

**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**

**DONZELL L DAVIS
152 S 9TH ST
BURLINGTON IA 52601**

**PEOPLE 2.0 GLOBAL INC
780 E MARKET ST #120
WEST CHESTER PA 19382**

**Appeal Number: 05A-UI-04886-JTT
OC: 04/03/05 R: 04
Claimant: Respondent (2)**

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 96.6(2) – Timeliness of Appeal
Section 96.5(2)(a) – Discharge for Misconduct
Section 96 .5(1)(j) – Voluntary Quit--Failure to Seek Reassignment
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

People 2.0 Global filed a timely appeal from the April 22, 2005, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on May 26, 2005. Donzell Davis did not respond to the notice of the hearing and did not participate. The employer participated through Brian Swinney, Director Affiliate Services. Exhibits D-1 and D-2, One through Three, and Six were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: People 2.0 Global is a temporary employment agency. People 2.0 Global did not receive the Agency representative's decision dated April 22, 2005, reference 03, until May 3, 2005, which was one day after the deadline for appeal noticed in the decision. On the same day the employer received the decision, it filed an appeal by mail.

Donzell Davis was employed on a full-time basis through People 2.0 Global from February 11, 2005, until March 24, 2005, when he left work before the end of his shift and was discharged from his final assignment based on attendance issues. Though Iowa Prestressed Concrete notified People 2.0 Global that Mr. Davis had been terminated from the assignment, Mr. Davis did not contact People 2.0 Global to advise that the assignment had ended. On March 24, People 2.0 Global staff attempted to contact Mr. Davis by telephone to see why he had left the assignment. Someone at the Davis residence answered the telephone and then hung it up again. Mr. Davis did not again contact People 2.0 Global.

The temporary employment agency's computer log of contacts with Mr. Davis indicates that on March 3, Mr. Davis missed two days of work after scratching the cornea on one of his eyes. The log further indicates that on March 11, Mr. Davis was in a workplace accident in which he got sulfur in his eye. The log indicates that Mr. Davis saw his optometrist the same day and that the optometrist flushed the sulfur out of his eye. The log indicates that on March 15, Mr. Davis had a follow up appointment with his optometrist. The log contains an entry from February 21 that recorded Mr. Davis' assertion that he wished to keep the job and People 2.0 Global's response that he needed to do a better job of getting to work.

On February 9, 2005, Mr. Davis signed his acknowledgment of the requirement to contact People 2.0 Global within three business days of the end of an assignment.

Mr. Davis has received benefits totaling \$1,631.00 since establishing his claim.

REASONING AND CONCLUSIONS OF LAW:

The first issue before the administrative law judge is whether the evidence in the record establishes that the employer's appeal was timely. It does.

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-day deadline for appeal begins to run on the on the date the decision is mailed. 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 evidence in the record establishes 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 People 2.0 Global 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). The record shows that People 2.0 Global did not have a reasonable opportunity to file a timely appeal.

Based on the evidence in the record, the administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay or other action of the United States Postal Service. 871 IAC 24.35(2). The administrative law judge concludes that the deadline for the appeal should be extended one day to May 3, 2005, and that the appeal should be considered timely. Finally, the administrative law judge concludes he has jurisdiction to make a determination with respect to the merits of the appeal. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

The next question is whether the evidence in the record establishes that Mr. Davis was discharged from the assignment at Iowa Prestressed Concrete due to misconduct. It does not.

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.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Mr. Davis' absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the employer must show that the *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32-8. Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

Based on the evidence in the record, the administrative law judge concludes that People 2.0 Global failed to produce sufficient evidence to corroborate the allegation that Mr. Davis was discharged from his last assignment for misconduct based on excessive unexcused absences. The next question is whether the evidence in the record establishes that Mr. Davis voluntarily quit the employment relationship with People 2.0 Global by failing to notify the temporary employment agency within three business days of the end of his last assignment.

Iowa Code section 96.5-1-j 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, But the individual shall not be disqualified if the department finds that:

j. The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.

To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.

For the purposes of this paragraph:

(1) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.

(2) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

871 IAC 24.26(19) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the

individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

The purpose of the statute is to provide notice to the temporary employment agency that the claimant is available for work at the conclusion of the temporary assignment. Mr. Davis was properly notified of his obligation to contact the temporary employment agency within three business days of the end of his assignment and failed to do so. Based on the evidence in the record the administrative law judge concludes that Mr. Davis' quit was voluntary and was not for good cause attributable to the employer.

The evidence in the record raises the additional issue of overpayment of benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The \$1,631.00 in benefits Mr. Davis has received constitutes an overpayment. Mr. Davis will have to repay that amount.

DECISION:

The employer's appeal was timely. The claimant was discharged from his final assignment for no disqualifying reason. However, the claimant voluntarily quit the employment relationship with the temporary employment agency by failing to contact the temporary employment agency within three business days of the end of the assignment. The Agency representative's April 22, 2005, reference 03, decision is reversed. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant is overpaid \$1,631.00.

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