

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DYLAN A GAUNA
Claimant

APPEAL NO: 10A-UI-12302-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

G M R I INC
Employer

OC: 06/13/10
Claimant: Appellant (2)

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

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's July 30, 2010 determination (reference 02) that disqualified him from receiving benefits and held the employer's account exempt from charge because the claimant had been discharged for disqualifying reasons. The claimant participated in the telephone hearing. Doug Schleimer, the general manager, and Becky Schwartz, the service manager, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is qualified to receive benefits.

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 reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in May 2008. The claimant worked as a part-time server. The claimant understood he was required to follow the employer's dress code requirements when he worked. The dress code required male employees to wear a white, long-sleeved shirt with a button-down collar and did not have any stains.

Prior to May 9, the claimant had no understanding his job was in jeopardy even though he received two previous warnings for violating the dress code. On November 30, 2009, the claimant received a written warning when he reported to work without his name tag, a dress code violation. On February 15, 2010, the claimant received a final written warning because he was not clean shaven and his shirt had not been ironed.

Schleimer became the general manager in early May 2010. When the claimant reported to work on May 9, Schwartz told him to get a new shirt because the shirt he wore to work had a small ink stain. The claimant went to a store and bought a new shirt. He took the shirt out of

the packaging and returned to work. The employer sent the claimant home because the second time he reported to work on May 9, he wore a shirt that needed to be ironed.

On May 12, the employer discharged the claimant. Before discharging him Schleimer received reports that managers had repeatedly talked to and counseled the claimant about the dress code. Managers also told Schleimer that the claimant had an attendance issue. The employer discharged the claimant because the next step in the disciplinary process after a final written warning was termination. When the employer discharged the claimant, the claimant understood he was discharged because he did not fit in with the other employees.

The claimant established a claim for benefits during the week of June 13, 2010. On July 30, 2010 a representative's determination was mailed to the claimant and employer. The representative disqualified the claimant from receiving benefits. The claimant did not receive the July 30 determination.

When the claimant did not receive any information about the status of his unemployment claim, he went to his local Workforce office on August 31. He then learned he had been disqualified from receiving benefits. The claimant filed his appeal at his local Workforce office on August 31, 2010.

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 section 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 after the August 9 deadline for appealing expired.

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 July 30 determination.

The claimant's failure to file a timely appeal was due to an Agency error or misinformation or delay or other 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 section 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).

On May 9, when Schwartz told the claimant to go to a store and get a new shirt, he did. Even though the claimant received a February 2010 written warning in part for reporting to work in a shirt that was not ironed, on May 9 he used poor judgment when he came back to work without first ironing the new shirt. The evidence does not establish that the claimant intentionally disregarded the employer's policy. Although Schleimer received information from other managers that the claimant had been repeatedly talked to about dress code and attendance issues, the facts do establish these allegations. The current act for which the claimant was discharged occurred on May 9. The evidence does not establish the last time the claimant had an attendance problem.

The employer established business reasons for discharging the claimant, but the employer did not establish that the claimant committed a current act of work-connected misconduct. Therefore, as of June 13, 2010, the claimant is qualified to receive benefits.

DECISION:

The representative's July 30, 2010 determination (reference 02) is reversed. The claimant did not file a timely appeal, but established a legal excuse for filing a late appeal. The Appeals Section has jurisdiction to address the merits of his appeal. While the employer had justifiable business reasons for discharging the claimant, he did not commit a current act of work-connected misconduct. As of June 13, 2010, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account is subject to charge.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs