

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RENSON A AQUASVIVA
Claimant

APPEAL NO. 12A-UI-06213-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCHENKER LOGISTICS INC
Employer

OC: 01/01/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated March 7, 2012, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on June 21, 2012. The parties were properly notified about the hearing. The claimant participated in the hearing. Janelle Johnston participated in the hearing on behalf of the employer. Exhibit A-1 was admitted into evidence at the hearing.

ISSUES:

Did the claimant file a timely appeal?

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked for the employer as a forklift driver from April 6, 2009, to December 26, 2011. The claimant was informed and understood that under the employer's work rules, employees were required to notify the employer if they were not able to work as scheduled and were subject to discharge after receiving 10 attendance points.

As of December 26, 2011, the claimant had accumulated 8 attendance points. The claimant was sick and unable to work on December 29 and 30. He called in properly and notified the employer that he was not able to work.

After the claimant called in on December 30, his supervisor, Kent Van Gilder, called and left a message for the claimant stating that he had just "pointed out" and there was nothing Van Gilder could do for him. The claimant was discharged on December 30, 2011, for exceeding the 10-point limit of the employer's attendance policy.

An unemployment insurance decision was mailed to the claimant's last known address of record on March 7, 2012. The decision concluded he had been discharged for work-connected misconduct and stated the decision was final unless a written appeal was postmarked or received by the Appeals Section by March 17, 2012.

The claimant received the decision within the ten-day period for appealing the decision. He filed a written appeal on March 14, 2012. For some reason, the appeal was not received by the Appeals Bureau. The claimant inquired about the status of his appeal at the end of May 2012, and when he discovered the appeal had not been received, he filed a second appeal on May 23, 2012.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant filed a timely appeal.

The law states that an unemployment insurance decision is final unless a party appeals the decision within ten days after the decision was mailed to the party's last known address. Iowa Code § 96.6-2. The claimant filed his appeal on time, but due to an Agency error or delay or other action of the United States Postal Service the appeal was not received, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. The appeal is deemed timely.

The next issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent, or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The unemployment insurance rules provide that 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. 871 IAC 24.32(7). In addition, the rules state that 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. 871 IAC 24.32(8).

The claimant's final absences were due to legitimate illness and he called in properly. No current act of work-connected misconduct has been proven in this case.

DECISION:

The unemployment insurance decision dated March 7, 2012, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/kjw