IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AARON M GEBHART
Claimant

A+ LAWN & LANDSCAPING INC
Employer

APPEAL NO: 12A-UI-06981-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/15/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
871 IAC 24.32(9) – Suspension or disciplinary layoff
Section 96.6-2 – Timeliness of Appeal
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Aaron M. Gebhart (claimant) appealed a representative's March 29, 2012 decision (reference 08) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from A+ Lawn & Landscaping (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 9, 2012. This appeal was consolidated for hearing with one related appeal, 12A-UI-06982-DT. The claimant participated in the hearing. Shawn Edwards appeared on the employer's behalf. During the hearing, Exhibit A-1 was 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 claimant's appeal timely or are there legal grounds under which it should be treated as timely? Was the claimant discharged or suspended for work-connected misconduct? Is the employer's account subject to charge?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's then-last known address of record on March 29, 2012. The claimant did not receive that decision. 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 June 13, 2012, which is after the date noticed on the disqualification decision. The appeal was made when it was in response to another representative's decision issued on June 4, 2012 (reference 09), the subject of 12A-UI-06982-DT. While the claimant did receive the June 4 decision, this was the first information the claimant had received indicating that there had been a decision disqualifying him in connection with his employment with the employer.

After a prior period of employment with the employer working through a temporary employment firm, the claimant started working directly for the employer on July 10, 2011. He worked full time as a lawn specialist. His last day of work was November 8, 2011. He went on a medical leave at that time due to suffering a work-related injury, and began receiving workers' compensation benefits.

While the claimant was off work, the employer learned from its insurance carrier about the end of November or early December that there were three speeding citations on the claimant's driving record for 2011, and that as a result, he could no longer be covered on the employer's insurance policy. The employer contacted the claimant to inform him of the situation. The claimant was surprised, as he had not had any speeding citations given to him in 2011; he told this to the employer, and indicated he would do some investigation. The claimant learned that a cousin who had been living with him had taken his driver's license and had used it when he was stopped for speeding on the three occasions in 2011. The claimant then retained an attorney to assist in clearing his driving record.

The claimant remained on medical leave through early February 2012. On or about February 3 the employer and the claimant further discussed the situation, and the claimant reported that it was proving more difficult to clear the driving record than had been anticipated. The employer informed the claimant that even though the claimant was about to be released to return to full-time duty, with some restrictions, he would not be allowed to return to work until he could prove that the driving record had been cleared. He was asked to complete a leave of absence form pending resolution of the driving record issue, and was told to contact the employer once the driving record issue was resolved. When the claimant consulted with some of the employer's managers on February 10 when he was taken off of workers' compensation, he was advised that he should file for unemployment insurance benefits, and did so. As of the date of the hearing the claimant's attorney had not yet gotten the citations removed from the claimant's record, so the claimant did not recontact the employer about returning to work. As he was without work, he has taken work elsewhere.

The claimant established an unemployment insurance benefit year effective May 15, 2011. He reopened the claim by filing an additional claim effective February 5, 2012.

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 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 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 or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant'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 eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a. A voluntary quit is a termination of employment initiated by the employee – where the employee has taken the action which directly results in the separation; a discharge is a termination of employment initiated by the employer – where the employer has taken the action which directly results in the separation from employment. 871 IAC 24.1(113)(b), (c). A suspension is a period of separation from the employer, usually temporary, which is initiated by the employer and is treated as a discharge for purposes of determining unemployment insurance benefit eligibility. 871 IAC 24.32(9). In this case, it was the employer, albeit perhaps at the insistence of its insurance carrier, who decided it could not allow the claimant to work until the driving record issue was resolved. Therefore, the employer effectively suspended the claimant as of February 3, 2012.

A claimant is not qualified to receive unemployment insurance benefits if an employer has suspended 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 suspended 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 an 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).

The reason cited by the employer for effectively suspending the claimant is the problem with the claimant's driving record caused by the claimant's cousin. There is no showing of any fault on the part of the claimant. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Benefits are allowed, if the claimant is otherwise eligible.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began January 1, 2010 and ended December 31, 2010. The employer did not employ the claimant during this time, and therefore the employer is not a base period employer on the claimant's 2011 claim, and its account is not chargeable for benefits paid to the claimant under that claim year.

DECISION:

The appeal in this case is treated as timely. The representative's March 29, 2012 decision (reference 08) is reversed. The employer effectively suspended the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits as of February 3, 2012, if he is otherwise eligible. The employer's account is not subject to charge in the 2011 benefit year.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs