IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KODIE J BROWN Claimant **EAST 53RD PIZZERIA AND PUB LLC** Employer	**APPEAL 18R-UI-01333-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/15/17** **Claimant: Respondent (2)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the November 1, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A first hearing was scheduled but not conducted on December 5, 2017 because the employer/appellant failed to appear. Upon successful request for reopening to the Employment Appeal Board (EAB), the matter was remanded for a new hearing. After proper notice, a telephone hearing was held on February 26, 2018. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Brian Olsen, general manager. Department Exhibit D-1 was received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

NOTE TO EMPLOYER:
If you wish to change the address of record, please access your account at: https://www.myiowaui.org/UITIPTaxWeb/.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an assistant kitchen manager and was separated from employment on October 15, 2017, when he was discharged for continued tardiness.

The claimant began his employment as a cook and was promoted in September 2017, to an assistant kitchen manager. He spent two full weeks training with the kitchen manager, and was issued company rules and procedures upon original hire. The claimant had been frequently tardy as a cook to his 3:00 p.m. shifts and upon becoming a manager, his shifts changed to 10:00 a.m. On three separate occasions, the employer spoke to the claimant about his continued tardiness, reiterating its expectation that the claimant be on time, and set a positive example for employees he managed. The employer stated the claimant's continued tardiness was primarily caused by oversleeping or staying out late at a nearby bar/strip club, which he frequently posted about on social media.

On October 12, 2017, the claimant met with the employer, who verbally warned him for a third and final time. He was also warned about smoking during designated times, his attitude which the employer described as a "negative black cloud, floating through the kitchen", and for errors on his invoices. On October 13, 2017, the claimant was 25 minutes late to his shift, without explanation. The claimant was then 40 minutes late on October 14, 2017 to his shift, for unknown reasons. The final incident occurred on October 15, 2017, when the claimant was one hour and 20 minutes late to his shift. The employer does not know the reason for the tardy and the claimant did not attend the hearing. He was subsequently discharged.

An initial unemployment insurance decision allowing benefits was mailed to the employer's last known address of record on November 1, 2017. The address on file was of an old accountant, who then forwarded the decision to Mr. Olsen. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by November 11, 2017. Because November 11, 2017 was a Saturday, the final day to appeal was extended to November 13, 2017. On November 13, 2017, Mr. Olsen mailed a copy of the appeal letter (Department Exhibit D-1).

The administrative record reflects that claimant has a weekly benefit amount of $272.00 but has not received unemployment benefits since filing a claim with an effective date of October 15, 2017. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. The reason the employer did not participate is that it did not receive the notice of fact-finding interview from its old accountant, who did forward other mail related from IWD to the employer.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the employer filed a timely appeal. For the reasons that follow, the administrative law judge concludes the employer's appeal is timely.

Iowa Code section 96.6(2) provides:

> 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. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit

> pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs “a” through “h”. Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976). The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from unemployment insurance 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. Iowa Dep’t of Job Serv.*, 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. Iowa Dep’t of Job Serv.*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). Pursuant to Iowa Admin. Code rules 871-26.2(96)(1) and 871-24.35(96)(1), appeals are considered filed when postmarked, if mailed. *Messina v. Iowa Dep’t of Job Serv.*, 341 N.W.2d 52 (Iowa 1983).

In this case, the final date to appeal was November 11, 2017, which was a Saturday. Because the final day to appeal was a weekend, the deadline was extended to November 13, 2017. On November 13, 2017, the employer submitted an appeal, which was postmarked on the same day, (Department Exhibit D-1) therefore, the appeal is deemed timely.

The next issue is whether the claimant was discharged for reasons that constitute misconduct and would disqualify him from the receipt of benefits.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual’s wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

The requirements for a finding of misconduct based on absences are twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). In this case, the claimant had three unexcused absences for oversleeping and unknown reasons on October 13, 14 and 15, 2017, after being issued a final verbal warning on October 12, 2017. The claimant did not attend the hearing to refute the employer's credible testimony which is the claimant was told as a member of management, he was expected to be on time and set a positive example to his subordinates.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. In this case, the claimant had three unexcused absences attributed to running late and oversleeping after his final warning.

Based on the evidence presented, the employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

The final issue to address is whether there is any overpayment and relief of charges for the employer.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. . In this case, the claimant did not receive any benefits and therefore there is no overpayment in accordance with Iowa Code § 96.3(7).

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits." Iowa Code § 96.3(7)(b)(1)(a). Here, the employer did not receive the notice of fact-finding interview. Benefits were not allowed because the employer failed to respond timely or adequately to IWD's request for information relating to the payment of benefits. Instead, benefits were allowed because the employer did not receive the notice of fact-finding interview. Therefore, the employer cannot be charged. Since neither party is to be charged, any potential charges for this claim should be absorbed by the fund.

DECISION:

The November 1, 2017, (reference 01) decision is reversed. The employer filed a timely appeal. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is relieved of charges associated with the claim.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn