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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1600**

Douglas Westphal,
Relator,

vs.

Friedges Landscaping Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 8, 2019
Affirmed
Larkin, Judge
Concurring specially, Randall, Judge***

Department of Employment and Economic Development
File No. 36479552-4

Douglas Westphal, Belle Plaine, Minnesota (pro se relator)

Friedges Landscaping Inc., Lakeville, Minnesota (respondent employer)

Lee B. Nelson, Anne B. Froelich, Minnesota Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

Considered and decided by Larkin, Presiding Judge; Smith, Tracy M., Judge; and Randall, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

In this unemployment-compensation appeal, relator challenges a decision by an unemployment-law judge dismissing his administrative appeal as untimely. We affirm.

F A C T S

Relator Douglas Westphal applied to respondent Minnesota Department of Employment and Economic Development (DEED) for unemployment benefits and established a benefit account effective November 20, 2016. On April 30, 2018, DEED mailed Westphal a determination of ineligibility. On May 8, 2018, DEED mailed Westphal an amended determination of ineligibility. The amended determination stated that it would become final unless an appeal was filed by May 29, 2018. Westphal filed an appeal on June 6, 2018.

An unemployment-law judge (ULJ) concluded that she lacked authority to consider the appeal because the ineligibility determination had become final by operation of law. The ULJ therefore dismissed the appeal as untimely. Westphal requested reconsideration, and the ULJ affirmed the dismissal. This appeal follows.

D E C I S I O N

This court may reverse or modify a ULJ's decision "if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or

decision” are “unsupported by substantial evidence in view of the entire record as submitted” or are “affected by other error of law.” Minn. Stat. § 268.105, subd. 7(d) (2018). “An agency decision of whether to dismiss an appeal as untimely is a question of law, which we review de novo.” *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 29 (Minn. App. 2012).

“A determination of . . . ineligibility is final unless an appeal is filed by the applicant . . . within 20 calendar days after sending.” Minn. Stat. § 268.101, subd. 2(f) (2018). “That 20-day deadline is absolute and unambiguous, and a ULJ must dismiss an untimely appeal from an eligibility determination for lack of jurisdiction.” *Kangas v. Indus. Welders & Machinists, Inc.*, 814 N.W.2d 97, 100 (Minn. App. 2012) (quotation omitted). “[T]here are no provisions for extensions or exceptions.” *Johnson v. Metro. Med. Ctr.*, 395 N.W.2d 380, 382 (Minn. App. 1986).

Because Westphal filed his appeal after the statutory filing deadline of May 29, 2018, which was clearly set forth in the amended determination of ineligibility mailed to him on May 8, 2018, the ULJ properly dismissed the appeal as untimely. Once again, there are no exceptions to the 20-day deadline and “[t]here is no equitable or common law denial or allowance of unemployment benefits.” Minn. Stat. § 268.069, subd. 3 (2018). Thus, relator’s acknowledgment that he “failed to interpret and correctly understand the appeal process” and argument that his “honest mistakes, good faith errors in judgment and simple inadvertence should not be the reason to rule against [him]” are unavailing.

Westphal asks this court to decide if he “is required to pay back unemployment benefits . . . that [he] believes he is rightfully owed.” We cannot do so. Because Westphal

did not timely appeal DEED's ineligibility determination, the determination is final. See Minn. Stat. § 268.101, subd. 2(f). We only review the ULJ's dismissal of Westphal's appeal as untimely. See *Christgau v. Fine*, 27 N.W.2d 193, 199 (Minn. 1947) (considering only the jurisdictional issue). Because Westphal filed his appeal after the statutory filing deadline, the ULJ did not err by dismissing the appeal.

Affirmed.

RANDALL, Judge (concurring specially)

I concur with the result.

Caselaw favors the argument that misrepresentation by an employee for the Department of Employment and Economic Development (DEED) is not a defense. See *Sheikh v. Emp't Sols. Mgmt., Inc.*, No. A17-1204, 2018 WL 1787964 at *1 (Minn. App. Apr. 16, 2018) (upholding ULJ's dismissal as untimely, despite a DEED employee allegedly misinforming relator about appeals process); *Sangwan v. Dep't of Emp't & Econ. Dev.*, No. A17-1195, 2018 WL 1145885 at *2 (Minn. App. Mar. 5, 2018) (upholding ULJ's dismissal as untimely, despite a DEED employee allegedly misinforming relator about appeals process). That caselaw interpretation is too harsh if it is interpreted strictly and with no exceptions.

It is not fair for the State of Minnesota to be able to hide from material mistakes by its own employees. The state effectively argues that they are not subject to the defense of estoppel.

That simply cannot resolve the question. *Dep't of Human Servs. of State of Minn. v. Muriel Humphrey Residences*, a published case in 1989 held, "A government agency may be estopped from recovering payments when: the agency makes representations upon which a facility reasonably relies; harm will result if the estoppel claim is not granted; and estopping the agency will not frustrate the public interest." 436 N.W.2d 110, 111 (Minn. App. 1989), *review denied* (Minn. Apr. 26, 1989).

In other words, the law has to give some credence to a citizen claiming that his mistake was caused by a misrepresentation of an employee/agent for the state who

appeared to the claimant to be in a position of authority sufficient to make the misrepresentation.

Here, Westphal claims that he spoke with a DEED employee who represented that all his issues were resolved. And based on what the DEED employee told him, Westphal took no further action.

Westphal should at least be allowed to argue the merits of that defense, and if successful, go on to be allowed the merits of his appeal.

In my more than three decades on the bench, it has seemed that a large percentage of all of the pro se appeals from a denial of unemployment compensation never even get to be heard on the merits because the pro se claimant missed dotting an “i” or crossing a “t,” or didn’t serve everybody on time, etc., etc.

The attorneys for DEED and the State of Minnesota are some of the best in this business and they know the law. That is a one-sided, complete legal advantage over the pro se appellant.

In the wild, on occasion the cobra gets the mongoose, but the rabbit never gets the fox. A pro se appellant almost has no chance at all.

The result in this case is legally correct, but the law concerning misrepresentation and estoppel should be modified to allow relators, once they can show legitimate material facts of misrepresentation by a DEED employee, to at least be able to argue estoppel.