

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDSEY M SIEMENS
Claimant

APPEAL NO. 14A-UI-02111-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CBE COMPANIES INC
Employer

OC: 01/19/14
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Lindsey Siemens (claimant) appealed a representative's February 10, 2014, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with CBE Companies (employer) for excessive unexcused absenteeism and tardiness after being warned. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 18, 2014. The claimant participated personally. The employer participated by Tami Bartz, Director of Operations; Megan Dean, Manager of Operations; and Mary Phillips, Senior Vice President of Human Resources. Exhibit D-1 was received into evidence. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 2, 2011, as a full-time collector. The claimant signed for receipt of the employer's handbook. The claimant understood she would be terminated if she received three written warnings for attendance in a six-month period. On August 28, 2013, the employer issued the claimant a verbal warning for attendance issues. On October 15, 2013, the employer issued the claimant a written warning for accumulating 30 attendance points for taking long breaks/lunches, missing punches, and taking unscheduled paid time off. On November 6, 2013, the employer issued the claimant a verbal warning for performance issues. On November 7, 2013, the employer issued the claimant a verbal warning for improperly reporting an absence. On December 4, 2013, the employer issued the claimant a written warning for improperly reporting an absence. The employer notified the claimant that further infractions could result in termination from employment.

On January 22, 2014, the claimant was supposed to start her shift at 9:30 a.m. She called the employer at 11:30 a.m. and said she overslept. She appeared for work at 12:00 p.m. Later that day the employer issued the claimant a third written warning and termination.

A disqualification decision was mailed to claimant's last-known address of record on February 10, 2014. She did receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 20, 2014. The appeal was not filed until February 21, 2014, which is after the date noticed on the disqualification decision because the fax would not go through on February 20, 2014. The claimant faxed her appeal on February 21, 2014.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

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 mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. 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, subsection 10, 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 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. 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.

The claimant's appeal shall be accepted as timely because the fax would not go through on the last day the appeal was due. The claimant faxed her appeal on the next possible day.

The next issue is whether the claimant was discharged for misconduct. The administrative law judge concludes she was.

Iowa Code section 96.5-2-a provides:

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.

871 IAC 24.32(7) provides:

(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.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The February 10, 2014, reference 01, decision is affirmed. The claimant's appeal is timely. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs