

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**LUIS CRESPO**  
Claimant

**CENTRUM VALLEY FARMS LLP**  
Employer

**APPEAL 20A-UI-09856-J1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 12/29/19  
Claimant: APPELLANT (2)**

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

**STATEMENT OF THE CASE:**

On August 20, 2020, the claimant filed an appeal from the January 28, 2020, (reference 01) unemployment insurance decision that denied benefits based on violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was held on September 23, 2020. Claimant participated. Claimant's primary language is Spanish although he has a basic knowledge of English. Employer participated through Norma Limon, Senior HR Manager.

**ISSUES:**

Did claimant file a timely appeal?  
Did claimant commit job related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on October 29, 2019. Claimant last worked as a full-time driver Claimant would drive a truck for the employer's egg business. Claimant would drive daily. He was not an over the road truck driver. As a condition of employment claimant was required to have a valid commercial driver's license (CDL). Claimant was separated from employment on December 16, 2020. Ms. Limon testified claimant was terminated for a number of reasons including No/Call/No Show, destruction of company property, loss of his driver's license, a prior warning about texting and driving and attendance issues. The employer has a three day No Call/No Show policy that holds that failure to call or show up for three consecutive days is abandonment of a job.

Ms. Limon did not have any specifics on the destruction of property other than it was electrical and air hoses and claimant lost a radio at some point. Ms. Limon testified that claimant was a No Call/No Show on December 12, 13 and 14, 2019 and was terminated on December 16, 2019. Ms Limon testified that claimant called Mr. Bowman on December 12, 2019 to tell Mr. Bowman about his license problem.

Claimant's last day at work was on December 12, 2019. On that day claimant received a letter from the Iowa Department of Transportation telling him his CDL was suspended due to payment of fines. Claimant called his supervisor Mike Bowman and told him that his license was being suspended and he was going to get the matter straightened out. Claimant testified that he spoke to Mr. Bowman on every day he was scheduled to work concerning the status of his license. On Tuesday December 17, 2019 claimant had his CDL restored. The claimant was improperly identified as an individual who owed fines and his license was restored. Claimant testified that the electrical and air hoses on a truck and trailer were damaged when he made a tight turn and the hoses were too short. Claimant testified he informed his supervisor when he was unable to come to work.

Claimant moved to his current address in January 2020. Claimant did not receive the fact finding decision as it was sent to his prior address. After claimant spoke to a representative of Iowa Workforce Development and found out his claim was denied he filed an appeal.

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

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.

Iowa Code section 96.6(2) provides, in pertinent part:

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. . . . 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.

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 fact finding decision was sent to a prior address of claimant, 202 12<sup>th</sup> Ave, rather than his address of 1291 Quail Ave. and claimant did not receive the fact finding decision the he did

The claimant's primary language is Spanish and there was no indication claimant had been informed about his rights concerning unemployment insurance benefits in Spanish. The fact finding decision was in English. The appellant did not have an opportunity to appeal the fact-finder's decision because the decision was not received in his primary language. 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) and 29 CFR § 38.9 and *Unemployment Insurance Program Letter No. 02-16 Change 1*, May 11, 2020.

I find the claimant's appeal timely.

The next issue to determine is whether claimant voluntarily quit his employment. I find he did not.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Claimant called his supervisor on December 12, 2019 and informed the employer of his CDL issues. Claimant called his supervisor each day he was scheduled to work. The claimant was not a No Call/No Show for three consecutive days.

The next issue is whether claimant committed job related misconduct. I find claimant did not commit job related misconduct.

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.

Iowa Admin. Code r.871-24.32(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.

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 loss of a CDL has been held to be misconduct. I find in this case an employee has lost the CDL due to driving under the influence (DUI) or other deliberate actions that caused the loss of the CDL. In this case claimant learned of a problem concerning his CDL on Thursday, December 12 and had it straighten out and his license restored by Tuesday December 17, 2019. Claimant was not at fault for the mix up and acted very promptly to fix his problem. The temporary loss of his CDL is not misconduct.

The employer's other allegations of misconduct are not substantial nor is there a current act of misconduct. The employer did not provide evidence of when the property damage occurred. Claimant credibly testified that he was not at fault for the property damage. The evidence in the record establishes a discharge for no disqualifying reason.

**DECISION:**

**Regular Unemployment Insurance Benefits Under State Law**

I find the claimant's appeal was timely. The January 28, 2020, (reference 01) unemployment insurance decision is reversed. Benefits payable, provided claimant is otherwise eligible.



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James F. Elliott  
Administrative Law Judge

September 28, 2020  
Decision Dated and Mailed

je/scn