

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

CANDICE M MCLAUGHLIN
Claimant

OTTUMWA DEVELOPMENTS INC
Employer

APPEAL 23A-UI-05812-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/18/22
Claimant: Appellant (2)**

Iowa Code § 96.6(2) – Timely Appeal
Iowa Code § 96.5(2)a – Discharge
Iowa Code § 96.4(3) – Able to and Available for Work

STATEMENT OF THE CASE:

Candice M. McLaughlin, the claimant/appellant,¹ filed an appeal from the Iowa Workforce Development May 23, 2023 (reference 03) unemployment insurance (UI) decision. The decision denied Ms. McLaughlin REGULAR (state) UI benefits because IWD concluded that the employer discharged her from work on April 27, 2023 for excessive unexcused absences and tardies after the employer had warned her. The Iowa Department of Inspections and Appeals (DIA) UI Appeals Bureau mailed a notice of hearing to Ms. McLaughlin and the employer. The undersigned administrative law judge held a telephone hearing on June 27, 2023. Ms. McLaughlin participated personally. The employer participated through Ron Stursma, administrator. The undersigned took official notice of the administrative record.

ISSUES:

Did Ms. McLaughlin file her appeal on time?

Did the employer discharge Ms. McLaughlin from employment for disqualifying, job-related misconduct?

Is Ms. McLaughlin able to and available for work?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the undersigned finds: IWD mailed the May 23, 2023, (reference 03) UI decision to Ms. McLaughlin at her correct address. The UI decision states that it becomes final unless an appeal is postmarked or received by the IWD Appeals Section by June 2, 2023.

On June 1, 2023, IWD mailed Ms. McLaughlin another UI decision. This decision, a reference 04 UI decision, allowed Ms. McLaughlin UI benefits as of May 7, 2023 because IWD concluded that she was available for work. The appeal deadline in this decision was Sunday, June 11, 2023. If the appeal deadline falls on a Saturday, Sunday, or legal holiday, the appeal period is extended to the next working day. So, the appeal deadline was extended to Monday, June 12.

¹ Claimant is the person who filed the UI claim with IWD. Appellant is the person or employer who filed the appeal.

Ms. McLaughlin received the reference 04 UI decision – the one that allowed her UI benefits – on, or about, Friday, June 2. Ms. McLaughlin received the reference 03 UI decision – the one that denied her UI benefits – on, or about Saturday, June 3. Ms. McLaughlin went to the IWD office in Ottumwa on Monday, June 5 because she was confused. The IWD representative told Ms. McLaughlin that she could file an appeal. Ms. McLaughlin filed an appeal online on June 5, 2023. The DIA UI Appeals Bureau received Ms. McLaughlin's appeal the same day.

The undersigned further finds: Ms. McLaughlin began working for the employer in January 2023. She worked as a full-time certified nursing assistant (CNA). Her employment ended on April 27, 2023.

Ms. McLaughlin called in on April 26 because she was shaking due to blood pressure being high. The employer's policy requires employees to call in absences to the nurse's station at least four hours before their shift. Ms. McLaughlin followed this policy on April 26. On April 27, the employer terminated Ms. McLaughlin's employment.

Ms. McLaughlin is not able to lift much or walk very far due to her medical conditions. Ms. McLaughlin's doctor has advised her to stop working as a CNA because that job is not good for her health. The doctor has advised Ms. McLaughlin to work in a less stressful job that does not involve lifting.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the undersigned concludes Ms. McLaughlin filed her appeal of the May 23, 2023 (reference 03) UI decision on time.

Iowa Code § 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:

2. 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:
 - (2) 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 undersigned has no authority to change the decision of a representative if a timely appeal is not filed.² Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid.³

Ms. McLaughlin received the May 23, 2023 (reference 03) UI decision after the appeal deadline so she could not have filed an appeal by the deadline. The notice provision of the decision was invalid. Ms. McLaughlin filed her appeal about two days after she received the decision. Ms. McLaughlin filed her appeal on time.

The undersigned further concludes the employer discharged Ms. McLaughlin from employment for a reason that does not disqualify her from receiving UI benefits.

Iowa Code section 96.5(2)(a) and (d) provide, in relevant part:

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.

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 such 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.

...

(9) Excessive unexcused tardiness or absenteeism.

Iowa Admin. Code r. 871-24.32(7) and (8) provide:

² *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979).

³ *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).

(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.

(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.

The purpose of subrule eight is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises.

The employer has the burden of proof in establishing disqualifying job misconduct.⁴ The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.⁵ Misconduct must be "substantial" to warrant a denial of job insurance benefits.⁶

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. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation of the employer's policy or rule is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The most recent incident leading to the employer ending Ms. McLaughlin's employment must be a current act of misconduct to disqualify her from receiving UI benefits. The most recent act for which the employer terminated Ms. McLaughlin's employment was because she called in on April 26 due to a medical issue. Calling in sick and properly reporting the absence to the employer is not misconduct. The employer has not established a current act of misconduct on the part of Ms. McLaughlin.

The undersigned also concludes that Ms. McLaughlin is able to and available for work.

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

⁴ *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

⁵ *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

⁶ *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Iowa Admin. Code r. 871-24.22(1) provides:

Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides.

To be able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood."⁷ "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides."⁸ A person claiming benefits has the burden of proof that she is able to work, available for work, and earnestly and actively seeking work.⁹

Ms. McLaughlin has established that she is able to and available for work. Although Ms. McLaughlin's doctor advised her to work in a less stressful job than the CNA job, she is able to work in some gainful employment. Since Ms. McLaughlin is able to and available for work and the employer has not established a current act of misconduct on the part of Ms. McLaughlin, UI benefits are allowed.

⁷ *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1).

⁸ *Sierra* at 723.

⁹ Iowa Admin. Code r. 871-24.22.

DECISION:

Ms. McLaughlin filed her appeal of the May 23, 2023 (reference 03) UI decision on time. The May 23, 2023 (reference 03) UI decision is REVERSED. The employer discharged Ms. McLaughlin from employment for a reason that does not disqualify her from receiving UI benefits and Ms. McLaughlin is able to and available for work. Benefits are allowed, as long as no other decision denies her UI benefits. Any benefits claimed and withheld on this basis must be paid.



Daniel Zeno
Administrative Law Judge

June 30, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with this 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 adquiera 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.