

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES L SHELLMYER
Claimant

APPEAL NO: 13A-UI-11390-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AUTOZONERS LLC
Employer

OC: 09/01/13
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge
Iowa Code § 96.6(2) – Timely Appeal

PROCEDURAL STATEMENT OF THE CASE:

The employer appealed a representative's September 24, 2013 determination (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because the claimant had been discharged for nondisqualifying reasons. The claimant participated in the hearing with his witness, Richard Dovel. Susan Hankins, an unemployment insurance specialist, and Matthew Pulcini, the regional human resource manager, appeared on the employer's behalf. During the hearing, Employer Exhibits One, Two and Three were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the employer did not file a timely appeal and the claimant is qualified to receive benefits.

ISSUES:

Did the employer 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 January 2010. He worked as a full-time hub feed driver. When the claimant worked for the employer, he received and periodically reviewed the employer's code of conduct. The employer's code of conduct indicates that threatening physical harm, intimidation, hostile conduct and racially offensive comments are kinds of impermissible conduct that are inappropriate at work. (Employer Exhibit Three.)

Prior to August 29, 2013, the claimant's job was not in jeopardy. On August 29, 2013, the claimant made a delivery at the store J.D. managed. When the claimant was at this store, he fell over a tote and fell down. When the claimant fell, he cut his leg and hurt his hand. The claimant was very upset that someone had left the tote out, a safety issue. Immediately after the claimant fell and injured himself, J.D. came around the corner and saw the claimant. The claimant told him, "I'll hang your ass for this." J.D. responded by telling employees to start documenting because he, J.D., was not going to take any verbal abuse from the claimant.

J.D. reported the claimant's comment and complained about the claimant's racial comment. J.D. is an African-American and considered the claimant's comment a threat. Pulcini immediately investigated the incident and interviewed the claimant. The claimant admitted he made the comment that J.D. reported. (Employer Exhibit Two.) The employer discharged the claimant on August 30, 2013, for threatening J.D.

The claimant established a claim for benefits during the week of September 1, 2013. A determination was mailed to the parties on September 24, 2013. The employer received the determination by September 30, 2013. The employer noticed the determination stated the deadline to appeal was October 4, 2013. The employer tried to fax its appeal several times on October 4, but was unable to successfully transmit the appeal. On October 8, the employer faxed its appeal to a different number and successfully transmitted the appeal letter. (Employer Exhibit One.)

REASONING AND CONCLUSIONS OF LAW:

The law states that an unemployment insurance determination is final unless a party appeals the determination within ten days after the determination was mailed to the party's last known address. Iowa Code § 96.6(2). The Iowa Supreme Court has ruled that appeals 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 appeal was filed after the deadline for appealing expired.

The next question is whether the employer had a reasonable opportunity to file a timely appeal. *Hendren v. IESC*, 217 N.W.2d 255 (Iowa 1974); *Smith v. IESC*, 212 N.W.2d 471, 472 (Iowa 1973). The employer received the determination by September 30, 2013. If Hankins did not receive the determination until October 4, 2013, that is an internal issue the employer may want to address.

The employer's failure to file a timely appeal was not due to any Agency error or misinformation or delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) would excuse the delay in filing an appeal. Since the law does require an appeal to be faxed, the employer could have mailed a timely appeal as long as it was postmarked October 4. While it is unfortunate, that the employer did not notice earlier that their appeal was not being successfully faxed, this does not constitute a legal excuse for filing a late appeal on October 8, 2013.

In the alternative, assume the employer had a legal excuse for filing a late appeal. The employer established a business reason for discharging the claimant, but the claimant did not commit work-connected misconduct. 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).

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. 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 do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

The claimant was upset that because a tote had not been properly stored, he fell and hurt himself. While the claimant's choice of words were not politically correct when he was upset and hurt, he had no intention of physically harming J.D. The claimant only wanted J.D. to know that this is was his fault and the claimant would make sure he received a reprimand. This one comment under this factual situation does not rise to the level of work-connected misconduct. Therefore, the claimant is qualified to receive benefits as of September 1, 2013.

DECISION:

The representative's September 24, 2013 determination (reference 01) is affirmed. The employer did not file a timely appeal or establish a legal excuse for filing a late appeal. In the alternative assume the employer established a legal excuse for filing a late appeal. The employer discharged the claimant for business reasons, but the claimant did not commit work-connected misconduct on August 29, 2013. As of September 1, 2013, 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/css