

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRYAN THURM
Claimant

IOWA CATHOLIC CONFERENCE
Employer

APPEAL 20A-UI-09314-J1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/05/20
Claimant: APPELLANT (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.6(2) – Timely Appeal

STATEMENT OF THE CASE:

On August 3, 2020, the claimant filed an appeal from the July 16, 2020, (reference 02) unemployment insurance decision that denied benefits based on voluntary quit. The parties were properly notified about the hearing. A telephone hearing was held on September 16, 2020. Claimant participated and was represented by attorney Joanie Grife. Employer participated through Paul Jahnke, Hearing Representative, Jeff Rusch, Director of Building and Grounds and Mary Sulantec, Human Resources.

ISSUES:

Was the appeal timely?
Did claimant commit job related misconduct?
Did claimant quit his employment?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on February 6, 2017. Claimant last worked as a full-time maintenance/custodian for the Holy Family Catholic Schools. Claimant was separated from employment on April 30, 2020, when he was terminated for having two unexcused absences. (Ex. A). Claimant and other school employees were laid off on April 6, 2020. Claimant was informed on Friday April 24, 2020 to return to work on Monday April 27, 2020. Claimant reported to work and worked that day. Claimant's work shift was generally from 7:30 a.m. until 3:30 p.m. Claimant's supervisor was Mr. Rusch. Pursuant to the employer's policy, employees were to contact their supervisor as soon as they know they will not be able to work or will be tardy. The employer's policy stated that employees can be disciplined up to dismissal for excessive unexcused absences. There is no definition of excessive absences in the company handbook. When claimant missed work and he had vacation to use, such absence was not considered unexcused.

Claimant notified Mr. Rusch via text at 1:04 a.m. that he was not able to come to work. (Ex. B, p. 2) Mr. Rusch sent a reply at 7:27 a.m. asking why claimant was not coming in to work, but was able to look for a vehicle. Mr. Rusch and Ms. Sulantec spoke to claimant later that day and told him his absence was unexcused. On April 29, 2020 claimant sent a text to Mr. Rusch at 1:19 a.m. saying he was having domestic problems. At 6:47 claimant texted Mr. Rusch that he was not able to come into work as he did not have a ride. (EX. B, p. 3) Mr. Rusch texted claimant to have him call at 2:20 p.m. At 3:30p.m. Mr. Rusch sent a text terminating claimant effective immediately. (Ex. B, p. 4) Claimant was sent a letter of termination on April 30, 2020. (Ex. A) The employer considered the two days that claimant missed April 28 and April 29, 2020 as unexcused as the claimant no longer had vacation or paid time off.

Claimant had received a warning on March 12, 2020 for a No Call/No Show that occurred on March 11, 2020. On March 21, 2019 claimant received a warning that he had exceeded his vacation and time off.

The fact finding decision was mailed to claimant in Wisconsin. Claimant had moved to Florida and left a forwarding address with the USPS. Claimant received the forwarded fact finding decision on July 30, 2020, contacted his attorney on July 31, 2020 and filed an appeal on August 3, 2020.

REASONING AND CONCLUSIONS OF LAW:

The first issue to determine is whether claimant's appeal is timely. Iowa Code section 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 issuing the notice of the filing of the claim to protest payment of benefits to the claimant. All interested parties shall select a format as specified by the department to receive such notifications. 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, subsections 10 and 11, 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 issued, 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.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge has no authority to change the decision of

representative if a timely appeal is not filed. *Franklin v. Iowa Dept. Job Service*, 277 N.W.2d 877, 881 (Iowa 1979). The ten-day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. *Messina v. Iowa Dept. of Job Service*, 341 N.W.2d 52, 55 (Iowa 1983); *Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. E.g. *Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Employment Sec. Commission*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Employment Sec. Commission*, 212 N.W.2d 471 (Iowa 1973). The question of whether the Claimant has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which states that “the submission of any ...appeal...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 fact finding decision was sent to claimant’s address in Wisconsin. Claimant had moved to Florida and did not receive the fact finding decision until July 30, 2020. The fact finding decision was forwarded to claimant as he filed a change of address notice with the USPS. Claimant contacted his attorney in Iowa who filed an appeal on August 3, 2020. The attorney filed an appeal promptly after learning that his claimant had been denied.

I find that the appeal is timely.

Iowa Code section 96.5(2)a 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:
 - a. The disqualification shall continue 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 to prove the claimant was discharged for job-related misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer made the correct decision in ending claimant's employment, 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 justifying termination of an employee and misconduct warranting denial of unemployment insurance benefits are two different things. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence is not misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). 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).

Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

In order for a claimant's absences to constitute misconduct that would disqualify claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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.

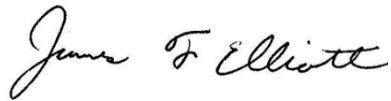
Infante v. Iowa Dep't of Job Serv., 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial."

The evidence in the record establishes a discharge for unexcused absences on April 28 and 29, 2020. The record does not establish a history of excessive unexcused absences. While there was a warning for a one day No Call/No Show in March 2020, the employer failed to prove that claimant had excessive unexcused absences. There was not a significant history of unexcused absences. I find the claimant was discharged for no disqualifying reason.

DECISION:

Regular Unemployment Insurance Benefits Under State Law

The July 16, 2020, (reference 02) unemployment insurance decision is reversed. Benefits are payable, provided claimant is otherwise eligible. The claimant's appeal is timely.



James F. Elliott
Administrative Law Judge

September 18, 2020
Decision Dated and Mailed

je/scn