

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**DIANA BERMUDEZ**  
Claimant

**HY VEE INC**  
Employer

**APPEAL 21A-UI-17258-AR-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/30/20**  
**Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.6(2) – Timeliness of Appeal

**STATEMENT OF THE CASE:**

The claimant, Diana Bermudez, filed an appeal from the June 22, 2021, (reference 03) unemployment insurance decision that denied benefits based upon the determination that the employer, Hy-Vee, Inc., discharged claimant for excessive, unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on September 29, 2021. The claimant participated personally, with testifying witness Anthony Scheffelman. The employer participated through its hearing representative, Barbara Buss, with testifying witness Lee Kenyon, and Jamie Renken, who did not testify. Claimant's Exhibits A and B were admitted. Employer's Exhibits 1 through 7 were admitted. Department's Exhibit D-1 was admitted. CTS Language Link provided language services for the claimant.

**ISSUES:**

Is the claimant's appeal timely?

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an order selector from October 16, 2019, until this employment ended on April 12, 2021, when she was discharged.

Claimant last worked on April 4, 2021. She began feeling ill and saw her doctor the following day. The doctor issued claimant a note excusing her from work until April 12, 2021. Claimant sent this note via text to the recruitment phone. This was not the appropriate way to send the note, since the employer did not see it until late in the day on April 6, 2021.

Claimant was scheduled to work April 6, 2021, at 5:00 a.m. She did not call in or report for work that morning. Her boyfriend, Scheffelman, who also works for the employer, did tell their supervisor that claimant would not be in. However, the employer has a dedicated call-in line for employees to use when they will be absent. Claimant did not call until approximately four hours after her shift had started.

Claimant had received warnings in the past for no call/no shows. These occurred on January 17, 2021, December 29, 2020, and July 19, 2020. On each occasion, the employer reviewed the attendance policy and call-in procedure with claimant. Claimant was aware of the employer's policy with respect to no call/no shows. The employer's policy dictates that employees who no call/no show three times should be terminated. Because of the April 6, 2021, incident, the employer decided to terminate claimant's employment.

A disqualifying decision was mailed to claimant on June 22, 2021. It imposed a deadline for appeal of July 2, 2021. Claimant explained that there has been trouble with her mail because she and her sister have the same first and last name. She believed the decision was delivered to her sister's house. She had little recollection regarding how much time elapsed between the time she became aware of the decision and the time at which she submitted her appeal, on August 5, 2021.

### **REASONING AND CONCLUSIONS OF LAW:**

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

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:

- (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 Data 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 appellant 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 Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant has experienced difficulty getting her mail delivered to the correct address due to the similarity of her name. Though she did not provide much detail regarding the timeline of events, because the delivery was delayed due to delay or error by the United States Postal Service, the appeal shall be accepted as timely.

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(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 Dep't of Job Serv.*, 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).

Claimant had received multiple previous warnings regarding failure to adhere to the employer's call-in policy. In each such instance, she was instructed regarding the proper procedure to use when she needed to be absent from a scheduled shift. Nevertheless, on April 6, 2021, claimant failed to employ the proper procedure in order to notify the employer of her absence. Though she apparently attempted to notify the employer of the existence of her doctor's excuse, she sent the excuse to the recruitment phone, and not to someone who would reliably see it. She did not call the absence call-in line before her shift on April 6, 2021, and instead asked Scheffelman to tell the supervisor of her absence.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented substantial and credible evidence that claimant failed to abide by its call-in procedure even after having been warned. Despite these warnings, claimant continued to engage in similar behavior. This is disqualifying misconduct.

**DECISION:**

The June 22, 2021, (reference 03) unemployment insurance decision is affirmed. Claimant's appeal is timely. The claimant was discharged from employment due to job-related misconduct. 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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Alexis D. Rowe  
Administrative Law Judge

October 5, 2021  
Decision Dated and Mailed

ar/kmj