

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOEL HERNANDEZ
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 22A-UI-03374-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 02/28/21
Claimant: Appellant (1)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

On January 19, 2022, the Claimant/appellant filed an appeal from the May 5, 2021, (reference 02) unemployment insurance decision that denied benefits based on claimant voluntarily quitting on December 7, 2020, for personal reasons. The parties were properly notified about the hearing. A telephone hearing was held on March 4, 2022. The hearing was held together with appeals 22A-UI-03374-CS-T and 22A-UI-03376-CS-T and combined into one record. Claimant participated through CTS Language Link Spanish Interpreter, Hared (Identification No. 12957). Employer participated through Human Resources Coordinator, Aye Nu Win. Administrative notice was taken of claimant's unemployment insurance benefits records.

ISSUES:

- I. Is claimant's appeal timely?
- II. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An unemployment insurance decision was mailed to the claimant's last known address of record on May 7, 2021. Claimant did not receive the document. The first notice of disqualification was the overpayment decision dated September 30, 2021. Claimant does not read English. In November 2021, claimant took the overpayment decisions (ref. 04 and 05) to his friend so he could read them to him. Claimant's friend informed him that he needed to contact Iowa Workforce Development and appeal the decisions. Claimant's friend did not inform him that he needed to appeal it within ten days of the decision. In December 2021, claimant took the overpayment decisions to his local Iowa Workforce and a Spanish Interpreter read the document to claimant and informed him he needed to appeal the decision. Claimant filed an appeal of the decision on January 19, 2022.

Claimant began working for employer on January 26, 2004. Claimant last worked as a full-time laborer. Claimant was separated from employment on March 16, 2021, when he was terminated after being put on a suspension for violation of employer's attendance policy.

Claimant notified employer that his wife was ill and that he needed to go to Mexico to be with her. The claimant did not know how long he would be gone because he did not know how long his wife would need his assistance after her surgery. The employer agreed claimant could leave work and go to Mexico to care for his wife. The employer required claimant to call in each day that he was gone. The claimant called in each day that he was absent. Claimant had accumulated vacation time that ran out on December 7, 2020.

Claimant returned to the employer on or about February 18, 2021. The employer sent him home and told him they would notify him if he could return to work. On February 26, 2021, employer put claimant on a suspension due to him accumulating 74.5 attendance points. Claimant did not receive a phone call from the employer so he filed for benefits with an effective date of February 28, 2021. On March 16, 2021, the employer terminated claimant for accumulating too many attendance points.

The claimant had not prior verbal or written warnings about his attendance.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal is untimely.

Iowa Code § 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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the appellant did have a reasonable opportunity to file a timely appeal. The claimant became aware that he was disqualified from benefits when he received the overpayment decisions. Claimant's friend told him he need to appeal the decisions. In December 2021, claimant spoke to an Iowa Workforce Development Representative that also told him he needed to appeal the decisions. Claimant did not appeal the decisions until January 19, 2022. This is past the ten days that is allowed for a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The May 7, 2021, (reference 02) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.



Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

March 25th 2022
Decision Dated and Mailed

cs/rs

NOTE TO CLAIMANT: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.