

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DOUGLAS A ZAVITKA
Claimant

APPEAL NO. 09A-UI-09013-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CRESCO FOOD TECHNOLOGIES LLC
Employer

**Original Claim: 05/03/09
Claimant: Appellant (2)**

Section 9 6.5-2-a – Discharge
Section 96 .6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Douglas A. Zavitka (claimant) appealed a representative's June 10, 2009 decision (reference 01) that concluded he was not qualified to receive benefits, and the account of Cresco Food Technologies, LLC (employer) would not be charged because he 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 July 9, 2009. The claimant participated in the hearing. Tom Watson and Jody Lueschow 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 February 5, 2008. The employer hired the claimant to work as a part-time packager. The claimant understood his job would develop into a full-time job.

The claimant understood that when he packaged products, the employer wanted him to use one strip of tape to close the package. Before packages were sent, the claimant had make sure dust was removed off the outside of the package. Throughout the course of his employment, when the claimant packaged a very fluffy product, he used two strips of tapes. Prior to April 23, management saw the claimant use two pieces of tape when he packaged a fluffy product and no one said anything to the claimant.

Prior to April 23, the claimant's job was not in jeopardy. The employer had not received any complaints about his work and the employer had not given the claimant any warnings about any problems. The employer had not scheduled work since mid-April because of a slowdown in the

employer's business. On April 23, the employer received a customer complaint that a package had arrived with two strips of tape and that the box was dirty. The employer did not say anything to the claimant about this complaint, because he was not at work. During the week of May 3, the claimant established a claim for benefits because of the slowdown in the employer's business.

On May 6, the claimant contacted the employer to let the employer know he had to go to a funeral and would not be able to return to work until May 13 if the employer planned to schedule the claimant to work. On May 7, the owner called the claimant and told him he was discharged because he heard the claimant said the employer did not pay him enough for him to care about his work. After the employer discharged the claimant, the same client made another complaint about a product arriving in dirty boxes and with two strips of tapes instead of just one. The employer has not hired anyone to replace the claimant.

The claimant did not participate in a fact-finding interview on June 9, 2009. On June 10, when he heard the message left on his answering machine the day before. The claimant called the representative and learned a decision would be mailed in the next few days. He waited a week and half for a decision. When the claimant had not received any decision by June 23, he again contacted Des Moines. He was then told he should file an appeal, which he mailed on June 23.

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 § 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 that 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 June 22 deadline for appealing expired. (Since June 20 was a Saturday, the deadline to appeal was Monday, June 22.)

The next question 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 receive the June 10 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 delay in filing an appeal. Since the claimant established a legal excuse for filing a late appeal, 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 § 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).

Even though the employer received a complaint before discharging the claimant and once after he was discharged, the employer did not warn the claimant that his job was in jeopardy if he used two strips of tape instead of one when he packaged a fluffy product. The facts do not establish that the claimant intentionally failed to perform his job satisfactorily by allowing a "dirty" box to be sent to a customer. The claimant denied he did not care about the job. He was frustrated that the employer had not made him a full-time employee after he worked more than a year, but the evidence does not establish that he performed his work so carelessly or negligently that he committed work-connected misconduct.

The employer established compelling business reasons for discharging the claimant. The employer had already reduced the claimant's hours because of slowdown in business. As of the date of the hearing, the employer has not hired a new employee to replace the claimant. The claimant did not commit work-connected misconduct. Therefore, as of May 3, 2009, he is qualified to receive benefits.

DECISION:

The representative's June 10, 2009 decision (reference 01) is reversed. The claimant did not file a timely appeal, but established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to address the merits of his appeal. The employer discharged the claimant for compelling business reasons, but did not establish that the claimant committed work-connected misconduct. As of May 3, 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.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/kjw