IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

VERLIN T HILL
733 E JEFFERSON
WASHINGTON IA 52353

TYSON FRESH MEATS INC
C/O TALX UC EXPRESS
P O BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-10202-RT
OC: 07/18/04 R: 03
Claimant: Appellant (4)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting
Section 96.6-2 – Initial Determination (Timeliness of Appeal)

STATEMENT OF THE CASE:

The claimant, Verlin T. Hill, filed an appeal from an unemployment insurance decision dated August 19, 2004, reference 02, denying unemployment insurance benefits to him because he was not able and available for work because he requested and was granted a leave of absence. After due notice was issued, a telephone hearing was held on October 14, 2004 with the claimant participating. Kristi Travis, Employment Manager, participated in the hearing for the employer, Tyson Fresh Meats, Inc. Department Exhibit One was admitted into evidence. This appeal is consolidated with appeal number 04A-UI-10203-RT for the purposes of the hearing with the consent of the parties. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit One, the administrative law judge finds: An unemployment insurance decision dated August 19, 2004, reference 02, determined that the claimant was not eligible to receive unemployment insurance benefits because he was not able and available for work because he requested and was granted a leave of absence, and benefits were denied as of July 18, 2004. That decision was sent to the claimant on August 19, 2004 and received by the claimant before September of 2004. That decision indicated that an appeal had to be postmarked or otherwise received by the Appeals Section by August 30, 2004 (the decision stated August 29, 2004, but since that was a Sunday, the appeal would be due the next business or working day). The claimant attempted to appeal that decision by a letter postmarked September 18, 2004, as shown at Department Exhibit One, which was 19 days late. The reason that the appeal was late was that the claimant was not going to appeal the decision because he was on a leave of absence, but decided to appeal later because he separated from his employment, as noted below.

Although the administrative law judge hereinafter concludes that the claimant's appeal was late, there is another issue before the administrative law judge concerning whether the claimant's separation from this employment on September 3 or September 7, 2004 was disqualifying. There is no timeliness of appeal issue concerning this issue, and the issue was set out on the notice sent to the parties. The administrative law judge has jurisdiction to decide that issue, and, as a result, further finds: The claimant was employed by the employer as a full-time maintenance mechanic from September 23, 2003 until he was separated from this employment on September 7, 2004. On or about July 19 or July 20, 2004, the claimant requested a leave of absence to take care of his pregnant wife who was going through a dangerous pregnancy and was put on bed rest. The claimant was approved for a leave of absence from July 21, 2004 through August 23, 2004. However, the wife's physician extended the need for the claimant to take care of her, and extended the family medical leave. On August 22, 2004, the claimant called the employer and spoke to Chris Hall. The claimant explained that he needed to extend his leave through September 7, 2004. Ms. Hall told the claimant that she needed the updated paperwork from the physician. She told the claimant that she would give him one week to bring in the paperwork. Ms. Hall told the claimant that if the employer did not receive the paperwork, she would do something about reinstating the leave. The claimant informed Ms. Hall that he would bring in the physician's paperwork when he returned to work. The claimant was busy tending to his wife and had no chance to deliver the paperwork until he was ready to return to work on September 7, 2004. On that date, the claimant returned to work with the physician's paperwork for the leave extension, but was informed that he had been terminated because he had not returned to work after the leave of absence. The employer treated this as a discharge. The employer sent the claimant no letter informing him that he would be terminated or discharged if he did not return to work or provide additional paperwork. The claimant did get a letter in the mail indicating that his insurance was cancelled, but he believed that was because he was on a leave of absence and thought once he retuned to work he could get that straightened out. It is customary for the employer to send a letter to an employee who has failed to return from a leave of absence informing the employee that he or she needs to return to work or provide additional paperwork, but the employer did not do so in this case. The employer was, at all material times hereto, aware of the claimant's need for the time off and the reason for his leave of absence. The employer did extend the claimant's leave to August 27, 2004, expecting the claimant to return on August 30, 2004, and when the claimant did not, the employer showed the claimant as being a no-call/no-show until September 7, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant filed a timely appeal of the decision dated August 19, 2004, reference 02, or, if not, whether the claimant demonstrated good cause for such failure. The claimant's appeal is not timely, and the claimant has not demonstrated good cause for the delay in the filing of his appeal, and, as a consequence, the claimant's appeal is not accepted, and the administrative law judge does not have jurisdiction to reach the issue in the decision from which the claimant seeks to appeal.

2. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he was not able, available, and earnestly and actively seeking work through September 7, 2004. The administrative law judge does not have jurisdiction to reach that issue.

3. Whether the claimant's separation from employment was a disqualifying event. The administrative law judge has jurisdiction to decide that issue and determines that the separation was not a disqualifying event.

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 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 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 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).

(1) The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that the claimant has the burden to prove that his appeal was timely or that he had good cause for the delay in the filing of his appeal. The administrative law judge concludes that he has not met his burden of proof to demonstrate by a preponderance of the evidence either that his appeal was timely or that he had good cause for the delay in the filing of his appeal. On its face, as shown at Department Exhibit One, the claimant's appeal is 19 days late. The claimant testified that he was late in filing his appeal because initially he did not intend to appeal because he was on a leave of absence and was not working. When the claimant was separated from his employment, he then attempted to appeal that decision for this is not good cause attributable to the employer. Accordingly, the administrative law judge concludes that the attempted appeal of the decision dated August 19, 2004, reference 02, is not timely, and the claimant has not demonstrated good cause for the delay in the filing of the appeal. Therefore, the administrative law judge concludes that the appeal should not be accepted and that he lacks jurisdiction to made a determination with respect to that decision. The administrative law judge concludes that the representative's decision of August 19, 2004, reference 02, should remain in full force and effect through September 7, 2004, and, as a consequence, the claimant is ineligible to receive unemployment insurance benefits through September 7, 2004 because he is, and was until that time, not able, available and earnestly and actively seeking work because he was on a voluntary leave of absence.

The administrative law judge notes that even if he had jurisdiction to determine whether the claimant was ineligible to receive unemployment insurance benefits through September 7, 2004, the administrative law judge would be constrained to conclude that the claimant was ineligible to receive unemployment insurance benefits for that period of time because the evidence establishes that he was on a requested leave of absence extended to September 7, 2004, when the claimant returned to work, and the claimant was not able and available for work and not earnestly and actively seeking work until he returned to work.

Iowa Code Section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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(1)a, (7) provide:

> 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

> (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 parties testified that the claimant was discharged, but they disagreed on the dates. The employer's witness, Kristi Travis, Employment Manager, testified that the claimant was discharged on September 3, 2004, when he did not return to work after a leave of absence. The claimant testified that he was discharged on September 7, 2004, when he returned to work

and learned that he had been terminated. The administrative law judge concludes that the claimant was discharged on September 7, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Ms. Travis testified that the claimant was discharged when he failed to return from a leave of absence on August 30, 2004. The claimant testified that he had called the employer on August 22, 2004, the day before his initial leave of absence was to expire on August 23, 2004, and informed the employer that he needed to extend the leave of absence to September 7, 2004. Ms. Travis testified that the claimant was told that he needed to provide proper paperwork from his wife's physician for the extension of the leave of absence before it would be granted. The claimant testified that he was told something to the effect that he had a week to do so, and then if not, he would be reinstated through September 7, 2004. The claimant believed that he had an extension of his leave of absence until September 7, 2004. This is somewhat confirmed by the testimony of Ms. Travis, who testified that the employer did extend the claimant's leave of absence through August 27, 2004, and expected the claimant to return on August 30, 2004. The employer did then extend the claimant's leave of absence; the difference being the duration of the extension. Because the employer did extend the claimant's leave of absence, the administrative law judge concludes that the claimant was justified in believing that his leave of absence would be extended through September 7, 2004. He testified that on August 22, 2004, he told the employer that he would bring the required paperwork to the employer when he returned to work on September 7, 2004. The claimant did so, but was discharged on that date, September 7, 2004, when he did return to work. The claimant further testified that he was quite busy during the extended medical leave taking care of his wife and did not have time to deliver the paperwork as necessary and had already informed the employer that he would do so when he returned to work. Under these circumstances, the administrative law judge is constrained to conclude that the claimant's behavior in not providing the appropriate paperwork to the employer prior to September 7, 2004 was not a deliberate act constituting a material breach of his duties and obligations arising out of his worker's contract of employment nor did it evince a willful or wanton disregard of the employer's interests nor was it carelessness or negligence to such a degree of recurrence as to establish disqualifying misconduct. At the most, the claimant's failure was ordinary negligence in an isolated instance and not disqualifying misconduct.

Ms. Travis testified that the claimant was absent as a no-call/no-show from August 30, 2004 until he returned to his work on September 7, 2004. The claimant may well have been absent, but he had justifiable reason for doing so, as noted above. Further, the employer was, at all material times hereto, aware of the need for the claimant's leave of absence and the reasons therefore. The claimant called and informed the employer on August 22, 2004 that he was going to need to be off work until September 7, 2004. Accordingly, the administrative law judge concludes that the claimant's absences were for reasonable cause and properly reported and were not excessive unexcused absenteeism and not disqualifying misconduct.

In summary, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct, and, as a consequence, he is not disqualified to receive

unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant beginning September 7, 2004, or beginning with the benefit week ending September 11, 2004, provided he is otherwise eligible. The administrative law judge notes there is no evidence that the claimant was not able and available for work the majority of the benefit week ending September 11, 2004 being able and available for work from and after September 7, 2004.

The more customary situation in this case is that the claimant left his employment voluntarily when he failed to return from a leave of absence. Even assuming that the claimant's separation was a voluntary quit, the administrative law judge would conclude that the claimant is not disqualified to receive unemployment insurance benefits because he left his employment for the necessary and sole purpose of taking care of a member of his immediate family, and when that family member had recovered, the claimant immediately returned to the employer and offered to go back to work, on September 7, 2004, and no work was available for the claimant. See Iowa Code Section 96.5(1)(c).

DECISION:

The representative's decision of August 19, 2004, reference 02, is modified. The claimant, Verlin T. Hill, is entitled to receive unemployment insurance benefits beginning September 7, 2004, or beginning with the benefit week ending September 11, 2004, and continuing thereafter because he was discharged, but not for disqualifying misconduct. He was also able and available and seeking work after that time. The claimant is not entitled to receive unemployment insurance benefits through and including the benefit week ending August 14, 2004 because he was not able, available or earnestly and actively seeking work, and his appeal of the decision in that regard to the extent that he was disqualified to receive unemployment insurance benefits through the benefit week ending September 3, 2004, was not timely, and the claimant has not demonstrated good cause for the delay in the filing of his appeal.

shar/kjf