IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

WILLIAM M LIGGETT
Claimant

WELTER STORAGE EQUIPMENT CO INC
Employer

APPEAL NO: 09A-UI-08355-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/05/09
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

William M. Liggett (claimant) appealed a representative's May 15, 2009 decision (reference 01) that concluded he was not qualified to receive benefits, and the account of Welter Storage Equipment Company, 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 June 25, 2009. The claimant participated in the hearing. Barbara Himes, the human resource director, 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 March 27, 2008. He worked full-time making delivery installations and as a driver. When the employer hired the claimant, the employer informed the claimant he was subject to random drug tests. The claimant possessed a commercial driver's license and was subject to Federal Drug testing regulations.

From March 27, 2008 through March 25, 2009, the employer asked the claimant to take four random drug tests. Each test was negative. The most recent test occurred in late February 2009.

On March 25, a co-worker, T., reported that the claimant had asked him if he wanted to smoke some marijuana on the employer's premises. When Himes learned about this report from T. on March 27, 2009, she concluded the employer had reasonable suspicion to have the claimant submit to a drug test. On March 27, the employer directed the claimant to go to Coopers, the

employer's laboratory, to provide a urine sample for a drug test. The claimant was in a company vehicle when he received this instruction and a co-worker drove him to the laboratory. Around 3:30 p.m., the claimant submitted a urine sample. The technician told the claimant he had not submitted a sufficient amount, threw away the sample and told him he had to wait about three hours to submit another sample.

The claimant had personal plans that evening and he did not want to stay at the clinic for another three hours. He contacted Himes to see if he could come back the next day to submit another urine sample. Himes told the claimant to wait until she talked to clinic personnel and got back to him. The claimant was anxious to leave and indicated to clinic personnel he was leaving. Clinic personnel had just talked to Himes and told him the employer indicated he could not use or ride in the employer's vehicle. The claimant called his mother to pick him up. About 15 minutes later, the Himes called the claimant and learned he was on his way home. She then told him he was discharged. The employer considered the claimant to have refused to take the requested drug test when he left the clinic before he provided a second urine sample.

The employer did not ask the claimant about the conversation that T. reported took place on March 25, 2009. The claimant denied he made the remark that T. reported.

When the claimant did not receive a written decision a week after he participated in a fact-finding interview, he contacted his local Workforce office to ask if a decision had been made yet. The local representative indicated the claimant would receive a written decision, but the fact finders had many unemployment insurance claims to examine and it took them longer than usual to make and send out decisions. The claimant called his local Workforce office a second time in late May or early June because he still had not received a written decision. The claimant finally received a copy of the representative's May 15 decision on June 2, 2009. He filed his appeal on June 10, 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 section 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 May 26, 2009 deadline for appealing expired. (Since May 25 was Memorial Day, the deadline must be extended to May 26, 2009.)

The next question to address 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 timely receive the May 15 decision.

The claimant's failure to file a timely appeal was due to an action of the United States Postal Service, which under 871 IAC 24.35(2) excuses the claimant's delay in filing an appeal. The

claimant established a legal excuse for filing a late appeal. Therefore, 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 section 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).

The employer asserted they had reasonable suspicion to request the claimant to submit to a drug test on March 27, 2009. The evidence, however, does not support the employer's conclusion. The employer relied on the report of an employee who did not testify at the hearing. The claimant's testimony is credible and must be given more weight than the employer's reliance on unsupported hearsay information. As a result, the evidence does not establish that the employer had reasonable suspicion to legally request that the claimant submit to a drug test.

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug test performed in violation of Iowa's drug testing laws. *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003); *Eaton v. Employment Appeal Board*, 602 N.W.2d 553, 558 (Iowa 1999). As the court in *Eaton* stated, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton*, 602 N.W.2d at 558.

Iowa's drug testing laws, however, do not apply to employees who are required to be tested under federal law and regulations. Iowa Code section 730.5-2. Although the court has not addressed this issue, it is logical that the courts would likewise require compliance with federal law before disqualifying a claimant who was discharged for failing a drug test required by federal law and regulations.

The employer discharged the claimant because he allegedly refused to take a requested drug test. Before a claimant is required to take a drug test, the employer must establish it had reasonable suspicion he was under the influence of drugs. Since the employer did not establish reasonable suspicion, the claimant was not legally obligated to take the requested drug test on March 27, 2009. This means, the employer cannot use the fact the claimant left the clinic before he provided a second sample to constitute work-connected misconduct.

The employer may have had business reasons for discharging the claimant. These reasons do not constitute work-connected misconduct. Therefore, as of April 5, 2009, the claimant is qualified to receive benefits.

DECISION:

The representative's May 15, 2009 decision (reference 01) is reversed. The claimant established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to address the merits of the claimant's appeal. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct because the employer did not establish reasonable suspicion to have the claimant submit to a drug test. As of April 5, 2009, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/css