IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICAH D JOHNSON
Claimant

ADVANCE BRANDS LLC
Employer

APPEAL NO: 10A-UI-04691-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/14/10
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant appealed a representative's March 9, 2010 decision (reference 01) that disqualified him from receiving benefits and held the employer's account exempt from charge because the claimant had been discharged for disqualifying reasons. A telephone hearing was held on May 3, 2010. The claimant participated in the hearing. Kathy Waterman, a human resource representative, appeared on the employer's behalf. 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:

Did the claimant file a timely appeal or establish legal excuse for filing a late appeal?

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on March 1, 2008. He worked as a full-time maintenance technician. The claimant worked the 10:00 p.m. to 7:00 a.m. shift. The claimant knew that in accordance with the employer's attendance policy, he would be discharged if he accumulated eight attendance points within a year.

On March 1, 2009, the claimant's anniversary date, the employer gave him three emergency days. The claimant used the three emergency days before December 13, 2009. On December 13, 2009, the claimant accumulated his sixth attendance point. The employer gave him a final written warning on December 22. The written warning advised the claimant that he had accumulated six attendance points.

On January 24, 2010, the claimant tried to get to work, but could not because of a snowstorm. The employer gave any employee who did not have any emergency days left an attendance point if the employee did not report to work as scheduled on January 24, 2010. The claimant understood his job was in jeopardy when he received his seventh attendance point.

On February 10 around 9:15 p.m., the claimant tried to start his car to drive to work. The claimant's vehicle would not start. The claimant's car sometimes had problems starting, but the claimant had been able to start it before, he had maintenance skills and believed he could troubleshoot the problem quickly so he would still be able to get to work. The claimant's father also works for the employer on the same shift as the claimant and may have been near the claimant's residence at 9:15 p.m. The claimant did not think about trying to contact his father for a ride to work because he believed he could get his vehicle started. When the claimant was unable to get his car started by 9:30 p.m., he called the employer to report he was unable to work because of transportation problems.

The February 10 absence was the claimant's eighth attendance incident or point within a year. On February 11, 2010, the employer discharged the claimant for violating the employer's attendance policy.

The claimant established a claim for benefits during the week of February 14, 2010. When the fact-finding interview was held, the fact finder knew the claimant was in Texas looking for work. The claimant asked that his decision be mailed to his Iowa residence because his mother would forward his mail to him. On March 9, 2010, a representative's decision was mailed to the claimant and employer. This decision disqualified the claimant from receiving unemployment insurance benefits as of February 14, 2010. The decision also contained information that the decision was final unless an appeal was postmarked by March 19 or received by the Appeals Section by that date.

The claimant's mother forwarded the claimant's mail to him in Texas. The claimant received the March 9 representative's decision on March 23, 24 or 25. On March 25, the claimant faxed his appeal to the Appeals Section.

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 § 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 March 19, 2010 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 had his mail forwarded to Texas. The claimant did not realize at the fact-finding interview he only had ten days to appeal a decision.

The claimant's failure to file a timely appeal was due to an Agency error, misinformation or lack of information, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. At the fact-finding interview, the claimant should have been told that after the decision was issued, a

party only had ten days to appeal a decision. If the claimant had known about the short time to appeal, he could have made other arrangements to obtain the March 9, 2010 decision. The claimant established a legal excuse for filing a late appeal. Therefore, 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 § 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 presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

The employer established justifiable business reasons for discharging the claimant. Pursuant to the employer's attendance policy, the employer discharged the claimant for excessive absenteeism. The facts do not, however, establish that the claimant intentionally failed to report to work on January 24 or February 10. On January 24, a snowstorm prevented the claimant from going to work even though the claimant tried. On February 10, the claimant did not anticipate he would not be able to get his vehicle started. Since he had already worked as scheduled on Monday and Tuesday, the claimant had no reason to question his ability to get to work on February 10. The claimant reasonably concluded that with his mechanical knowledge he would be able to troubleshoot the problem and get his vehicle started so he could get to work. When the claimant was unable to get his vehicle started in 15 minutes, he properly notified the employer he was unable to get to work. The claimant may have used poor judgment when he did not immediately try to get a ride to work from his father, but poor judgment does not constitute work-connected misconduct. Based on the facts in this case, the claimant did not commit work-connected misconduct. Therefore, as of February 14, 2010, the claimant is qualified to receive benefits.

DECISION:

The representative's March 9, 2010 decision (reference 01) is reversed. The claimant did not file a timely appeal, but he established a legal excuse for filing a late appeal. The Appeals Section has jurisdiction to address the merits of his appeal. The employer discharged the claimant for business reasons that do not constitute work-connected misconduct. As of February 14, 2010, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/css