IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MIKE J JENSEN
Claimant

AARON'S RENTAL PURCHASE
Employer

APPEAL NO: 09A-UI-05402-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/01/09
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

Aaron's Rental Purchase (claimant) appealed a representative's March 23, 2009 decision (reference 01) that held Mike J. Jensen (claimant) was qualified to receive benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 27, 2009. The claimant participated in the hearing. Lisa Ziesman appeared on the employer's behalf. Bryan Jones was initially present at the hearing, but his cell phone dropped the connection. Jones did not contact the Appeals Section again even though he was called and asked to contact the Appeals Section when the administrative law judge discovered he was no longer on the conference call. 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 employer file a timely appeal or establish a legal excuse for fling a late appeal?

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

FINDINGS OF FACT:

The claimant started working for the employer in 2006 at the employer's Fremont location. The claimant transferred to the Marshalltown location in 2007. Prior to his employment separation, the claimant worked full time as the acting sales person. Kevin Reese supervised the claimant.

In late February 2009, a female employee told Jones the claimant made comments to her that made her feel uncomfortable. When the employer talked to the claimant, he denied he sexually harassed this employee or made any of the reported comments at work. The claimant admitted he told the female employee at work that she looked nice or dressed nicely, but these were the extent of his comments. On the Saturday, the female employee went home early, the claimant asked her to work harder because the employer was preparing for an audit. The female employee became upset about the claimant's Saturday remarks and went home early.

Since the claimant and employee went out for drinks after work, the claimant may have made comments to her that he would not have made at work. The female employee made comments to the claimant when they went out for drinks together that were not appropriate at work. When the employer talked to other employees, no one heard the claimant say anything that could be construed as sexual harassment. The employer took the complaining employee's version of events and discharged the claimant on February 27, 2009.

The claimant established a claim for benefits during the week of March 1, 2009. On March 23, 2009, a representative made a decision holding the claimant qualified to receive benefits because he had been discharged for nondisqualifying reasons. This decision was mailed to Merit Resources and Ziesman received it. Ziesman does not know when she received the decision, but it may have been as late as March 30, 2009. Ziesman has noticed the postmark date can be three to four days later than the decision date.

On April 2, Ziesman attempted to fax the employer's appeal letter to the Appeals Section. Ziesman faxes and then calls to see if the fax has been received. Ziesman attempted to fax the employer's appeal letter two times on April 2. When she called, an Appeals Section employee indicated the employer's appeal letter had not been received. Ziesman faxed the appeal letter again on April 3, 2009. The Appeals Section received the appeal letter faxed on April 3, 2009. The employer's fax machine does not verify whether a fax has been successfully transmitted. Ziesman did not realize that as long as the postmark date was no later than April 2, 2009, she could have mailed the employer's appeal letter on April 2, 2009.

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 Department also considers an appeal filed on the date a party successfully transmits a fax.

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 employer's appeal was filed one day after the April 2, 2009 deadline for appealing expired.

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) excuses the delay in filing an appeal. Instead, the facts establish the two faxes the employer tried to transmit on April 2 were not successfully transmitted. The employer had the opportunity to mail the appeal on or before April 2, 2009, but did not. The employer's failure to successfully transmit a fax can be compared to a party mailing an appeal letter without a stamp. Since the envelope with the appeal letter would be returned to the sender, failure to put a stamp on an envelope is comparable to successfully transmit a fax by the deadline date. The employer did not file a timely appeal or establish a legal excuse for filing a late appeal. Therefore, the Appeals Section does not have jurisdiction to make a decision on the merits of the appeal.

In the alternative, assume the employer filed a timely 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).

Since the complaining employee did not participate at the hearing, the claimant's testimony as to what he said to her must be given more weight than the employer's reliance on unsupported hearsay information. The employer's hearsay information from other employees supports the claimant's testimony that he did not sexually harass the complaining employee. While the employer may have had business reasons for discharging the claimant, the facts do not establish that he violated the employer's sexual harassment policy or committed work-connected misconduct. As of March 1, 2009, the claimant is qualified to receive benefits.

DECISION:

The representative's March 23, 2009 decision (reference 01) is affirmed. The employer filed a late appeal and did not establish a legal excuse for filing a late appeal. In the alternative, if the employer filed a timely appeal, the employer did not establish that the claimant was discharged for work-connected misconduct. Therefore, as of March 1, 2009, the claimant remains 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