

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TROY D DENNIS
Claimant

APPEAL NO: 12A-UI-08497-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FRED'S TOWING INC
Employer

OC: 06/19/11

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Fred's Towing, Inc. (employer) appealed a representative's March 29, 2012 decision (reference 05) that concluded Troy D. Dennis (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 8, 2012. This appeal was consolidated for hearing with one related appeal, 12A-UI-08498-DT. The claimant participated in the hearing. Don Giammetta appeared on the employer's behalf and presented testimony from one other witness, Katie Babers. During the hearing, Exhibit A-1 and Employer's Exhibit One were 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 employer's appeal timely or are there legal grounds under which it should be treated as timely? Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits denied.

FINDINGS OF FACT:

The representative's decision was mailed to the employer's last-known address of record on March 29, 2012. The employer received the decision within a few days thereafter. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by April 8, 2012, a Sunday. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, April 9. The appeal was not filed until it was faxed on July 16, 2012, which is after the date noticed on the disqualification decision.

When the employer received the representative's decision, the office manager, Babers, was unclear about what it meant or what to do, so she called the number for the local Agency office which appears on the representative's decision. She was told that the decision did not have any impact on the employer at that time and, despite the clear language in the decision, was told that it did not have anything to do with the recent February 1, 2012 separation. Rather, she was advised that the employer need not do anything at that time, but that there would be a subsequent further decision regarding the recent separation, and that the employer would follow the process to make an appeal if necessary at that time. As a result, the employer waited until it received the subsequent decision issued on the new claim year which was issued on July 6, 2012 (reference 01), the subject of the concurrently issued decision in 12A-UI-08498-DT.

After a prior period of employment with the employer, the claimant most recently started working for the employer on February 1, 2011. He worked part time (about 30 hours per week) as an on-call tow truck driver. He worked based out of his home, and kept possession of the employer's truck and cell radio with him at that site, to be available for calls at a moment's notice from 4:00 p.m. to 8:00 a.m. His last day of work was February 1, 2012. The employer discharged him on that date. The stated reason for the discharge was possession of drugs contrary to the employer's policies.

During the day on February 1 the claimant's house was raided and he was arrested; he was charged with possession of drug paraphernalia and possession of a controlled substance (marijuana). The local police contacted the employer and informed the president, Giammetta, of the arrest, as the local police have a contract with the employer for towing services, and the contract provided that the employer's employees could not be engaged in illegal activity. Giammetta had the claimant come in later that day to discuss the arrest. The claimant denied to Giammetta that the marijuana which was found was his. However, he subsequently submitted a guilty plea to the court on the pending possession charge. Giammetta did not believe the claimant's denial, and determined to discharge him for violation of the employer's alcohol and drug policy.

While the claimant denied having seen the employer's alcohol and drug policy, the policy had been in place and unchanged for many years, and the employer had a notice signed by the claimant in February 2011 indicating that he had read the policies. The policy provides in pertinent part:

The following rules regarding alcohol (and) drugs of abuse have been established . . . The rules apply during working hours to all employees . . . while they are on company premises or elsewhere not on company time while employed by Fred's Towing . . .

Being under the influence . . . on company property if prohibited. . .

. . . [A]ny of the following actions constitutes a violation of the company's policy of drugs and may subject an employee to disciplinary action, up to and including immediate termination.

. . . storing an illegal drug . . . while in the course of employment.

The claimant established a claim for unemployment insurance benefits effective June 19, 2011. He reopened that claim by filing an additional claim effective January 29, 2012. Upon expiration of the prior claim year, he established a subsequent claim effective June 17, 2012. The claimant has received unemployment insurance benefits after the separation in both claim years.

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 that unless the affected party (here, the employer) 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 shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation pursuant to 871 IAC 24.35(2), or other factor outside of the employer'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*, supra; *Franklin*, supra; 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); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work connected." *Diggs v. Employment Appeal Board*, 478 N.W.2d 432 (Iowa App. 1991). However, the court has concluded that some off duty conduct can have the requisite element of work connection. *Kleidosty v. Employment Appeal Board*, 482 N.W.2d 416, 418 (Iowa 1992). There must be some connection with the work, there must be some harm to the employer's interests, and the conduct must be in violation of some known or implied code of behavior between the claimant and the employer. *Dray v. Director*, 930 S.W.2d 390 (Ark. App 1996); *In re Kotrba*, 418 N.W.2d 313 (SD 1988), quoting *Nelson v. Department of Employment Security*, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§77-78. Therefore, use of a controlled substance on an employee's own time can be work-connected misconduct where the employer's policies prohibit such illegal off-duty conduct and the employee is on notice of such policies. *Kleidosty*, supra.

The employer asserts that its policy clearly applies to all off-duty conduct of its employees. While the administrative law judge does not read the policy as so clearly applying to all off-duty conduct, I do conclude that it does apply to the conduct in this case. Here, the claimant did have possession of a controlled substance in his home. He was in his home during the time that he was "on-call" for the employer between 4:00 p.m. and 8:00 a.m. It is not credible to believe that the marijuana just magically appeared in the claimant's home during the time between when he went "off duty" at 8:00 a.m. and the time when the police arrived to raid his home and arrest him. Therefore, while the claimant might not have been actively working, as in, out on a call, while he was in possession of the substance, he was "on duty" while he was in possession, creating a nexus to his employment. There was obvious potential harm to the employer's interests through the jeopardizing of its contract with the local police, and the claimant knew or should have known that such possession was in violation of the employer's expectations.

The claimant's possession of a controlled substance while he was on "on-call" status shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining

the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The appeal in this case is treated as timely. The representative's March 29, 2012 decision (reference 05) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of January 29, 2012. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css