

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LIBERTY L CRUZ
Claimant

APPEAL NO. 09A-UI-17439-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CRINC LC
Employer

OC: 08/23/09
Claimant: Respondent (5)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
871 IAC 24.32(8) – Current Act of Misconduct
Section 96.6-2 – Timeliness of Protest
871 IAC 24.35(2) – Protest Delay

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated November 9, 2009, reference 01, that held it failed to file a timely protest regarding the claimant's separation from employment on August 25, 2009, and that allowed benefits. A telephone hearing was held on December 30, 2009. The claimant did not participate. Julie Hiatt, Accountant, participated for the employer. Employer Exhibits One and Two was received as evidence.

ISSUES:

Whether the employer protest is timely.

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered the evidence in the record, finds that: The employer did not receive the claimant's notice of claim dated and mailed August 28, 2009. When the employer received information that claimant filed a claim, it sent e-mail inquiries to the department on September 15 and October 15. The department faxed a copy of the notice of claim to the employer on October 19, and it faxed a protest on October 27.

The employer attendance policy focuses on the number of absences rather than the reason for absence. The claimant received attendance warnings on December 17, 2008, and February 17, 2009. The claimant reported to work late on August 14, and left work early due to illness. The claimant reported absences from work on August 24/25 due to illness. When the claimant reported to work on August 26, she provided a doctor's excuse for her recent illness, which was due to a thyroid problem. The employer discharged the claimant for excessive absenteeism.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

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.

871 IAC 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 department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The department shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

The administrative law judge concludes the employer affected a timely protest to the claimant's claim. The delay was due to either department or postal delivery error. When the employer received a "copy" of the notice, it faxed a protest within ten days.

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(8) provides:

(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.

871 IAC 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 administrative law judge further concludes that the employer failed to establish misconduct in the discharge of the claimant on August 26, 2009, for any current act of excessive "unexcused" absenteeism.

Absences due to properly reported illness are not misconduct. The claimant provided a doctor's excuse when she reported to work the day she was discharged to cover her recent illnesses.

DECISION:

The decision of the representative dated November 9, 2009, reference 01, is modified with no effect. The employee affected a timely protest. The claimant was not discharged for a current act of misconduct in connection with employment on August 26, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw