

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN M OLSON

Claimant

APPEAL NO. 13A-UI-01926-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ASPLUNDH TREE EXPERT CO

Employer

OC: 12/16/12

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated January 11, 2013, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 14, 2013. Claimant participated. Employer participated by Jason Davis, General Foreman. The record consists of the testimony of Justin Olson and the testimony of Jason Davis.

ISSUES:

Whether the claimant filed a timely appeal; and

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

On January 11, 2013, a representative issued a decision that held that the claimant was ineligible for unemployment insurance benefits. The decision also states that the decision would become final unless an appeal was postmarked by January 21, 2013, or received by the Appeal Section on that date. The claimant's appeal was filed on February 19, 2013. The claimant never received a copy of the representative's decision and only found out about the decision when he inquired at his local office.

The employer trims trees to clear lines for power companies. The claimant was hired on January 4, 2010, as a foreman. He was a full-time employee. His last day of work was December 16, 2012. He was terminated on December 16, 2012, for fighting on the job.

The incident that led to the claimant's termination occurred on December 16, 2012, at approximately 5:25 p.m. The claimant had received some phone calls from his wife. She was complaining to him about some things supposedly said about her by another employee. The

claimant got upset. He did not speak to the other employee at all during the day. While they were parking the trucks at the end of the work day, the other employee approached the claimant. The claimant told him to leave him alone. The other employee came up to the claimant and put his arm around the claimant. The claimant did not know what the employee was going to do and so he pushed him away and the other employee fell. The police were then called but the police declined to press charges since the other employee was not injured and had not been hit.

The other employee then complained to Jason Davis, the general foreman. The employer has a policy that prohibits fighting on the job. Mr. Davis terminated both employees for violation of this policy.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code section 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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 record in this case shows that the claimant did not have a reasonable opportunity to assert an appeal in a timely fashion because he never received a copy of the representative's decision. The appeal will therefore be deemed a timely appeal.

The next issue is whether the claimant was discharged for misconduct.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer does have a material interest in providing a safe workplace and prohibiting harassment and physical violence. The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The evidence in this case showed that the claimant did not instigate the physical altercation in question. He was angry with the other employee and had done his best to avoid him during the work day. He even told the other employee to stay away when the other employee approached him. The other employee put his arm around the claimant and the claimant testified that he did not know what the other employee was going to do. He simply pushed him away and the other employee fell. No punches were thrown and there was no intention to physically harm the other employee. The most reasonable inference from the evidence is that the claimant reacted instinctively to inappropriate touching by another employee. Under these circumstances there is insufficient evidence of misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The claimant's appeal is deemed timely. The decision of the representative dated January 11, 2013, reference 01, is reversed. Benefits are allowed if the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css