimant for justifiable business reasons, but these reasons do not constitute work-connected misconduct. Therefore, as of May 3, 2009, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. During the claimant's current benefit year, the employer's account will not be charged.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/kjw