IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SALADO ABDI Claimant **WAL-MART STORES INC** Employer	**APPEAL 16A-UI-10606-H2** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/21/16** **Claimant: Appellant (2)**

Iowa Code § 96.6-2 – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 15, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in person hearing was held in Des Moines, Iowa on October 18, 2016. Claimant participated with the assistance of CTS Language Link Somail interpreter Ayan identification number 4890. The interpreter was disconnected and reconnected at 9:29 a.m. At 9:51 a.m. the interpreter was disconnected again and a new Somali interpreter Muse identification number 22324 was added into the hearing to participate on claimant's behalf. Employer participated through (representative) Heather Snyder, Personnel Coordinator and Scott Bogs, Assistant Manager.

ISSUES:

Did the claimant file a timely appeal?

Was the claimant discharged due to job connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a fabrics and crafts sales associate beginning on June 30, 2015, through August 18, 2016, when she was discharged. The claimant was discharged for violation of the employer's attendance policy. In March 2016 the employer changed their attendance policy and procedures. Each employee, including the claimant was given access to an internet link that would allow them at any time to access via a computer their own attendance record. Employees were allowed to use computers at work to keep track of their own attendance. The claimant was specifically told during the March meeting that if and when she reached nine attendance points she would be discharged. During the March meeting the claimant was also told that she would not be given any warnings or coaching about attendance. From March 2016 onward, all employees were to keep track of their own attendance under the employer's policy. The claimant then accrued attendance points as follows: March 20, (4 points, no-call no-show); March 29, (.5 point, left early); May 29, (1 point, absent); June 5, (1 point, absent); June 29, (.5

point, tardy); July 28, (.5 point, tardy); August 14, (.5 point, tardy); and August 17, (.5 point, tardy). Under the employer's policies, an employee is only considered tardy if they are more than ten minutes late to work. The claimant was at least ten minutes late to work due to transportation issues on August 17. None of the claimant's absences were considered excused.

A decision denying the claimant benefits was mailed to her on September 15, 2016. The claimant stopped filing benefits the week the decision was mailed to her denying her benefits. The claimant did not receive the decision denying her benefits.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 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, subsection 10, 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 claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472 (Iowa 1973). Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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.

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 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 Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. A failure to report to work without notification to the employer is generally considered an unexcused absence. All of the claimant's absences outlined above are considered unexcused. The eight separate incidents in a five month period is excessive absenteeism. The issue then becomes whether the employer can meet their burden to establish work connected misconduct when they chose not to warn an employee at all about any attendance issues prior to discharge. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The administrative law judge finds that without any employee being given any warning that they are in danger of losing their job due to attendance issues, the employer simply has not met their burden to establish job connected misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The September 15, 2016, (reference 01) decision is reversed. The claimant did file a timely appeal. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/rvs