

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ADAM E KEHRWALD
Claimant

APPEAL NO. 07A-UI-08012-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRINK AND SEXTRO LLP
BRINK AND SEXTRO
Employer

OC: 03/18/07 R: 01
Claimant: Respondent (5)

Section 96.6-2 – Timeliness of Protest
Section 96.5(2)(a) – Discharge
Section 96.5(5) – Severance Pay

STATEMENT OF THE CASE:

Brink and Sextro, L.L.P, filed an appeal from the August 15, 2007, reference 01, decision that allowed benefits and found the employer's protest untimely. After due notice was issued, a hearing was held by telephone conference call on September 5, 2007. Claimant Adam Kehrwald participated. Robert Brink, Partner, represented the employer and presented additional testimony through Tracie Miller, Bookkeeper. The administrative law judge took official notice of the Agency's records concerning benefits disbursed to the claimant and benefits assessed against the employer's account. Exhibits One, Two and Three, as well as Department Exhibits D-1 and D-2 were received into evidence. The parties waived formal notice on the severance pay issue.

ISSUES:

Whether the employer's protest of the claim for benefits was timely.

Whether the claimant was discharged for a reason that would disqualify him for unemployment insurance benefits.

Whether the claimant received severance pay that should have been deducted from his unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: The Notice of Claim concerning Adam Kehrwald's application for unemployment insurance benefits was mailed to the employer's address or record on March 21, 2007 and received by the employer on March 23, 2007. The Notice of Claim indicated on its face an April 2, 2007 deadline for the employer's protest and/or other response to the Notice of Claim. Though the Notice of Claim solicited protest information, the employer left blank the spaces provided for protest information. Bookkeeper Tracie Miller provided information concerning dates of employment and severance pay in the spaces provided for the same on the Notice of Claim form. On March 23, Partner

Robert Brink signed the Notice of Claim form to certify that the information contained thereon was correct. On March 23, Ms. Miller faxed the Notice of Claim form and a cover sheet to the appropriate number for the Unemployment Insurance Service Center in Des Moines: 515-281-6208. Ms. Miller received written confirmation of a successful fax transmission. The employer then heard nothing more of the claim for benefits until August 13, 2007, when the employer received a quarterly statement of charges for benefits paid to Mr. Kehrwald. On the same day, Ms. Miller contacted the Iowa Workforce Development Tax Bureau to contest the assessment to the employer's account. On August 14, Lisa Kolontar of the Iowa Workforce Development Tax Bureau advised the employer that Agency had no record of the employer submitting a protest or other response to the Notice of Claim mailed to the employer on March 21, 2007.

Mr. Kehrwald was employed by Brink and Sextro as a full-time associate from September 5, 2006 until February 28, 2007, when the employer discharged him for reasons other than misconduct. At the time Mr. Kehrwald separated from the employment, the employer provided Mr. Kehrwald with the equivalent of two-weeks' salary as severance pay. The gross amount of the severance pay was \$1,384.60. In the employer's March 23, 2007 response to the March 21 Notice of Claim, the employer provided the severance amount and designated March 1-16 as the period to which the severance pay should be applied. This period pre-dated the effective date of Mr. Kehrwald's claim, which claim was effective March 18, 2007. Mr. Kehrwald discussed the severance pay with a Workforce Development representative when he applied for unemployment insurance benefits. Mr. Kehrwald received unemployment insurance benefits commencing with the benefit week of March 18-24, 2007. The Agency did not deduct severance pay from Mr. Kehrwald's benefits.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant.

871 IAC 24.35(1) provides:

- (1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:
 - a. If transmitted via the United States postal service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
 - b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

871 IAC 24.35(2) provides:

- (2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.
 - a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
 - b. The department shall designate personnel who are to decide whether an extension of time shall be granted.
 - c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
 - d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

The greater weight of the evidence in the record indicates that the employer did in fact submit a timely response to the Notice of Claim and that the employer's response was received, at least electronically, on March 23, 2007. What happened to the employer's response thereafter was attributable to Agency error, whether the error was human error or an issue with the Unemployment Insurance Service Center's fax machine. The employer's "protest" was timely. Accordingly, the administrative law judge has jurisdiction to address the merits of the employer's "protest" and the merits of the employer's timely appeal from the August 15, 2007, reference 01, decision.

The administrative law judge will next address Mr. Kehrwald's separation from the employer before turning to the severance pay issue.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
 - a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such 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. On the other hand 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.

The employer has the burden of proof in a discharge matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The employer readily concedes that Mr. Kehrwald's involuntary separation from the employment was not based on misconduct. Accordingly, Mr. Kehrwald's separation from the employment would not disqualify him for unemployment insurance benefits. Mr. Kehrwald is eligible for benefits, effective March 18, 2007, provided he is otherwise eligible. The employer's account may be assessed for benefits paid to Mr. Kehrwald.

The administrative law judge will now turn to the severance pay issue.

Iowa Code section 96.5-5 provides:

An individual shall be disqualified for benefits:

5. Other compensation. For any week with respect to which the individual is receiving or has received payment in the form of any of the following:

a. Wages in lieu of notice, separation allowance, severance pay, or dismissal pay.

b. Compensation for temporary disability under the workers' compensation law of any state or under a similar law of the United States.

c. A governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment made under a plan maintained or contributed to by a base period or chargeable employer where, except for benefits under the federal Social Security Act or the federal Railroad Retirement Act of 1974 or the corresponding provisions of prior law, the plan's eligibility requirements or benefit payments are affected

by the base period employment or the remuneration for the base period employment. However, if an individual's benefits are reduced due to the receipt of a payment under this paragraph, the reduction shall be decreased by the same percentage as the percentage contribution of the individual to the plan under which the payment is made.

Provided, that if the remuneration is less than the benefits which would otherwise be due under this chapter, the individual is entitled to receive for the week, if otherwise eligible, benefits reduced by the amount of the remuneration. Provided further, if benefits were paid for any week under this chapter for a period when benefits, remuneration or compensation under paragraphs "a", "b", or "c", were paid on a retroactive basis for the same period, or any part thereof, the department shall recover the excess amount of benefits paid by the department for the period, and no employer's account shall be charged with benefits so paid. However, compensation for service-connected disabilities or compensation for accrued leave based on military service, by the beneficiary, with the armed forces of the United States, irrespective of the amount of the benefit, does not disqualify any individual, otherwise qualified, from any of the benefits contemplated herein.

871 IAC 24.13(3)c provides:

(3) Fully deductible payments from benefits. The following payments are considered as wages; however, such payments are fully deductible from benefits on a dollar-for-dollar basis:

c. Wages in lieu of notice, separation allowance, severance pay and dismissal pay.

Workforce Development Rule 871 IAC 24.13(1) provides as follows:

Procedures for deducting payments from benefits. Any payment defined under subrules 24.13(2) and 24.13 (3) made to an individual claiming benefits shall be deducted from benefits in accordance with the following procedures until the amount is exhausted; however, vacation pay which is deductible in the manner prescribed in rule 24.16(96) shall be deducted first when paid in conjunction with other deductible payments described in this rule unless otherwise designated by the employer: The individual claiming benefits is required to designate the last day paid which may indicate payments made under this rule. The employer is required to designate on the Form 65-5317, Notice of Claim, the amount of the payment and the period to which the amount applies. If the individual or the employer does not designate the period to which the amount of the payment applies, and the unemployment insurance representative cannot otherwise determine the period, the unemployment insurance representative shall determine the week or weeks following the effective date of the claim to which the amount of the payment applies by dividing the amount of the payment by the individual's average weekly wage during the highest earnings quarter of the individual's base period. The amount of any payment under subrule 24.13 (2) shall be deducted from the individual's weekly benefit amount on the basis of the formula used to compute an individual's weekly benefit payment as provided in rule 24.18 (96). The amount of any payment under subrule 24.13 (3) shall be fully deducted from the individual's weekly benefit amount on a dollar-for-dollar basis.

The evidence in the record indicates that Mr. Kehrwald received severance pay in the gross amount of \$1,384.60. This amounted to two weeks' pay. The evidence indicates that the employer made a timely designation of period to which the severance pay should be applied

vis-à-vis Mr. Kehrwald's application for unemployment insurance benefits. That period the employer designated was March 1-16, 2007. This was a logical designation, in that it was the two-week period immediately following Mr. Kehrwald's February 28 separation from the employment. Because the employer made a timely designation of the period to which the severance pay should be applied, the employer's designation controls. See 871 IAC 24.13(1). The evidence indicates that during the two-week period the employer had designated for the severance pay, Mr. Kehrwald had not yet established his claim for unemployment insurance benefits. Accordingly, the severance pay would have no impact on Mr. Kehrwald's eligibility for unemployment insurance benefits or the employer's liability for benefits. See Iowa Code section 96.5(5).

DECISION:

The Agency representative's August 15, 2007, reference 01, decision is modified as follows. The employer's "protest" was timely. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant. The claimant received severance pay applicable to a period that pre-dated his claim for unemployment insurance benefits. Accordingly, the severance pay would have no impact on claimant's benefit eligibility or the employer's liability for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css