

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DENISE J SOMMERFELT
Claimant

APPEAL NO. 09A-UI-17601-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABCM CORPORATION
Employer

**Original Claim: 04/19/09
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 17, 2009 (reference 05) decision that denied benefits. After due notice was issued, a telephone conference hearing was held on January 4, 2010. Claimant participated. Employer participated through Administrator Kathy Miller, Co-DON Robert Dulesky, and Co-DON Mary Eggers-Palmer. Department's Exhibit D-1 was admitted to the record.

ISSUES:

The issues are whether claimant's appeal was timely and whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant mailed an appeal of the reference 05 decision sometime in late September 2009. The appeals section did not receive it. She filed another in response to the reference 06 overpayment decision dated November 17, 2009.

Claimant most recently worked full-time as a CNA from May 14, 2009 and was separated from employment on August 3, 2009. Her last day of work was July 19, 2009. She called Dulesky on July 21 to request time off for undisclosed personal reasons. He granted time off for July 22 but instructed her to "call back and let us know" what her plans were because of personnel scheduling issues. She was next scheduled to work but failed to report or call in on July 23, 24, 25, 26, 28, 29, and 30, 2009. She did not tell employer that she needed to monitor her teenage son after he "got into trouble breaking into the school." She worked third shift and could not leave him alone. She did not ask for a shift change or seek help from the employer or others in the community. The employer has a history of allowing employees to bring children to work with them to avoid missing work and has allowed employees' children to sleep at the facility while third-shift parents work.

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 § 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 filed an appeal in a timely manner but it was not received. Immediately upon receipt of information to that effect, a second appeal was filed. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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 as to when and why the employee is unable to report to work. The employer has established that the claimant was instructed to maintain communication with employer about her absences and failed to do so for several consecutive workdays. Had claimant simply communicated with employer about the situation causing her to miss work, the separation could likely have been avoided, but because she did not, the absences are considered unexcused and excessive. Benefits are withheld.

DECISION:

The September 17, 2009 (reference 05) decision is reversed. The claimant’s appeal is timely, but she was discharged for reasons related to job misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw