IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CRISTIAN O ORDONEZ
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO: 09A-UI-02825-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/11/09
Claimant: Respondent (5)

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

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer)) appealed a representative's February 10, 2009 decision (reference 02) that concluded Cristian O. Ordonez (claimant) was qualified to receive unemployment insurance benefits and the employer's account might be charged because the employer's protest was not timely filed. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 18, 2009. The claimant participated in the hearing. Ron Hott appeared on the employer's behalf and presented testimony from one other witness, Brandi Henry. 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 employer's protest timely? Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant established a claim for unemployment insurance benefits effective January 11, 2009. A notice of claim was mailed to the employer's last-known address of record on January 14, 2009. The employer's representative received the notice within a few days thereafter. The notice contained a warning that a protest must be postmarked or received by the Agency by January 26, 2009. As received by the Agency the protest was marked as postmarked on January 27, 2009, which is after the date noticed on the notice of claim. However, the employer's representative's witness provided testimony that the protest was placed into the custody of the United States Postal Service no later than 5:30 p.m. on January 26.

The claimant started working for the employer on July 2, 2007. He worked full time as a second shift production worker at the employer's Storm Lake, Iowa pork slaughter facility. His last day of work was January 9, 2009. The employer suspended him on that date and discharged him

on January 12. The reason asserted for the discharge was having four disciplinary warnings in a 12-month period.

The employer had given the claimant a warning on May 14 or May 15, 2008 for leaving his work area; no details were available; the claimant believed this had to do with a situation where he was unable to wait until his break to go and use the restroom and there had not been a supervisor nearby to ask permission. On June 11 the employer gave the claimant a warning for failing to weigh hams before throwing them into a combo. On November 17 the claimant was given a warning and suspension for an incident of failing to fully and adequately clean the meat off the bones on a different work assignment than he usually worked.

On January 7, 2009 the claimant had rotated off of his cutting position and was to rotate to the monitoring position where he would watch the line for blockage while his partner did the cutting for a half hour. The claimant advised his partner that he was going to go and get a fresh, sharpened knife for his next rotation and another for the next day, and proceeded to do so. On his way back to his work station, he stopped for a few minutes where another employee was cleaning meat from the bones to ask him how he was able to do this with apparently more ease than the claimant had had. He then proceeded back to his work area, where the supervisor had come and found he was not at his spot. The supervisor was not satisfied with the claimant's explanation for being away from his work area, and gave him a warning. As a result of this fourth warning, the employer suspended and then discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

The law provides that all interested parties shall be promptly notified about an individual filing a claim. The parties have ten days from the date of mailing the notice of claim to protest payment of benefits to the claimant. Iowa Code § 96.6-2. Another portion of Iowa Code § 96.6-2 dealing with timeliness of an appeal from a representative's decision states an appeal must be filed within ten days after notification of that decision was mailed. In addressing an issue of timeliness of an appeal under that portion of this Code section, the Iowa court has held that this statute clearly limits the time to do so, and compliance with the appeal notice provision is mandatory and jurisdictional. Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979). The administrative law judge considers the reasoning and holding of the Beardslee court controlling on the portion of Iowa Code § 96.6-2 which deals with the time limit to file a protest after the notice of claim has been mailed to the employer.

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), protests are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). The question in this case thus becomes whether the employer was deprived of a reasonable opportunity to assert a protest 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 employer did not have a reasonable opportunity to file a timely protest.

The record establishes the employer's representative placed a completed protest into the custody of the United States Postal Service on January 26, 2009, within the time for filing a timely protest. The administrative law judge concludes that failure to have the protest postmarked within the time prescribed by the Iowa Employment Security Law was due to error, delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge, therefore, concludes that the protest was 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 protest. 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 qualified to receive unemployment insurance benefits if an employer has discharged 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 discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former 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 discharging the claimant is having received four disciplinary actions in a 12-month period. The employer has not established that the claimant's brief absence from his work area was substantial misbehavior, as compared to inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or a good faith error in judgment or discretion. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's February 10, 2009 decision (reference 02) is modified with no effect on the parties. The protest in this case was timely. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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