

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

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**ASHLEY L CROFT**  
Claimant

**APPEAL 23A-UI-12140-DZ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DIVERSIFIED SERVICES FOR INDUSTRY**  
Employer

**OC: 06/11/23  
Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

Diversified Services for Industry, the employer/appellant,<sup>1</sup> appealed the Iowa Workforce Development (IWD) June 29, 2023 (reference 01) unemployment insurance (UI) decision. IWD found Ms. Croft eligible for REGULAR (state) UI benefits because IWD concluded the employer discharged her from work on June 8, 2023 for a reason that does not disqualify her from receiving UI benefits. On January 2, 2024, the Iowa Department of Inspections, Appeals, and Licensing (DIAL), UI Appeals Bureau mailed a notice of hearing to the employer and Ms. Croft for a telephone hearing scheduled for January 16, 2024.

The undersigned administrative law judge held a telephone hearing on January 16, 2024. The employer participated in the hearing through Deanna Berntgen, facility manager and John O’Fallon, UC Advantage hearing representative. Ms. Croft did not participate in the hearing. The administrative law judge took official notice of the administrative record and admitted Employer’s Exhibit 1 as evidence.

**ISSUE:**

Did the employer appeal on time?  
Did the employer discharge Ms. Croft from employment for disqualifying, job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed the evidence in the record, the administrative law judge finds: IWD mailed the June 29, 2023 (reference 01) UI decision to the employer at its correct address. The UI decision states that it becomes final unless an appeal is postmarked or received by the IWD Appeals Section by Sunday, July 9, 2023. If the appeal deadline falls on a Saturday, Sunday, or legal holiday, the appeal period is extended to the next working day. So, the appeal deadline was extended to Monday, July 10, 2023.

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<sup>1</sup> Claimant is the person who applied for UI benefits. Appellant is the person or employer who appealed.

The employer received the decision in the mail. The employer appealed via fax on July 7, 2023. The UI Appeals Bureau did not receive the fax. The employer appealed again via fax on December 26, 2023. The DIAL UI Appeals Bureau received the appeal the same day.

The administrative law judge further finds: Ms. Croft began working for the employer on July 29, 2022. She worked as a full-time general cleaner, and as of early 2023, a second shift supervisor. Her employment ended on June 8, 2023.

The employer's policy provides that an employee accrues one occurrence for each absence, instance of tardiness or leaving early. The policy further provides that the employer may terminate the employment of an employee who accrues more than 5 points during either the first half of a calendar year (January – June) or the second half of a calendar year (July – December). The policy is in the employer's handbook and Ms. Croft acknowledged receiving a copy of the policy on her hire date.

On January 31, 2023, the employer gave Ms. Croft a verbal warning for leaving early two times in January. On April 4, the employer gave Ms. Croft a second verbal warning for calling in sick. On May 31, the employer gave Ms. Croft a written warning for calling in due to personal issues. On June 6, the employer gave Ms. Croft a final written warning for calling in sick. On June 8, Ms. Croft left work about one hour after she arrived because she needed to care for her child. The employer terminated Ms. Croft's employment on June 8 because she accrued more than 5 occurrences.

IWD paid Ms. Croft REGULAR (state) UI benefits in the total gross amount of \$7,445.31 for 16 weeks between June 25, 2023 and October 14, 2023. The employer did not participate in the fact-finding interview.

## **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes as follows: 1) the employer appealed the June 29, 2023 (reference 01) UI decision on time, 2) the employer discharged Ms. Croft from employment on June 8, 2023 for disqualifying, job-related misconduct, 3) IWD overpaid Ms. Croft REGULAR (state) UI benefits in the total gross amount of \$7,445.31, but 4) Ms. Croft is not required to repay these benefits to IWD.

### The Employer Appealed on Time

Iowa Code § 96.6(2) provides, in relevant 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:

2. 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:
  - (2) 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 Date 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.<sup>2</sup> Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid.<sup>3</sup>

The employer received the June 29, 2023 (reference 01) UI decision before the appeal deadline and, therefore, could have appealed by the deadline. The notice provision of the decision was valid. The employer appealed on July 7, 2023, before the July 9, 2023 appeal deadline. The employer appealed on time.

The Employer Terminated Ms. Croft's Employment on June 8, 2023  
For Disqualifying, Job-Related Misconduct

Iowa Code section 96.5(2)(a) and (d) provide, in relevant part:

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.

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

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<sup>2</sup> *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979).

<sup>3</sup> *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).

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 evil 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.

Iowa Admin. Code r. 871-24.32(7) and (8) provide:

(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.

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The purpose of subrule eight is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises.

Excessive absenteeism is not considered misconduct unless the absences are also unexcused. 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. The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive.<sup>4</sup> The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings.<sup>5</sup> Second, the absences must be unexcused.<sup>6</sup> 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."<sup>7</sup>

An employer's no-fault absenteeism policy or point system does not, on its own, decide the issue of qualification for UI benefits. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not voluntary. This is true even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy.<sup>8</sup> Medical documentation is not essential to a determination that an absence due to illness should be treated as excused.<sup>9</sup> Absences related to other issues such as transportation, lack of childcare, and oversleeping are not considered excused.<sup>10</sup> When a claimant does not provide an excuse for an absence the

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<sup>4</sup> *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989).

<sup>5</sup> *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984).

<sup>6</sup> *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982).

<sup>7</sup> *Higgins*, 350 N.W.2d at 191; *Cosper*, 321 N.W.2d at 10.

<sup>8</sup> Iowa Admin. Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 9; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

<sup>9</sup> See *Gaborit*, 734 N.W.2d at 555-558.

<sup>10</sup> *Higgins*, 350 N.W.2d at 191.

absences is deemed unexcused.<sup>11</sup> Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned.<sup>12</sup>

The employer has the burden of proof in establishing disqualifying job misconduct.<sup>13</sup> The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.<sup>14</sup> Misconduct must be “substantial” to warrant a denial of job insurance benefits.<sup>15</sup>

In this case, the employer disciplined Ms. Croft multiple times for attendance issues. After the employer gave her a final written warning, Ms. Croft left work early again. Ms. Croft’s June 8 early departure was for an understandable and human reason – to care for her children – but, under Iowa law, this early departure was unexcused. The employer has established disqualifying, job-related misconduct on the part of Ms. Croft. Ms. Croft is not eligible for UI benefits.

IWD Overpaid Ms. Croft REGULAR (state) UI Benefits in the Total Gross Amount of \$7,445.31,  
But Ms. Croft is Not Required to Repay These Benefits Back to IWD

Iowa Code §96.3(7) provides, in relevant part:

*7. Recovery of overpayment of benefits.*

a. 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.

b. (1) (a) 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 employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department’s request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers. If the department determines that an employer’s failure to respond timely or adequately was due to insufficient notification from the department, the employer’s account shall not be charged for the overpayment.

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<sup>11</sup> *Id.*; see also *Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

<sup>12</sup> See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep’t of Job Serv.*, 364 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929\*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep’t of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

<sup>13</sup> *Cosper v. Iowa Dep’t of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

<sup>14</sup> *Infante v. Iowa Dep’t of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

<sup>15</sup> *Newman v. Iowa Dep’t of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

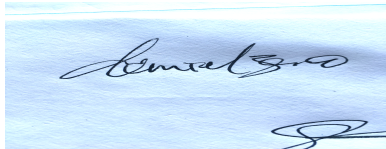
This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Since Ms. Croft is not eligible for UI benefits based on how her job ended with the employer, she is not eligible for the UI benefits IWD already sent her. IWD overpaid Ms. Croft REGULAR (state) UI benefits in the total gross amount of \$7,445.31 for 16 weeks between June 25, 2023 and October 14, 2023. Since the employer did not participate in the fact-finding interview, Ms. Croft is not required to repay these UI benefits back to IWD.

**DECISION:**

The June 29, 2023 (reference 01) UI decision is REVERSED. The employer discharged Ms. Croft from employment for disqualifying, job-related misconduct. Ms. Croft is not eligible for UI benefits until she has worked in and been paid wages for insured work equal to ten times her weekly UI benefit amount, as long as no other decision denies her UI benefits.

IWD overpaid Ms. Croft REGULAR (state) UI benefits in the gross amount of \$7,445.31 for 16 weeks between June 25, 2023 and October 14, 2023.. Since the employer did not participate in the fact-finding interview, Ms. Croft is not required to repay these UI benefits back to IWD.



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Daniel Zeno  
Administrative Law Judge

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January 22, 2024  
Decision Dated and Mailed

DZ/jkb

**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  
6200 Park Avenue Suite 100  
Des Moines IA 50321  
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  
6200 Park Avenue Suite 100  
Des Moines IA 50321  
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 adquiera 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.