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

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

**KARI L CANTRELL**
Claimant

**CASEY'S MARKETING COMPANY**
**CASEY'S GENERAL STORES**
Employer

**APPEAL NO. 10A-EUCU-00738-DT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 08/02/09**
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving
Section 96.6-2 – Timeliness of Appeal

**STATEMENT OF THE CASE:**

Kari L. Cantrell (claimant) appealed a representative's July 7, 2010 decision (reference 04) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Casey's Marketing Company/Casey's General Stores (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 28, 2010. The claimant participated in the hearing. Donald Zebell appeared on the employer's behalf. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant's appeal timely or are there legal grounds under which it can be treated as timely?

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

**FINDINGS OF FACT:**

The representative's decision was mailed to the claimant's last known address of record on July 17, 2010. The claimant did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by July 17, 2010, a Saturday, extended to the next working day, Monday, July 19, 2010. The appeal was not filed until it was hand-delivered to a local Agency office on August 10, 2010, which is after the date noticed on the disqualification decision. The claimant did not learn of the entry of the disqualification decision until on or about August 5, 2010, when she paid a visit to the local Agency office in response to receiving a letter issued on or about July 26, indicating she might be eligible for emergency unemployment compensation benefits on a prior claim. The local Agency office staff then informed her there was a lock on her claim due to a determination on

her separation from the employer. The office staff informed the claimant they could not take her appeal from her that day due to the office moving to a new location, but advised her to return the following week and file an appeal, which she did on August 10.

The claimant started working for the employer on October 21, 2009. She worked part-time (about 30 hours per week) as a pizza and sub cook at the employer's Urbana, Iowa store. She normally worked daytime shifts on Thursdays, Fridays, and Saturdays. Her last day of work was Friday, May 7. She was a no-call, no-show for work on Saturday, May 8. The reason she was absent was that she had overslept. Upon awakening, she realized that she was late and that, because of a warning for attendance given to her on May 6, she was likely going to be discharged. Her next regular workday would have been May 13. However, on or by May 9 the employer had determined that the claimant's employment was ended, and the claimant's hours had been removed from the schedule; the claimant learned of this on that date from her then roommate, who also worked for the employer. An assistant manager also conveyed a message to the claimant through the roommate/coworker that the claimant would need to turn in her name tags before being given her final paycheck. The claimant did go in on May 14 to pick up her paycheck, and the assistant manager did ask the claimant for her name tags.

The employer had given the claimant a final written warning for attendance on May 6, indicating that if she missed any more work she would be discharged. The warning was issued because the claimant had missed about seven days of work thus far in 2010; however, the absences were all for personal medical reasons.

**REASONING AND CONCLUSIONS OF LAW:**

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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 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). The record shows that the appellant did not have a reasonable opportunity to file a

timely appeal. She did file an appeal within ten days of actually learning of the existence of the disqualification decision.

The administrative law judge concludes that the appellant's failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993); Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that she voluntarily quit by being a no-call, no-show for work on May 8. A consecutive three-day no-call, no-show in violation of company rule can be considered to be a voluntary quit. 871 IAC 24.25(4). However, a single day no-call, no-show does not alone establish a quit. Here, the claimant did not contact the employer after May 8 because prior to the next time she was scheduled to work she had learned that her employment was ended. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code §96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate

violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer effectively discharged the claimant was her attendance. Excessive unexcused absences can constitute misconduct. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). While the final occurrence of missing work on May 8 due to oversleeping was not excused, the claimant's prior occurrences were excused as due to properly reported medical issues. Therefore, the claimant did not have excessive unexcused absences. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative's July 7, 2010 decision (reference 04) is reversed. The appeal is treated as timely. The claimant did not voluntarily quit and the employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/kjw