IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TRAVIS P BAKER
Claimant

ALPHA PRODUCTS INTERNATIONAL INC
Employer

APPEAL NO. 07A-UI-11373-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/28/07 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Travis P. Baker (claimant) appealed a representative's November 28, 2007 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits, and the account of Alpha Products International, Inc. (employer) would not be charged because the claimant 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 December 27, 2007. The claimant participated in the hearing. Lisa Haggard, a co-owner, 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 May 11, 2006. The claimant worked as a full-time technical support operator. The employer's Internet policy allows employees to use the employer's Internet and computers for some personal use, but an employee must not use the employer's Internet excessively for personal reasons.

During the claimant's employment, the employer received complaints from co-workers that the claimant was away from his work area talking to a co-worker in another department instead of performing his work. The claimant's job required him to answer customer questions and respond to the customers' problems. This meant the claimant usually called the customer to resolve the issue or answer a question. On an average, the claimant handled 20 customer concerns an hour.

During his employment, the employer discovered the claimant was involved in a romantic relationship with an employee in another department. On June 29, 2007, the employer gave the claimant a warning and a suspension for attendance issues. The employer also told the claimant he could not be away from his work area to talk to the employee in another department or send her instant messages. The employer warned the claimant that he was required to stay at his work area and do his work.

Although Haggard did not believe the claimant followed the employer's instructions after the June 29 suspension, she did not give the claimant any more written warnings for being away from his workstation or for talking to the other employee.

In mid-September 2007, the employer suspended the claimant for 30-days for having a poor attitude. When the claimant returned to work from this suspension, the employer told the claimant that if he displayed a positive work attitude, his employment would continue. The claimant returned to work on October 18, 2007. On October 24, the claimant was training three new employees. Part of the training included touring the employer's facility and explaining different procedures to the new employees. As a result of training the new employees, the claimant was not at his work area very much the morning of October 24. This meant the claimant did not respond to customers' questions or call customers as he usually did.

In an attempt to make sure the claimant was doing his work and had a positive attitude, Haggard monitored his work the morning of October 24. During this audit, the employer discovered the claimant sent 18 emails to a former employee (the same person he was romantically involved in above) and made a total of five phone calls between 8:00 and 11:30 a.m. When the employer asked the claimant why he had sent so many emails, the claimant had no idea he had sent that many emails. The emails the claimant sent were very short and the employer did not know how much time the spent to send the emails. The employer discharged the claimant on October 24, 2007, for sending personal emails on company time and equipment.

The claimant established a claim for unemployment insurance benefits during the week of October 28, 2007. On November 28, 2007, a representative's decision was mailed to the claimant and employer indicating the claimant was not qualified to receive unemployment insurance benefits as of October 28, 2007.

The claimant received the representative's decision on December 1, 2007. He noticed he had until December 8, 2007 to file an appeal. On December 8, 2007, the claimant mailed his appeal letter in a mailbox located outside the Ottumwa Post Office. The postmark on the claimant's letter indicates Des Moines on December 11, 2007.

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 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 on December 8, 2007. When the ten-day deadline falls on a weekend or holiday, the time to appeal is extended to the next working day. In this case, the claimant had until Monday, December 10 to file his appeal. Although it is presumed a party files an appeal on the date the envelope is postmarked, this presumption has been rebutted by the claimant's testimony. The claimant's testimony is credible and he established he mailed his appeal on December 8, 2007. The claimant filed a timely 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).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8).

The claimant knew or should have known his job was in jeopardy when the employer gave him a 30-day suspension. When the claimant returned on October 18, he understood that to remain employed he had to have a positive attitude. Since the employer asked the claimant to train three new employees on October 24, it appeared the claimant's job was not at that time in any immediate danger.

Since the claimant had recently returned from a suspension, the employer's decision to review his work performance and email was not unreasonable. Prior to October 24, the employer warned the claimant about leaving his workstation and using instant messaging to contact a co-worker he was romantically involved with. Prior to October 24, the employer did not talk to the claimant about using the employer's email for personal usage. The claimant understood employees could use the employer's email, but could not send an excessive number of emails.

On October 24, the claimant was busy training three new employees and sent emails to a former employee. The claimant sent a series of short emails to the former employee in an attempt to confirm luncheon plans with her. When the employer confronted the claimant about sending 18 emails the morning of October 24, the claimant was surprised because he had not realized he had sent that many emails. Even though the employer had addressed problems with the claimant leaving his workstation to talk to this person prior to October 24, the employer had not previously warned or talked to the claimant about any excessive personal email usage.

The claimant used poor judgment when he used the employer's email system to send 18 short emails to a former worker. The facts do not establish that the claimant's conduct the morning of October 24 substantially disregarded, or that he intentionally disregarded, the employer's interests. Even though the employer discharged the claimant for justifiable business reasons, the facts do not establish that the claimant committed a current act of work-connected misconduct. Therefore, as of October 28, 2007, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's November 28, 2007 decision (reference 01) is reversed. The claimant filed a timely appeal. The employer discharged the claimant for business reasons that do not constitute a current act of work-connected misconduct. As of October 28, 2007, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/kjw