

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RONALD E BATES
Claimant

APPEAL NO: 06A-UI-09128-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACTION WAREHOUSE CO LTD
Employer

**OC: 07-16-06 R: 02
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 9, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 26, 2006. The claimant did participate. The employer did not participate.

ISSUE:

Did the claimant file a timely appeal?

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: The claimant was incarcerated from August 6 through August 28, 2006. A fact-finding decision was mailed to him on August 9. He did not receive the fact-finding decision until he was released from jail on August 28. He went to his local office on August 30 and wrote on a piece of paper that he wanted to appeal. That piece of paper was somehow lost by Iowa Workforce Development and never sent by the local office to the appeals section. The claimant returned to his local office on September 12, 2006, when he had not heard anything on his appeal. The claimant's appeal was delayed due to his incarceration and due to the local Iowa Workforce Development office failing to submit his original appeal to the appeals section.

The claimant was employed as a quality control person full time beginning March 26, 2005 through July 21, 2006, when he was discharged. The claimant was discharged when he was four minutes late to work on July 21. The claimant was late because his arranged transportation was late picking him up for work. The claimant had received a copy of the employer's attendance policy and knew that he had accumulated five and one-half points. He knew that after accumulated six points, he could be discharged. The claimant was last warned in June, one month prior to his discharge, that if he were late again, he would be discharged. In June

the claimant was also placed on probation for his poor attendance. The claimant was previously suspended in June for two days, also due to his poor attendance.

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 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 claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received because he was incarcerated. Without notice of a disqualification, no meaningful opportunity for appeal exists. See Smith v. Iowa Employment Security Commission, 212 N.W.2d 471, 472 (Iowa 1973). The claimant attempted to appeal the decision when he was released from jail, but his first attempt at an appeal was not properly submitted to the appeal section by the local Iowa Workforce Development office. The claimant's appeal of September 12, 2006, was filed by him as soon as he discovered Iowa Workforce Development's error in submitting his first appeal to the appeal section. 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 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.

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).

The evidence has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The August 9, 2006, reference 01, decision is affirmed. The claimant's appeal is timely. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw