IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SANTOS MENJIVAR-FRANCO
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 07A-UI-07938-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/01/07 R: 12
Claimant: Appellant (4)

Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Santos Menjivar-Franco (claimant) appealed a representative's August 6, 2007 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Tyson Fresh Meats, Inc., (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 5, 2007. This appeal was consolidated for hearing with one related appeal, 07A-UI-07939-DT. The claimant participated in the hearing. Susan Pfeifer appeared on the employer's behalf. Oliver Koch served as interpreter. During the hearing, Exhibit A-1 was entered into evidence. 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:

Was the claimant's appeal timely? Was the claimant discharged for work-connected misconduct? Is the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on August 6, 2007. The claimant had moved from that address to a nearby address on or about August 1, 2007. The claimant received the decision, but was not clear on when it was received. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by August 16, 2007, a Thursday. The appeal was not filed until it was postmarked on August 18, 2007, which is after the date noticed on the disqualification decision. The appeal letter was dated August 8, 2007. The claimant asserted that he placed the letter into a United States Postal Service mail pick up box near his residence in Bellevue, Nebraska, on August 9, 2007; the postmark was in Omaha, Nebraska.

The claimant started working for the employer on October 22, 2001. He worked full time as a trimmer in the beef slicing department of the employer's Council Bluffs, Iowa, further meat processing facility. His last day of work was June 30, 2007. The employer discharged him that day because his work authorization expired as of that date.

The claimant is from El Salvador, and thus in order to be employed by an employer in the United Stated under the Immigration and Nationality Act (INA) §1324a, he must obtain the necessary work authorization through the U.S. Citizenship and Immigration Services office (USCIS or the Service) (formerly the Naturalization and Immigration Service (NIS)). The claimant is classified by the USCIS as within the "A-12" classification; under 8 C.F.R. § 274a.12(a)(12) he is "[a]n alien granted Temporary Protected Status under section 244 of the [INA] for the period of time as that status, as evidenced by an employment authorization document issued by the Service" and is therefore eligible to apply to the Service for documentation of an authorization to work. The claimant had applied for and had been issued an authorization to work; that authorization on its face expired as of September 9, 2006. The Service had issued an extension of the claimant's status initially through March 15, 2007. On March 15, 2007, the claimant was able to produce his work authorization with a back side extension sticker extending the authorization through June 30, 2007.

On August 21 the Service issued a notice in the *Federal Register* "extending the Temporary Protected Status (TPS) designation for El Salvador until March 9, 2009." The validity of current EADs (Employment Authorization Documents) held by nationals of El Salvador who had been previously granted TPS were extended until March 9, 2008. This EAD extension applied to EADs bearing the notation "A-12" on the card and with either 1) an original expiration date of July 5, 2006 or September 9, 2006 on the face of the card together with a September 2007 official extension sticker on the back or 2) an original expiration date of September 30, 2007 on the face of the card.

The employer ended the claimant's employment as of June 30, 2007, as there was no applicable work authorization issued for the claimant after that date. The terms of the August 21, 2007 notice do not clearly apply to the claimant, as while his original EAD expiration date was September 9, 2006, his official extension sticker on the back expired June 30, 2007, not September 2007. While it is entirely possible that the Service made an error when it issued the extension sticker to the claimant expiring June 30, 2007 rather than in September 2007, it is also at least theoretically possible that that protected status as applied specifically to the claimant could be under review.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision.

Iowa Code § 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 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. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

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 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 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). The claimant contends that he timely placed the completed appeal into the custody of the United States Postal Service but that the United States Postal Service failed to postmark the appeal until nine days after the claimant's deposit of the appeal into the mail system. While at least highly unusual, this scenario is at least somewhat possible, and the administrative law judge has no evidence to the contrary. Therefore, the record shows that the appellant did not have a reasonable opportunity to file a timely postmarked appeal.

The administrative law judge therefore concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979), and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the expiration of the claimant's work authorization. While the employer had no choice but to discharge the claimant, there is no evidence of avoidable or intentional delay on the part of the claimant. A failure to successfully obtain necessary certification is not evidence of misconduct where there is an attempt in good faith to satisfy the requirements. Holt v. IDJS, 318 N.W.2d 28 (Iowa App. 1982). The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits if he is otherwise eligible.

The final issue in this case is whether the claimant is currently eligible for unemployment insurance benefits by being able and available for employment.

Iowa Code § 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(2)o provides:

> Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> *o. Lawfully authorized work.* An individual who is not lawfully authorized to work within the United States will be considered not available for work.

While likely through no fault of his own, the claimant is regardless not currently lawfully authorized to work within the United States. He is therefore not considered available for work and consequently is not currently eligible for unemployment insurance benefits unless or until he can establish that, as specifically applied to him, he is in fact authorized to work.

DECISION:

The representative's August 6, 2007 decision (reference 01) is modified in favor of the claimant. The appeal in this case is treated as timely. The employer did discharge the claimant, but not for disqualifying reasons. However, the claimant is not available for work, and therefore he is currently is not otherwise eligible for unemployment insurance benefits.

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Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/kjw