

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**IRMAN PAJIC**  
Claimant

**DAVENPORT FARM & FLEET INC**  
Employer

**APPEAL 21A-UI-13820-SN-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/31/20**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct  
Iowa Code § 96.4(3) – Ability to and Availability for Work  
Iowa Code 96.6(2) – Timeliness of Appeal

**STATEMENT OF THE CASE:**

The claimant, Irman Pajic, filed an appeal from the September 18, 2020, (reference 03) unemployment insurance decision that denied benefits based upon the conclusion he was discharged for violating a known rule. The parties were properly notified of the hearing. A telephone hearing was held on August 13, 2021. The claimant participated and testified. The employer, Davenport Farm and Fleet Inc., participated through Human Resources Business Partner Kyle Gjertson. This hearing was conducted jointly with 21A-UI-13821-SN-T. Exhibits 1, 2, D-1 and D-2 were received into the record.

**ISSUE:**

Whether the claimant's appeal is timely?

Whether there are reasonable grounds to consider the claimant's appeal otherwise timely?

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant was able and available for work after separating from the employer?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed part-time as a sales associate from October 17, 2019, until this employment ended on December 6, 2019, when he was discharged. The claimant worked a varied schedule.

The employer's conduct and work rules include a no-fault absenteeism policy which states discipline can occur after any occurrence of any absence regardless of the circumstances, "except where [the] Americans with Disabilities Act, federal, or state legislation applies." The

work rules state the dress code and grooming standards are separately defined. The employer did not provide this policy. However, Human Business Partner Kyle Gjertson stated the policy prohibits the wearing of hats on the premises. Attendance and appearance violations are defined as group A violations, which follow progressive discipline. The employer's conduct and work rules define insubordination as, "Disobeying or disregarding a supervisor's reasonable directive or the use of abusive language, including disrespectful or inappropriate tone of voice toward a supervisor will not be tolerated." Insubordination is classified as a class B offense. The work rules state any group B violation can result in immediate termination of employment. The employer provided a copy of its conduct and work rules and the claimant's acknowledgement of its policies on October 22, 2019. (Exhibit 1)

In late-November 2019,<sup>1</sup> the claimant was wearing a regular hat on the employer's premises. The claimant took this hat off, when instructed. The claimant observed coworker's wearing a Blain's hat, which is a hat with the employer's logo on it.

On December 3, 2019, the claimant wore a Blain's hat to work. Mr. Kahler observed the claimant wearing the hat and told him to take it off.

On December 6, 2019, Assistant Store Manager Val Kahler discharged the claimant. Mr. Kahler gave the following rationale on the claimant's discharge notice, "Since he has joined the team, he has struggled to maintain several company standards. For example, he has repeatedly worn hats on the floor while specifically [sic] told he was unable to do so. He has attempted to leave right at 9:00 p.m. when we closed while we still had customers in the store and he, along with the rest of the store was called to face candy. Overall tasks have not been completed as quickly or as well as they should be at this point. He asks to leave early because he tells management he is not feeling well, while telling floor associates he has things to do at home. He has missed a significant amount of work. He has called in five times within his first 45 days. He was previously given a verbal warning about his attendance and told that if he did not improve he wouldn't reach his 90 day eval. The next week he called in again." The employer provided a copy of the claimant's discharge notice. (Exhibit 2)

Mr. Gjertson did not have specific information regarding any of the underlying misconduct described in the discharge notice. Mr. Gjertson stated he did not believe there was a final incident that led to the claimant's employment; instead it was a cumulative assessment of his behavior. The claimant said he was absent due to transportation twice and due to illness three times.

The following section describes the findings of fact for the able and available issue:

In 2015, the claimant had surgery on his wrist. The claimant had surgery on his shoulder in 2016. These surgeries have limited the claimant's ability to perform repetitive work and limit the range of motion he has with these respective body parts. These surgeries have not disrupted his ability to perform the work he customarily performs.

Over the course of 2020, the claimant applied for 100 positions. The administrative record KCCO shows the claimant made the requisite employer contacts throughout his claim period. Although the claimant was afraid of the effect of the Covid19 pandemic, he was willing to work during this period because he has bills he has to pay.

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<sup>1</sup> Neither party could provide a specific date for this incident.

The administrative record Wage-A shows the claimant worked for Wal-Mart in the first and second quarter of 2021. He worked for International Paper Company in the second quarter of 2021.

The following section describes the findings of fact for the timeliness issue:

A disqualification decision was mailed to the claimant's address of record on September 18, 2020. (Exhibit D-1) The claimant did not receive the decision. The first notice of disqualification was the overpayment decision of June 4, 2021. The claimant filed his appeal within 10 days of the receipt of the overpayment decision. (Exhibit D-2)

### **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. The administrative law judge further concludes the claimant was discharged for no disqualifying reason.

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 issuing the notice of the filing of the claim to protest payment of benefits to the claimant. All interested parties shall select a format as specified by the department to receive such notifications. 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 issued, 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). The claimant timely appealed the overpayment decision, which was the first notice of disqualification. Therefore, the appeal shall be accepted as timely.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

Iowa Admin. Code r. 871-24.32(4), (7) and (8) provide:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

(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.

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

It is an axiom of unemployment law that an employer must terminate a claimant for a current or final incident. To the extent that past misconduct is relevant at all, it must be related to the final incident. The employer refused to identify a final incident that led to the claimant's discharge either in testimony or in the discharge notice. It provides several disparate categories of behavior and does not provide specifics regarding the occurrence of any of the incidents. Regarding attendance, the employer concedes the claimant provided proper notice for most of his absences. The claimant provided un-rebutted testimony stating that the majority of these were excused due to his illness or other reasonable grounds outside of his control due to transportation. As a result, the employer has failed to meet its burden under Iowa Admin. Code r. 871-24.32(4), (7) and (8).

The administrative law judge finally concludes the claimant was able and available for work after he separated from employment.

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

**Benefits eligibility conditions.** For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden

of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) *Able to work.* An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. *Illness, injury or pregnancy.* Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.22(2) provides:

**Benefit eligibility conditions.** For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) *Available for work.* The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.23 provides:

**Availability disqualifications.** The following are reasons for a claimant being disqualified for being unavailable for work.

(1) An individual who is ill and presently not able to perform work due to illness.

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

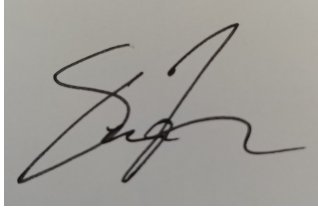
An individual claiming benefits has the burden of proof that he is be able to work, available for work, and earnestly and actively seeking work. Iowa Admin. Code r. 871-24.22.

The claimant credibly testified he was able and available for work effective May 31, 2020. Although he mentioned he had some surgeries that have impacted his range of motion of his

wrist and shoulder, these have not disrupted his ability to work. Accordingly, he is eligible for unemployment insurance benefits.

**DECISION:**

The September 18, 2020, (reference 03) unemployment insurance decision is reversed. The claimant was discharged from employment due to non-disqualifying conduct. The claimant was also able and available for work after he was discharged by the employer. Benefits are granted, provided he is otherwise eligible.

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read "Sean M. Nelson".

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Sean M. Nelson  
Administrative Law Judge  
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August 25, 2021  
Decision Dated and Mailed

smn/kmj