

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRANDI L ROBERTSON
Claimant

CASEY'S MARKETING COMPANY
Employer

APPEAL 23A-UI-08550-AR-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/30/23
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871—24.10 – Employer/Representative Participation Fact-finding Interview
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

On September 7, 2023, the employer filed an appeal from the May 30, 2023, (reference 02) unemployment insurance decision that allowed benefits based on the determination that claimant was discharged from employment without a showing of disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on October 4, 2023. Claimant, Brandi L. Robertson, participated. Employer, Casey's Marketing Company, participated through Valeu NSN Operations Manager Jennifer Juarez and District Manager Adam Badgley. Department's Exhibit D-1 was admitted. The administrative law judge took official notice of the administrative record.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on July 21, 2021. Claimant last worked as a full-time floating store manager. Claimant was separated from employment on April 28, 2023, when she was discharged. Claimant worked 7:00 a.m. to 4:00 p.m., Monday through Friday.

Claimant last worked on April 19, 2023. On April 20, 2023, she suffered a miscarriage. She attempted to reach out to Badgley, her supervisor, by text message prior to the start of the shift, around 6:30. She told him she was going to the hospital because she was concerned about her pregnancy. The text apparently never went through. The employer's records reflect that claimant was a no call/no show for her shift on April 20, 2023. On April 21, 2023, virtually the same sequence of events occurred. Claimant attempted to reach Badgley by text message to

let him know that she suffered a miscarriage and would not be in to work. She attempted to text before the start of her shift. The text did not go through, and the employer's records indicate that claimant was a no call/no show for April 21, 2023. On April 24, 25, 26, and 27, claimant texted Badgley in advance of her shift to inform him that she would not be coming to work. At some point, Badgley reached out to claimant and told her that text messaging was not an appropriate way of letting him know she would be absent. However, claimant was struggling after the upsetting medical event of the week before and did not feel she could place a phone call. On April 28, 2023, claimant again reached out to Badgley via text, but the text did not go through. The employer's records reflect the third no call/no show for claimant on April 28, 2023. Because the employer's policies dictate that three no call/no shows will result in discharge, claimant was discharged from employment on April 28, 2023. She was not informed of this immediately. At some point, she went to one of her stores for a shift and was told she needed to call Badgley. Thereafter, she received a termination notice in the mail. Each day that employer believed claimant to be a no call/no show, Badgley would reach out to claimant. Claimant never received these contact attempts.

Prior to this period, claimant had not received disciplinary warnings for no call/no shows or for attendance. She was aware that the employer might take action against her for her poor attendance from this period, but she hoped the employer would understand that she was struggling.

The administrative record reflects that claimant filed a claim for unemployment insurance benefits with an effective date of April 30, 2023. She filed weekly continuing claims for benefits between April 30, 2023, and August 19, 2023. She received unemployment insurance benefits in the gross amount of \$9,152.00. The employer did not participate in the fact-finding interview. The employer's records do not indicate that it received the notice of fact finding, and it did not receive a call for the interview on the scheduled date of May 25, 2023. The number that the fact finder called, as reflected on KFFD, matches the number of the person who prepared the SIDES response to the notice of claim.

An unemployment insurance decision was mailed to the employer's correct address of record on May 30, 2023. The employer did not receive the decision. The decision indicated that an appeal was due by June 9, 2023. The employer has had difficulty reliably receiving mail from a few states, including Iowa. It has attempted to discover the problem and correct the issue both with Iowa Workforce Development and with the local postmaster, but no solution has been discovered. The employer submitted an appeal on September 7, 2023, after it received its quarterly statement that reflected charges attributable to the claimant's claim for benefits, which was mailed August 9, 2023.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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

Iowa Code section 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:

1. 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:

(a) 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 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 appellant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a decision, no meaningful opportunity for appeal exists. *See Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The employer timely appealed the August 9, 2023, statement of charges, which was the first notice of qualification. Therefore, the appeal shall be accepted as timely.

Iowa Code section 96.5(2)(a) and (d)(9) provide:

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 disqualification shall continue 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 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 even 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. Misconduct by an individual includes but is not limited to all of the following:

(9) Excessive unexcused tardiness or absenteeism.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

Iowa Admin. Code r. 871—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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper*, 321 N.W.2d 6. The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep’t of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep’t of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

The employer must prove two elements to establish misconduct based on absenteeism. First, the absences must be excessive. *Sallis v. Emp’t Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10. The requirement of “unexcused” can be satisfied in two ways. An absence can be unexcused either because it was not for “reasonable grounds,” or because it was not “properly reported,” holding excused absences are those “with appropriate notice.” *Higgins*, 350 N.W.2d at 191; *Cosper*, 321 N.W.2d at 10.

The administrative law judge acknowledges that claimant was absent between April 20, 2023, and April 28, 2023. Three of those dates, April 20, 21, and 28, 2023, were no call/no shows according to the employer’s records. However, the administrative law judge carefully considered the credibility of the testifying witnesses and concludes that claimant’s testimony is

credible that she attempted to reach out to inform Badgley of her absence on each scheduled day. While her notifications were being sent via text message, which was not an allowed method of notifying the employer of an absence, claimant was also going through a difficult time, and any notice of an absence is better than none under such circumstances.

Even if some of claimant's absences were not properly reported and the absences taken together were excessive, claimant had not been warned about attendance or no call/no shows in the past. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The separation is not disqualifying.

Because the separation is not disqualifying, the issues of overpayment, repayment, and participation are moot.

DECISION:

The employer's appeal is accepted as timely. The May 30, 2023, (reference 02) unemployment insurance decision is **AFFIRMED**. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The issues of overpayment, repayment, and participation are moot.



Alexis D. Rowe
Administrative Law Judge

October 6, 2023
Decision Dated and Mailed

ar/scn

APPEAL RIGHTS. If you disagree with the 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 adquiriera 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.