

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**THUAN PHU**  
Claimant

**APPEAL NO. 08A-UI-05088-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WELLS DAIRY INC**  
Employer

**OC: 04/20/08 R: 01**  
**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge  
Section 96.6-2 – Timeliness of Appeal

**STATEMENT OF THE CASE:**

Thuan Phu (claimant) appealed a representative's May 13, 2008 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Wells Dairy, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 11, 2008. The claimant participated in the hearing. Jacqueline Jones of TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Kristine Comstock and Mike Strasner. 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?

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The representative's decision was mailed to the claimant's last-known address of record on May 13, 2008. The claimant received the decision on or about May 16. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 23, 2008. The appeal was not filed until it was postmarked on May 27, 2008, which is after the date noticed on the disqualification decision.

The claimant had taken the representative's decision to his local Agency office on or before May 23; he requested and had been given an appeal form. He requested that the local office either fax or mail the form to the Appeals section on that day, but was told the office could not do that, that the claimant needed to mail the appeal himself. The claimant requested and was given an envelope with which he could mail the form. The claimant then took the form, put it in the envelope, and left the local office, went and purchased a stamp that he applied to the envelope, and placed the envelope into a United States Postal Service drop box.

The claimant started working for the employer on November 21, 2005. He worked full time as a freezer specialist. His last day of work was April 18, 2008. The employer was going to discharge him on April 21, but the claimant did not return to work after April 18, as he realized he was going to be discharged. The employer mailed the claimant's discharge notice to him on April 24. The reason asserted for the discharge was excessive absenteeism.

As of April 5, due to a schedule change at the claimant's request, his regular schedule was 4:25 a.m. to 2:00 p.m. Monday through Friday and 4:30 a.m. to 5:00 p.m. on Saturday. He had previously worked on a second shift. The employer's policy provides for discharge after a ninth attendance occurrence. The claimant had already incurred nine attendance occurrences prior to transferring to the first shift on April 5; he had sought the first shift in hopes it would reduce the likelihood of an additional occurrence. His prior occurrences were primarily due to illness on the part of his girlfriend, so that the claimant would stay home to care for their child, although some of the occurrences were for personal reasons; the final occurrence prior to April 19 was a tardy on March 16, which was due to being pulled over for a traffic violation on the way to work. The employer gave him a final warning after that occurrence.

On April 19 the claimant overslept, and as a result arrived at the employer's plant at least two minutes late for the start of his shift. He considered going in and proceeding to work, but was unable to enter the facility because he did not have his entry badge with him, as his supervisor had failed to return it to him on April 14 when the claimant returned to work after a suspension for a lock-out/tag-out violation, and he was late enough that there was no one else entering who could allow him to enter with them. As he realized the tardy would be a final occurrence, he went home and did not seek to contact the employer and did not seek to return to work on April 21.

#### **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.

The administrative law judge concludes that pursuant to 871 IAC 24.35(2) the failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation in not processing the claimant's appeal as he had requested while in the local Office or delay or other action of the United States Postal Service in not properly emptying or postmarking the mail from the deposit box. 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 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); Iowa Code § 96.5-2-a.

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 which 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 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. 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).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). Tardies are treated as absences for purposes of unemployment insurance law. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The presumption is that oversleeping is generally within an employee's control. Higgins, supra. The claimant's final occurrence was not excused and was not due to illness or other reasonable grounds. The claimant had previously been warned that future absences could result in termination. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct.

**DECISION:**

The representative's May 13, 2008 decision (reference 01) is affirmed. The appeal in this case is treated as timely. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of April 19, 2008. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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