

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**APRIL J STEARNS-DEPRIEST**  
Claimant

**MCSOIFER'S INC**  
Employer

**APPEAL 15A-UI-05124-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/15/15  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the April 10, 2015, (reference 09) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 5, 2015. Claimant participated. Employer participated through Randy Betsinger Area Supervisor and (representative) Karla Bucholz, General Manager. Department's Exhibit D-1 was entered and received into the record. Employer's Exhibit One was entered and received into the record.

**ISSUE:**

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 crew person beginning on September 26, 2014 through March 26, 2015 when she was discharged.

The claimant was repeatedly late for work and been warned repeatedly for being late to work. On March 22 the claimant was given her final warning telling her that once again she was late to work and that if she was late to work again she would be discharged. The claimant's signature on prior warning documents was not forged. In the employer's records it is clear that the claimant was late to work over 899 minutes in the time period between January 26, 2015 and her discharge two month later. In December 2014 the claimant's work scheduled was changed by the employer in an attempt to help her be on time to work. The claimant had reported that she was late to work because she was sharing a car with her husband who occasionally had to work late at his job. The claimant would normally begin her shift at 10:00 pm or 11:00 pm. Since she was so late all the time, the employer changed her start time to midnight. The claimant continued to be late to work.

On March 25 the claimant arrived 37 minutes late to work. The next day a customer who was in the store called Ms. Bucholz to complain about the service he had received and about the claimant. As a result of that complaint Ms. Bucholz went back and reviewed surveillance records not only from the night of March 25 but also some earlier days. She discovered that the claimant was late to work and was also taking food without paying for it and was eating on the clock. Ms. Bucholz also discovered other employees committing rule infractions. Those employees were also disciplined. The claimant was not treated any differently than any other employee.

The decision was mailed to the claimant's address of record on April 10, 2015. The claimant did not receive the decision until April 29, 2015 because she did not check her post office box. The claimant filed her appeal when she received 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 in a timely fashion. Without timely 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 filed the appeal within one day of receipt. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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).

The administrative law judge is not persuaded that the claimant did not know her poor attendance record was placing her job in jeopardy. The employer had gone to the trouble to change her work schedule. The claimant is simply alleging no knowledge of the expectation she be on time to work to obtain unemployment insurance benefits.

An employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The claimant was late for work on 30 of her last 36 work shifts. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are denied.

**DECISION:**

The April 10, 2015 (reference 09) decision is affirmed. The claimant's appeal was timely. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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