IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRISTOPHER J HAUGERUD
Claimant

WINNEBAGO INDUSTRIES
Employer

APPEAL NO. 08A-UI-00680-SWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/24/06 R: 01
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated January 7, 2008, reference 03, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on February 5, 2007. The parties were properly notified about the hearing. The claimant participated in the hearing. Gary McCarthy participated in the hearing on behalf of the employer. Exhibit A-1 was admitted into evidence at the hearing.

ISSUE:

Did the claimant file a timely appeal?

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer as a production assembler from February 11, 2002, to December 2, 2007. The claimant was informed and understood that under the employer's work rules, employees are required to submit to alcohol testing under certain circumstances, including when an employee is reasonably believed to be under the influence of alcohol. Employees are given the opportunity to obtain treatment after they test positive for alcohol the first time. Employees were subject to termination if they tested positive for alcohol a second time.

Pursuant to the policy, the claimant was required to submit to an alcohol test on March 7, 2006. Because he had a confirmed positive test for alcohol, he was suspended and given the opportunity to obtain alcohol treatment through the employer's employee assistance program. He successfully completed treatment but knew that he could be terminated if he again tested positive for alcohol.

On November 26, 2007, the claimant was required to submit to alcohol testing after a security guard detected the smell of alcohol coming from the claimant. The security guard administered a screening test using an approved alcohol screening device. The test was positive for alcohol.

The guard had received training on recognizing the signs of alcohol and administering the alcohol screening device.

In accordance with the policy, the claimant was taken to the law enforcement center. A trained member of law enforcement administered a confirmatory test using an approved evidential breath testing device. The confirmatory test was also positive for alcohol. The level of alcohol demonstrated the claimant had consumed alcohol in violation of the employer's alcohol policy.

On December 3, 2007, the employer discharged the claimant due to his second violation of its alcohol policy. The testing procedures used by the employer were in compliance with its written policy and the regulations of the United States department of transportation governing alcohol testing.

The claimant mailed his written appeal of a disqualification decision dated January 7, 2008, in Albert Lea, Minnesota, on January 17, but the letter was not postmarked until it reached Mankato, Minnesota, on January 18.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant filed a timely appeal.

Iowa Code section 96.6-2 provides in pertinent part:

> The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

An appealed is considered filed when mailed. Although the date of the postmark is presumed to be the date of mailing, that presumption can be overcome by credible evidence. In this case, the claimant's testimony that he mailed the appeal on January 17, 2008, is believable. The appeal is deemed timely.

The next issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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.

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on drug or alcohol testing performed in violation of Iowa law. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). As the court in Eaton stated, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." Eaton, 602 N.W.2d at 558.

The evidence in this case establishes the claimant violated the employer's alcohol policy for a second time on November 26, 2007. The evidence further establishes the employer complied with the requirements of Iowa law in testing the claimant. The employer was entitled to discharge the claimant after he violated the employer's alcohol policy for a second time. He was discharged for work-connected misconduct.

DECISION:

The unemployment insurance decision dated January 7, 2008, reference 03, is affirmed. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

saw/kjw