

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MIKE D BRISBOIS
Claimant

APPEAL NO. 10A-UI-12851-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HUBBARD FEEDS INC
Employer

OC: 08/01/10
Claimant: Appellant (1)

Section 96.5(2)a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant, Mike Brisbois, filed an appeal from a decision dated September 3, 2010, reference 04. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on November 2, 2010. The claimant participated on his own behalf. The employer, Hubbard Feeds, participated by Human Resources Assistant Paula Tersteeg. Exhibit D-1 was admitted into the record.

ISSUE:

The issue is whether the appeal is timely and whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

A disqualification decision was mailed to the claimant's last-known address of record on September 3, 2010. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by September 13, 2010. The appeal was not filed until September 14, 2010, which is after the date noticed on the decision. The claimant admitted he waited until the Storm Lake Workforce Center was closing on September 13, 2010, before arriving to request the document be faxed. He had filled out the appeal form a week before but declined to mail it, choosing instead to drive over an hour to deliver to the Storm Lake Office when it was closing. As a result it was not faxed until the next day.

Mike Brisbois was employed by Hubbard Feeds from May 19, 2008 until August 4, 2010 as a full-time utility person. He was warned on April 1, 2010, by Plant Superintendent Trent Coombs that he had been tardy to work too many times and he needed to correct the problem. The reasons he was tardy were either car problems or the fact his part-time job took longer than he anticipated and he was unable to arrive at Hubbard Feeds at his scheduled start time.

The claimant never asked his supervisor to schedule his start time an hour or two later, but he continued to be late to work. On August 4, 2010, he was 35 minutes late to work and was discharged by Mr. Coombs and Plant Manager Scott Uhlrich.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

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. . . . 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.

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. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' 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. IDJS, 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. IDJS, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973).

(1) The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The claimant's appeal shall be accepted as timely as his local Workforce Center did not fax the appeal until the day after it was received due to the claimant not submitting the appeal until the time the office was closing.

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.

871 IAC 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 claimant was discharged for excessive, unexcused absenteeism. He had been advised he needed to come to work at the time scheduled and declined to do so. Matters of purely personal consideration, such as car problems and a second job, are not considered an excused absence. *Harlan v. IDJS*, 350 N.W.2d 192 (Iowa 1984). Under the provisions of the above Administrative Code section, this is misconduct for which the claimant is disqualified.

DECISION:

The decision of the representative dated September 3, 2010, reference 04, is affirmed. Mike Brisbois is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs