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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-495

Ikechi Kallys Albert,
Appellant,

vs.

Sandy Larson, Program Director (Shadyview)
in her individual capacity and an employee of
Thomas Allen, Inc., et al.,
Respondents,

Minnesota Department of Employment and Economic Development,
Respondent.

Filed April 15, 2008
Affirmed in part and vacated in part
Worke, Judge

Ramsey County District Court
File No. C6-06-906

Ikechi Kallys Albert, P. O. Box 5873352, Minneapolis, MN 55458 (pro se appellant)

Mary K. Martin, 2411 Francis Street, South St. Paul, MN 55075 (for respondents Larson, et al.)

Lori Swanson, Attorney General, Kelly S. Kemp, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent Department of Employment and Economic Development)

Considered and decided by Toussaint, Chief Judge; Hudson, Judge; and Worke, Judge.

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

WORKE, Judge

On appeal from the district court's dismissal of his claims against respondents, appellant's former employer and the Minnesota Department of Employment and Economic Development (DEED), for lack of proper service and the running of the statute of limitations, appellant argues that dismissal was neither the exclusive nor the appropriate remedy. We affirm the district court's dismissal of appellant's claims against his former employer. And although we vacate the district court's dismissal of appellant's claims against DEED for lack of jurisdiction, we note that appellant's failure to timely file a proper appeal of his denial of unemployment benefits precludes him from challenging that denial.

D E C I S I O N

TAI

The district court dismissed appellant Ikechi Kallys Albert's claims against respondents Thomas Allen, Inc., his former employer (TAI); and Sandy Larson, Fay Lischeid, and Sandy Quinn, individually and as its employees for lack of proper service. "If service of process is invalid, the district court lacks jurisdiction to consider the case, and it is properly dismissed." *Leek v. Am. Express Prop. Cas.*, 591 N.W.2d 507, 509 (Minn. App. 1999), *review denied* (Minn. July 7, 1999). Whether service is proper presents a question of law, which we review de novo. *Turek v. A.S.P. of Moorhead, Inc.*, 618 N.W.2d 609, 611 (Minn. App. 2000), *review denied* (Minn. Jan. 26, 2001).

The Minnesota Rules of Civil Procedure provide that a defendant may be served by mail, which is achieved by mailing a copy of the summons and complaint, along with two copies of a notice and acknowledgment of service and an addressed, postage-prepaid, return envelope. Minn. R. Civ. P. 4.05. When service is made by mail, the action commences on the date of acknowledgment of service. Minn. R. Civ. P. 3.01(b). Acknowledgment of service under rule 4.05 must be in writing. *Larson v. New Richland Care Ctr.*, 520 N.W.2d 480, 482 (Minn. App. 1994). Strict compliance with this rule is required; if the acknowledgment of service is not returned, service is ineffectual, and the action will be dismissed. *Coons v. St. Paul Cos.*, 486 N.W.2d 771, 776 (Minn. App. 1992), *review denied* (Minn. July 16, 1992); *see also Hughes v. Lund*, 603 N.W.2d 674, 677 (Minn. App. 1999) (holding that proper service by mail was not effected when service was not acknowledged). Thus, a litigant seeking to serve by mail must be prepared to serve the intended party personally within the timeframe for answering the complaint. *Nieszner v. St. Paul Sch. Dist. No. 625*, 643 N.W.2d 645, 649 (Minn. App. 2002).

The record shows that in February 2006, appellant attempted service by mail on TAI by mailing a copy of a complaint to their attorney-of-record in a previous action filed by appellant in federal district court. Appellant filed affidavits of service indicating that he mailed a copy of the complaint to the attorney and to the chief executive officer of Thomas Allen, Inc. But the affidavits do not show that appellant included an acknowledgment of service by mail or a postage-paid return envelope, and none of the respondents returned an acknowledgment of service. Because the rules for service by

mail are strictly applied, and appellant did not obtain an acknowledgment of service from TAI, appellant's attempted service by mail was ineffectual, and the district court properly dismissed the action as to TAI.

Appellant claims that service by mail on the attorney who represented TAI in the federal court action was proper under Minn. R. Civ. P. 5.02, which allows service on an attorney whenever service "is required or permitted to be made upon a party represented by an attorney." But "[r]ule 5 applies only to service of documents after an action has been initiated." *Kmart Corp. v. County of Clay*, 711 N.W.2d 485, 490 (Minn. 2006). It is inapplicable to the initial service of process. *See id.*

Appellant maintains that TAI had actual knowledge of the filing of the summons and complaint and waived their right to challenge the sufficiency of process by moving to dismiss the action. But actual notice is irrelevant to the issue of whether proper service by mail has been effected. *Turek*, 618 N.W.2d at 612. And TAI's motion to dismiss did not operate as a waiver because TAI did not take an affirmative step to invoke the court's power to determine the merits of the claim. *Id.* Because the rules for service by mail are strictly applied, and appellant did not obtain an acknowledgment of service from TAI, appellant's attempted service by mail was ineffectual. There is no showing that appellant then served TAI personally; therefore, the district court properly dismissed the action as to TAI.

Appellant also argues that the district court's dismissal of his action with prejudice as to TAI violated his right to seek redress under the United States and Minnesota Constitutions by barring his claim under the Minnesota Human Rights Act (MHRA). But

when dismissing a suit for lack of jurisdiction, the district court has authority to dismiss an untimely claim with prejudice if the parties had fair notice and an opportunity to be heard. *Mercer v. Andersen*, 715 N.W.2d 114, 119 (Minn. App. 2006). Appellant's MHRA claim arose from his discharge in March 2005. Appellant's attempt to file suit in February 2006, just before the expiration of the one-year limitations period, exposed him to the risk that his claim would be barred if he were required to reinitiate the suit due to defective process. *See Coons*, 486 N.W.2d at 775 (warning that plaintiffs should not attempt service by mail at any time near the end of the period of limitations because defendants have the power to let the period run out before acknowledging receipt). Appellant appeared personally at the motion hearing and argued his position at some length. Because the one-year statute of limitations had run on appellant's MHRA claim by the December 2006 hearing, the district court properly dismissed that claim with prejudice.

Appellant argues that because the district court did not expressly consider whether the statute of limitations barred his claim of retaliation for reporting abuse under the Vulnerable Adults Act, Minn. Stat. §§ 626.557-.5573 (2006 & Supp. 2007), this issue remains before the district court and is not subject to our review. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate court will not generally consider issues not raised and considered by the district court). We may decide such an issue if it is a refinement of an issue raised before the district court. *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 523 (Minn. 2007).

The Vulnerable Adults Act prohibits retaliation against a person who, in good faith, reports suspected maltreatment of a vulnerable adult, and specifically provides for "any remedies allowed under sections 181.931 to 181.935." Minnesota's Whistleblower Act. Minn. Stat. § 626.557, subd. 17(a), (b) (2006). This court has determined that the statute of limitations for whistleblower claims is two years from the date of discharge, based on Minn. Stat. § 541.07(1), which provides that actions alleging intentional torts must be brought within two years. *Larson v. New Richland Care Ctr.*, 538 N.W.2d 915, 920 (Minn. App. 1995), *review granted* (Minn. Dec. 20, 1995), *order granting review vacated* (Minn. Mar. 4, 1997), *abrogated on other grounds by Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (Minn. 2002). Based on the statutory language in the Vulnerable Adults Act referring to remedies available under the Whistleblower Act, and the statutes' shared subject matter of prohibiting retaliation for reporting, we conclude that appellant's claim under the Vulnerable Adults Act is subject to the two-year statute of limitations. *See id.; Harris v. County of Hennepin*, 679 N.W.2d 728, 732 (Minn. 2004) (stating that "[s]tatutes should be read as a whole with other statutes that address the same subject"). Because appellant was discharged in March 2005, the statute of limitations has run on his claim under the Vulnerable Adults Act, and we affirm the district court's legal determination that appellant's claims against TAI are time-barred. Finally, we reject appellant's claim that the interests of justice require reversal of the district court's dismissal of his action against TAI.

DEED

The district court dismissed appellant's claims against the Minnesota Department of Employment and Economic Development (DEED) without prejudice, based on improper service. Appellant attempted to file district-court claims against DEED based on the administrative denial of his application for unemployment benefits. A DEED adjudicator disqualified appellant from receiving unemployment benefits in May 2005, determining that he had been discharged for employment misconduct in March 2005. This determination is final unless the applicant files an appeal within 30 calendar days. Minn. Stat. § 268.101, subd. 2(e) (2004).

Minnesota statutes provide a specified process for appealing the disqualification from unemployment benefits. *Id.; see* Minn. Stat. § 268.105 (2004). This process is strictly construed. *See Rowe v. Dep't of Unemployment & Econ. Dev.*, 704 N.W.2d 191, 196 (Minn. App. 2005) (dismissing untimely appeal). This process does not include an appeal to the district court. *See* Minn. Stat. § 268.105.

The record shows that appellant was disqualified from receiving unemployment benefits. Because the statutory scheme for appeal of disqualification from unemployment benefits does not include an appeal to district court, the district court lacked jurisdiction to hear appellant's appeal. We further observe that appellant did not challenge the administrative denial of his unemployment-benefits claim by the required process, which includes a certiorari appeal of a decision by the unemployment law judge upon reconsideration. *See id.*, subds. 2(e), 7. This court lacks jurisdiction to consider any future, untimely appeal. *See Harms v. Oak Meadows*, 619 N.W.2d 201, 203 (Minn.

2000) (affirming this court's dismissal of unemployment-benefits appeal for lack of jurisdiction when petitioner failed to timely serve commissioner with petition for writ of certiorari within 30-day statutory period after mailing of commissioner's decision).

Affirmed in part and vacated in part.