

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTOPHER L THOMPSON
Claimant

APPEAL NO: 14A-UI-06892-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRANDFX LLC
Employer

OC: 06/01/14

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

BrandFX, L.L.C. (employer) appealed a representative's June 23, 2014 (reference 01) decision that concluded Christopher L. Thompson (claimant) was qualified to receive unemployment insurance benefits after a separation from employment from BrandFX, L.L.C. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 18, 2014. A review of the Appeals Section's conference call system indicates that the claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Grace Garcia appeared on the employer's behalf. One other witness, Rebecca Zayas, was available on behalf of the employer but did not testify. During the hearing, Exhibit A-1 and Employer's Exhibits One through Five were entered into evidence. Based on the evidence, the arguments of the employer, 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?

OUTCOME:

Reversed. Benefits denied.

FINDINGS OF FACT:

The representative's decision was mailed to the employer's last-known address of recordⁱ on June 23, 2014. No evidence was provided to rebut the presumption that the employer received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by July 3, 2014. The appeal was not received at the

Appeals Section until July 7, 2014, which is after the date noticed on the disqualification decision. However, the appeal had been successfully faxed by employer on July 2, 2014 to a fax number for the Benefits Bureau of the Agency and apparently then forwarded to the Appeals Section where it was received on July 7.

The claimant started working for the employer on July 18, 2011. He worked full time as lead welder at the employer's Pocahontas, Iowa fiber glass body manufacturing facility. His last day of work was June 4, 2014. The employer suspended him that day and discharged him on June 6, 2014. The stated reason for the discharge was making harassing and inappropriate comments.

On about June 3 an employee complained to the employer's plant manager that the claimant had been making harassing and inappropriate comments on an ongoing basis since at least August 2013. The plant manager reported this to the employer's corporate human resources personnel, who conducted an investigation. As a result of this investigation the employer learned that the claimant had been making sexually inappropriate and racially derogatory statements to coworkers, such as referring to some other employees as "f - - - ing n - - - -" as recently as June 3. As a result of this, the employer determined to discharge 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 employer) 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 opportunity to file a timely appeal.

The administrative law judge concludes that failure to have the appeal treated as received within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay or other action pursuant to Rule 871 IAC 24.35(2). 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. Rule 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. Rule 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. Rule 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 making of the sexually and racially inappropriate statements to coworkers 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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will still be charged for the overpaid benefits. Iowa Code § 96.3-7-a,-b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. The matter of determining the amount of the overpayment and whether the overpayment is subject to recovery and the employer's account subject to charge, under Iowa Code § 96.3-7-b, is remanded to the Benefits Bureau.

DECISION:

The appeal in this case is treated as timely. The representative's June 23, 2014 (reference 01) decision is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of June 4, 2014. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The matter is remanded to the Benefits Bureau for investigation and determination of the overpayment, participation, and chargeability issues.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/can

ⁱ The employer's official address of record for purposes of the Agency is in Swea City, Iowa. The employer's corporate office is in Texas. This distance between the offices appears to have contributed to the issues regarding making a proper appeal in this matter. While the employer can choose which address to use as its official address of record, for calculating compliance with time deadlines no extension is provided to allow for the transmission of information from one of the employer's offices to the other, so the employer should take that into consideration when choosing which address to use as its address of record. Should the employer wish to change its address of record, it can access its account at: <https://www.myiowaui.org/UITIPTaxWeb/>.

Helpful information about using this site may be found at:
<http://www.iowaworkforce.org/ui/uiemployers.htm> and
http://www.youtube.com/watch?v=_mpCM8FGQoY