IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOSE M MORA LUNA Claimant **EXEL INC** Employer	**APPEAL 18A-UI-00538-NM** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/19/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 8, 2017, (reference 01) unemployment insurance decision that denied benefits based on his discharge for having too many accidents. The parties were properly notified of the hearing. An in-person hearing was held in Creston, Iowa on March 9, 2018. The claimant participated with the assistance of Spanish Language interpreter Raphael Geronimo. The employer participated through Human Resource Representative Juan Vargas and Operations Supervisor Walter Montoya. Department's Exhibit D-1 and employer's Exhibits 1 through 7 were received into evidence.

ISSUES:

Is the appeal timely?

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a forklift operator from December 13, 2016, until this employment ended on November 21, 2017, when he was discharged.

On November 14, 2017, claimant was involved in an accident while driving his forklift. Claimant was entering the frozen food area when he collided with another forklift driver. Vargas testified the surveillance footage showed claimant did not stop or honk his horn when entering the area and he admitted to not looking in the direction of travel at the time the collision occurred, in violation of the employer's standard safety procedures. Claimant testified he was glancing back at his load at the time of the collision to make sure it was not going to fall and that this is common for driver's to do. Claimant further testified the other driver was driving backwards and wearing headphones. This was the only accident claimant had ever been involved in, though he was on a final written warning for an incident where he was involved in an altercation and had removed him safety vest. The warning for that incident was issued on November 15, 2017 and

advised that any further incidents would lead to termination. Following an investigation of the November 14, 2017 collision it was determined that termination was appropriate. (Exhibit 7).

A disqualifying unemployment insurance decision was mailed to the claimant's last known address of record on December 8, 2017. The claimant did not receive the decision until sometime towards the end of December because it was accidently delivered by the postal worker to his neighbor. Claimant's neighbor did not give the decision to him until claimant returned from a trip to Mexico at the end of December. Claimant does not read or understand English and therefore was unable to read or understand the decision. Claimant attempted to call a bilingual employee at his local Iowa Workforce Development (IWD) office to assist him in interpreting the letter, but several attempts were unsuccessful as the individual answering his calls only spoke English. On January 12, 2018, claimant was finally able to travel in-person to his local office in Creston where the disqualifying letter was translated to him for the first time. Claimant filed his appeal that same day.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 96.8, subsection 5.

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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976). 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 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

Here, decision was not delivered to claimant in a timely manner due to a mistake made by the U.S. Postal Service. Additionally, the claimant's lack of proficiency in English created a language barrier, which hindered his ability to file his appeal by the prescribed deadline. His inability to personally understand the fact finding decision affected his ability to timely appeal the adverse decision through no fault of his own. Due process principles apply in the context of appeal hearings for persons seeking unemployment benefits. *Silva v. Employment Appeal Board*, 547 N.W.2d 232 (Iowa App. 1996). Two of the benchmarks of due process are adequate notice and meaningful opportunity to be heard. The claimant was not afforded due process rights. While the claimant was literally provided the decision, he could not timely comply with the appeal instructions, as he required additional time to fully understand the decision, along with his corresponding appeal rights and instructions. Once claimant was able to seek and receive assistance in understanding the decision and his appeal rights, he immediately filed an appeal. Accordingly, the claimant's appeal is accepted as timely.

The next issue to be decided is whether the claimant was discharged for disqualifying misconduct. For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Claimant was discharged following a collision while driving his forklift. The conduct for which claimant was discharged was merely an isolated incident of poor judgment. Prior to the accident on November 14, 2017, claimant was involved in one other safety-related incident in which he was involved in an altercation and removed his safety vest. To the extent that the circumstances surrounding each incident were not similar enough to establish a pattern of misbehavior, the employer has only shown that claimant was negligent. "[M]ere negligence is not enough to constitute misconduct." *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 666 (Iowa 2000). A claimant will not be disqualified if the employer shows only "inadvertencies or ordinary negligence in isolated instances." 871 IAC 24.32(1)(a). When looking at an alleged pattern of negligence, previous incidents are considered when deciding whether a "degree of recurrence" indicates culpability. Claimant was careless, but the carelessness does not indicate

"such degree of recurrence as to manifest equal culpability, wrongful intent or evil design" such that it could accurately be called misconduct. Iowa Admin. Code r. 871-24.32(1)(a); *Greenwell v. Emp't Appeal Bd.*, No. 15-0154 (Iowa Ct. App. Mar. 23, 2016). Ordinary negligence is all that is proven here.

Further, an employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. The only warning claimant was ever issued was given for an incident unrelated to any collision and was not issued to him until the day after the collision occurred. The employer has not shown there were any safety-related incidents occurring after November 15, 2017, when the final warning was issued. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The December 8, 2017, (reference 01) unemployment insurance decision is reversed. The claimant's appeal is timely. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs