IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ALEJANDRO M RAMIREZ
Claimant

CURLY'S FOODS
Employer

APPEAL NO: 11A-UI-06218-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/25/10
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Alejandro M. Ramirez (claimant) appealed a representative's April 22, 2011 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Curly's Foods (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 8, 2011. The claimant participated in the hearing. Lucy Murguia appeared on the employer's behalf and presented testimony from one witness, Marvin Rodriguez. 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 claimant's appeal timely or are there legal grounds under which it should be treated as timely?

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on April 22, 2011. The claimant received the decision within a few days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 2, 2011. The appeal was not filed until it was hand-delivered to a local Agency office on May 9, 2011 and faxed to the Appeals Section, which is after the date noticed on the disqualification decision.

The claimant has limited English proficiency; Spanish is his primary language, and virtually all of his communications in his employment were in Spanish. He has an eighth grade education, five years of which included instruction in English, but his ability to read English is perhaps 20 percent. When he received the representative's decision, he recognized there was reference to some type of insurance, but he did not comprehend the verbiage in the decision indicating

that the subject of the determination was his unemployment insurance eligibility, but rather thought it was referencing some other type of insurance. When he had not received any unemployment insurance benefits by May 9, he went to his local Agency office with the decision he had received. It was then explained to him that the decision was in reference to his eligibility for unemployment insurance benefits, and he made his appeal at that time.

The claimant started working for the employer on October 15, 2009. He worked full time as general laborer at the employer's facility on the first shift. His last day of work was April 1, 2011. The employer suspended him that day and discharged him on April 4, 2011. The stated reason for the discharge was failure to follow a directive and being insubordinate after prior warning.

A new lead person was designated over the claimant's team about two weeks prior to April 1. The new lead person was a woman. Lead persons are designated by wearing yellow helmets. On April 1 the lead person told the claimant to remove a combo of meat. The claimant was standing and talking with a coworker, and while he acknowledged the lead person's instruction, did not immediately comply. She then repeated her instruction, telling him to do it right now. He responded to the effect of questioning who she thought she was and laughing, and telling her he was not going to do it because she had screamed at him. She then indicated she was going to get a supervisor, and the claimant agreed she should. He then proceeded to move the meat combo as he had been instructed.

When the supervisor, Mr. Rodriguez, arrived, the claimant asked him why he allowed the lead person to talk to the claimant as she had, that she was not a supervisor. The claimant was then brought to the office and then sent home on suspension. The employer interviewed the other employees who had been present, who confirmed the lead person's statements regarding the events and agreed that the lead person had not screamed at the claimant.

On February 7, 2011 the claimant had been given a warning with a three-day suspension for an incident of insubordination toward Mr. Rodriguez, where when given a directive the claimant had responded that Mr. Rodriguez should "go do it yourself." There had also been two prior warnings for incorrect job performance not involving insubordination. Because of the repeated incident of failing to comply with a directive accompanied by insubordination, the employer discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

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 record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. Beardslee v. IDJS, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert 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 record shows that the appellant did not have a reasonable or meaningful opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as 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 appeal. 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); Iowa Code § 96.5-2-a.

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 claimant's failure to promptly comply with the lead person's directive and his insubordination shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's April 22, 2011 decision (reference 02) is affirmed. The appeal in this case is treated as timely. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of April 1, 2011. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/css