IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 06A-UI-02756-SWT
OC: 01/01/06 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a - Discharge
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated February 3, 2006, reference 02, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on March 28, 2006. The parties were properly notified about the hearing. The claimant participated in the hearing with his representative, Ted Hoglan, attorney at law. Klaren Bentley participated in the hearing on behalf of the employer with a witness, Joe Schmidt. Exhibits A-1 and One through Three were admitted into evidence at the hearing. The record was left open until March 31, 2006, for Mr. Hoglan to submit evidence regarding the disposition of the operating a vehicle while intoxicated charge. A request was made on April 4, 2006, to extend the deadline for submitting the evidence until April 5 at 4:30 p.m. Mr. Hoglan submitted evidence on April 6, 2006, at 3:51 p.m., which consisted of an Order excluding evidence that the claimant had refused a breath test and any evidence following that alleged refusal; an Amended Information charging the claimant with public intoxication; and a Judgment

and Sentence convicting and sentencing the claimant for public intoxication. The employer's representative objected to the evidence as being filed untimely without proper diligence. My ruling regarding the submitted evidence is that it was submitted after deadline for submitting evidence and Mr. Hoglan had not requested an extension of time for submitting the evidence until after the deadline. He has not shown good cause for not submitting the request for an extension of time before the deadline of March 31, 2006. The request to submit the post-hearing evidence is denied.

FINDINGS OF FACT:

The claimant worked full time for the employer from November 19, 2001, to December 16, 2005. Effective February 22, 2004, the claimant was promoted to the position of Tire Lube Express Manager. The claimant was informed and understood that one of the job requirements was that he have a valid driver's license. He was required to drive cars in and out of the shop as a regular part of his job. He was also informed and understood that under the employer's work rules, an individual case-by-case review is conducted whenever an employee is arrested and charged with a felony or misdemeanor. The review determines whether the alleged conduct is job-related and whether it renders the employee unfit for his job. If the conduct is determined job-related, management then decides whether to suspend the employee without pay pending the outcome of the charges or to allow the employee to continue to work. The policy provides for discharge of an employee convicted of a job-related offense and reinstatement of an employee found not guilty of the charged offense. If an employee ends up being convicted of an offense different than the charged offense, the employer will determine whether the convicted offense renders the employee unfit for his job.

On December 16, 2005, the claimant was arrested and charged with operating a motor vehicle while intoxicated (OWI). The offense took place while the claimant was off duty and in his personal vehicle. He was lodged in jail pending his appearance before a judge the next morning. The claimant's mother notified his supervisor that he had been arrested for OWI and was in jail. The claimant bonded out of jail on December 16, 2005, and reported to work after speaking with his supervisor. The district manager informed the claimant that he was suspended without pay under the employer's criminal offense policy pending the outcome of his criminal charges.

At the time the claimant was suspended, he still had a valid driver's license and had one for a few weeks after he was arrested. He subsequently had his license suspended because he had refused a breath test. The suspension was not due to the suspension of the claimant's driver's license, because the claimant's supervisor did not inquire about the status of his driver's license until sometime in March 2006, when he was told by the Department of Transportation that the claimant's license was suspended. As of the time of the hearing, the claimant had not been convicted of OWI and remained suspended without pay pending the outcome of the criminal case. There was an agreement between the prosecuting attorney and the claimant to dismiss the OWI charge and permit the claimant to plead guilty to public intoxication due to evidentiary problems, but that agreement had not been finalized or accepted by the judge as of the time of the hearing.

Besides the fact that the claimant was arrested and charged with OWI, there is no evidence that the claimant was driving a vehicle while intoxicated.

An unemployment insurance decision was mailed to the claimant's last-known address of record on February 3, 2006. The decision concluded the claimant was discharged for work-connected misconduct and stated the decision was final unless a written appeal was postmarked or received by the Appeals Section by February 13, 2006.

The claimant never received the decision. He filed a written appeal on March 6, 2006. He filed the appeal after receiving an overpayment decision dated February 22, 2006, which was the first time that he realized that he had been disqualified.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant filed a timely appeal.

Iowa Code section 96.6-2 provides in pertinent part:

> 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. . . . 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.

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 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 claimant filed his appeal late because he never received the decision. The claimant did not have a reasonable opportunity to file a timely appeal. He filed his appeal promptly after he discovered that he was disqualified. The appeal is deemed timely.

The next issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The unemployment insurance rules provide: "Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered discharged, and the issue of misconduct must be resolved." 871 IAC 24.32(9).

The issue then is whether a suspension pending the outcome of a criminal case constitutes a "disciplinary suspension."

Since the employer in this case made a determination as to whether the claimant should be suspended without pay pending the outcome of the criminal charges or allowed to continue working pending the outcome of job-related criminal charges, the suspension constitutes a disciplinary suspension.

The employer has the burden to prove the claimant was discharged or suspended 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 suspension or discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging or suspending an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and 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).

The Iowa Supreme Court has ruled that off-duty misconduct may constitute work-connected misconduct under the unemployment insurance law if the conduct deliberately violates the employer's work rules. Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa

1992). Although the court concluded that violating a work rule was sufficient to prove "work-connected" misconduct, common sense dictates that there must be some connection between the off-duty conduct and the employment, even if the employer has a rule prohibiting the conduct and the employee is aware of the rule. For example, an employee with a work rule prohibiting its employees from consuming alcohol either on the job or off the job may have cause to discharge an employee who drinks champagne at his daughter's wedding reception for violating a known rule of the employer. The off-duty conduct, however, would not be "misconduct in connection with the individual's employment," unless the employer establishes some harm or potential harm to its interests from the conduct beyond the fact that a rule was violated. See In re v. Kotrba, 418 N.W.2d 313, 316 (S.D. 1988); Nelson v. Department of Employment Security, 655 P.2d 242 (Wash. 1982).

The evidence supports the conclusion that an off-duty driving offense would have a connection with a job for which regular driving of vehicles and having a valid driver's license were job requirements. There is a potential harm to the employer's interests in having an employee driving customers' vehicles after having committed an offense of driving while intoxicated or the employee's inability to perform that task if his license is suspended.

The final issue is whether an arrest and charge of OWI without any further evidence of committing the offense is enough to establish disqualifying work-connected misconduct. The fact that an individual has been arrested and charged with OWI in a case in which the claimant denies committing the offense is insufficient to meet the employer's burden that the claimant committed work-connected misconduct as defined by the unemployment insurance law.

DECISION:

The unemployment insurance decision dated February 3, 2006, reference 02, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

saw/kkf