**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **HEATHER R LANE**<br>Claimant<br><br>**FAMILY DOLLAR SERVICES INC**<br>Employer | **APPEAL 21A-UI-12399-AR-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 02/28/21**<br>**Claimant: Appellant (2)** |

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.4(3) – Ability to and Availability for Work

**STATEMENT OF THE CASE:**

On May 12, 2021, claimant, Heather R. Lane, filed an appeal from the April 28, 2021, reference 01, unemployment insurance decision that denied benefits based upon the determination that the employer, Family Dollar Services, Inc., discharged claimant for excessive, unexcused absenteeism. The parties were properly notified about the hearing held by telephone on July 27, 2021. The claimant participated personally. The employer participated through Kirsten Witherspoon. Employer's Exhibits 1 and 2 were admitted, as was Department's Exhibit D-1. The administrative law judge took official notice of the administrative record.

**ISSUES:**

Is the claimant's appeal timely?
Did the employer discharge claimant for job-related misconduct?
Is claimant able to and available for work?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a cycle counter beginning on August 6, 2020, and was separated from employment on February 19, 2021, when she was discharged.

During her employment, claimant had 22 absences. These did not include leave related to COVID-19. In February 2021, claimant worked her shift on February 3, 2021, and did not return to work thereafter. February 4, 2021 was an excused day on which all employees were allowed to stay home due to weather. The week of February 8 through 12, 2021, claimant took PTO as approved by her manager. On February 10 and 11, 2021, the employer was aware that claimant believed herself to be exposed to COVID-19. She was also having symptoms that were associated with COVID-19. After February 10, 2021, claimant believed that she was on COVID-related leave due to exposure. This leave would have lasted up to 14 days. Of the days claimant was absent in February, the employer only considered February 4, 10, and 11, 2021, to be excused.

Also on February 10, 2021, claimant's partner emailed the employer and indicated that he and claimant would return to work February 15, 2021. Claimant testified that she believed at the time that she could get a doctor's note during a scheduled appointment on February 15, 2021, indicating that the symptoms she was having were not related to COVID-19, which would have allowed her to return to work before the 14-day quarantine period elapsed in full. However, on February 15, 2021, a personal issue arose for claimant, which caused her to miss the doctor's appointment she had for that day. She called out absent without giving details regarding the reason for her absence on February 15 through 18, 2021. On February 19, 2021, claimant received a call from the employer notifying her of her discharge. All of the other absences in February were related to illness or weather. Claimant attempted to adhere to the employer's absence notification policy, which required a call to the supervisor at least one hour in advance of shift start. She did not always provide one hour of notice before shift start, but always phoned her supervisor as required, and always in advance of her shift start time.

Claimant believed that all of her absences were excused and approved by the employer. She was not warned that continued absences might jeopardize her employment.

Claimant received the disqualifying decision within the 10-day period allowed for appeals. She recalled that the deadline for the appeal fell on a Saturday, and she mailed the appeal to the Appeals Bureau on the following Monday, May 10, 2021. Department's Exhibit D-1 indicates that the postmark is dated May 10, 2021. The appeal was received by the Appeals Bureau on May 12, 2021.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. She was able to and available for work effective February 28, 2021.

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

Iowa Code § 96.6(2) provides, in pertinent part: "[u]nless 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."

Iowa Admin. Code r. 871—24.35(1) provides:

> 1. Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:
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> (a) If transmitted via the United States Postal Service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

> (b) If transmitted via the State Identification Date Exchange System (SIDES), maintained by the United States Department of Labor, on the date it was submitted to SIDES.
>
> (c) If transmitted by any means other than [United States Postal Service or the State Identification Data Exchange System (SIDES)], on the date it is received by the division.

Iowa Admin. Code r. 871—24.35(2) provides:

> 2. The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

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. 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).

The postmark on the claimant's appeal is clear and reads May 10, 2021. The deadline for appeal was May 8, 2021, which was a Saturday. When the deadline for appeal falls on a weekend or holiday, the deadline is extended to the next business day. In this case, claimant filed her appeal within the time granted to her to do so. The appeal is 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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871—24.32(7); *Cosper*, 321 N.W.2d at 6; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, 734 N.W.2d at 554. 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. Iowa Admin. Code r. 871—24.32(7) (emphasis added); *see Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) (holding "rule [2]4.32(7)…accurately states the law").

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192. Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. 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.

Claimant did not remain in touch with the employer adequately during her final weeks of employment; she relied on her partner to communicate with the employer in more detail than she did herself. However, she credibly testified that she believed her absences to be excused based on the fact that she had no indication otherwise from her supervisor. She further testified that she believed that she was on leave related to COVID exposure at the time she was discharged, which would have been excused by the employer. Finally, she credibly testified that neither her supervisor nor anyone else at the employer warned her that her absences were excessive and would jeopardize her employment. It is the lack of warning prior to her discharge that results in no disqualification.

The last question is whether claimant was able to an available for work effective February 28, 2021. For the reasons that follow, the administrative law judge concludes she was.

Iowa Code § 96.4(3) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 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(2) 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.
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> (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.

Claimant was prevented from working through February 24, 2021, based on exposure to COVID-19 and the associated quarantine period due to that exposure. However, after that time, there were no limits on the amount or type of work claimant could do. There was also no indication at hearing that she was limited regarding employability in other ways, such as due to transportation or child care concerns. Claimant was able to and available for work effective February 28, 2021. Benefits are allowed, provided claimant is otherwise eligible.

**DECISION:**

The April 28, 2021, (reference 01) unemployment insurance decision is reversed. The claimant's appeal is timely. The claimant was discharged from employment for no disqualifying reason. Claimant was able to and available for work effective February 28, 2021. Benefits are allowed, provided the claimant is otherwise eligible.

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Alexis D. Rowe
Administrative Law Judge

August 2, 2021
Decision Dated and Mailed

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