

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DANIEL F PEJCHL
Claimant

MIDWESTERN TRADING INC
Employer

APPEAL 23A-UI-08902-PT-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 07/30/23
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

On September 18, 2023, the claimant filed an appeal from a decision of a representative dated August 22, 2023, (reference 01) that held claimant ineligible for unemployment insurance benefits after a separation from employment. After due notice, a hearing was held on October 3, 2023. The claimant participated personally. The employer participated through Owner Rick Stickle. The administrative law judge took official notice of the administrative record.

ISSUES:

Whether claimant's appeal is timely.
Whether claimant was discharged for disqualifying, job-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for the employer on August 3, 2023. The employer discharged claimant on August 3, 2023, due to defecating on the walls and floor of a bathroom and for violations of the employer's timekeeping policies.

Claimant was employed as a full-time laborer/machine operator from July 2019, until his employment with Midwestern Trading Inc. ended on August 3, 2023. As a laborer/machine operator, claimant was responsible for performing general construction work, operating machinery, running tile, and organizing materials.

The employer has a written employee manual that includes policies on clocking-in and out of work and maintaining accurate timesheets. The employer uses an online program to track employees' time, wherein employees are required to swipe a badge each time they enter and exit a worksite. However, the policy allows employees to log into a computer and manually enter or adjust their time in certain situations, such as when a badge reader fails to register an employee's badge swipe or if an employee forgets to clock-in or out of work. Additionally, if employees need to leave work for personal reasons, the employees are required to notify their

supervisor, receive approval, and clock-out of work before leaving. Claimant was familiar with the employer's timekeeping policy.

Throughout claimant's employment, claimant struggled to comply with the employer's timekeeping policy. On numerous occasions, claimant's supervisors instructed claimant that he must start and stop work as scheduled for his shift and that claimant must clock-in and clock-out of work every time he enters and exits a jobsite. Despite receiving these verbal warnings, claimant often chose not to clock-in or out of work and, rather, chose to enter his time manually.

On August 3, 2023, claimant was sick due to his lactose intolerance and defecated on the walls and floor of the employer's restroom. Claimant did a poor job cleaning up the restroom. Claimant's supervisor discovered the mess and instructed claimant to clean the restroom, which claimant did. After cleaning the restroom, Claimant left work for an unrelated medical appointment. However, claimant did not inform his supervisor that he was leaving and he did not clock-out of work when he left the jobsite. When claimant arrived at his medical provider's office, claimant was told the appointment would need to be rescheduled to 2:30 p.m. that afternoon, so claimant returned to work.

At 2:00 p.m., claimant again left work to attend his rescheduled appointment. Claimant did not notify his supervisor that he was leaving and he did not clock-out of work when he left the jobsite as required by the employer's timekeeping policy. A short time later, an employee called and notified claimant's supervisor that he had seen claimant driving around in Cedar Rapids. Claimant's supervisor searched the jobsite and confirmed that claimant was not at work and then checked claimant's timesheet and discovered that claimant was still clocked-in. The supervisor called the human resources department and the HR director manually clocked claimant out from work. Claimant did not return to work after his appointment.

That afternoon, the owner tried calling claimant to find out why he had left work early without notifying his supervisor. However, the claimant did not answer his phone or return the owner's call. That evening, the owner texted and informed claimant that his employment was being terminated effective immediately for failing to clean his mess in the restroom and for repeated violations of the employer's timekeeping policy.

An unemployment insurance decision was mailed to the claimant's correct address of record on August 22, 2023. The claimant did not receive the decision. The decision indicated that an appeal was due by September 1, 2023. The claimant has had difficulty reliably receiving mail at his address, as his mail is often delivered to his neighbor's address. The claimant submitted an appeal on September 18, 2023, after claimant contacted his local IowaWORKS center to find out why he was not receiving unemployment insurance benefits payments and a representative at the local office informed claimant of the disqualification decision.

REASONING AND CONCLUSIONS OF LAW:

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

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

Iowa Code section 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 claimant did not have an opportunity to appeal the fact finder's decision because the decision was not received. Without notice of a decision, 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 appealed the disqualification decision on September 18, 2023, the same day he learned of the decision.

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.

Iowa Code section 96.5(2)d(14) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Reporting time on one's timecard when one is not working is theft from the employer. Theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law.

The employer has presented substantial and credible evidence that on August 3, 2023, claimant misreported his time to reflect time that he did not actually work on two separate occasions. Claimant had been warned several times about the importance of maintaining an accurate timesheet, but chose to leave work early twice without notifying his supervisor and without clocking-out. Claimant's misreporting of his time resulted in claimant being paid for time he did not actually work.

A company policy against theft is not necessary; honesty is a reasonable, commonly accepted duty owed to the employer. Claimant submitted a timecard reflecting that he should be paid for

time that he did not work. Claimant's theft was contrary to the best interests of his employer. Based on the evidence presented, the administrative law judge concludes that claimant was discharged for disqualifying, job-related misconduct. Benefits are denied.

DECISION:

The August 22, 2023, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for disqualifying, job-related misconduct. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.



Patrick B. Thomas
Administrative Law Judge

October 10, 2023
Decision Dated and Mailed

pbt/scn

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.