IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

BERNARD PENELTON
Claimant

HORMEL FOODS CORPORATION
Employer

APPEAL NO. 19A-UI-03227-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/17/19
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Bernard Penelton filed an appeal from the April 3, 2019, reference 01, decision that disqualified him for benefits and that held the employer's account would not be charged for benefits, based on the deputy's conclusion that Mr. Penelton was discharged on March 20, 2019 for excessive unexcused absences. After due notice was issued, a hearing was held on May 8, 2019. Mr. Penelton participated. Beverly Maez of Employers Unity represented the employer and presented testimony through Erin Montgomery, Jordan Banwart, and Todd Yocum. Exhibits 1 through 12, 14 through 19 and A, and Department Exhibit D-1 were received into evidence.

ISSUES:

Whether there is good cause to treat Mr. Penelton's late appeal as a timely appeal.

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On April 3, 2019, Iowa Workforce Development mailed a copy of the April 3, 2019, reference 01, decision to Bernard Penelton. Iowa Workforce Development directed the decision to the correct house number, but omitted Mr. Penelton's apartment number from the decision. The decision stated that an appeal from the decision must be postmarked by April 13, 2019 or be received by the Appeal Section by that date. Mr. Penelton did not receive the decision that was mailed to him on April 3, 2019. Mr. Penelton learned of the decision when he contacted Iowa Workforce Development on April 18, 2019. Mr. Penelton submitted his online appeal from the decision that same day and the Appeals Bureau received the appeal that same day.

Mr. Penelton was employed by Hormel Foods Corporation as a full-time mechanic from April 2018 until March 20, 2019, when Erin Montgomery, Human Resources Manager, discharged him for attendance. Mr. Penelton's regular work hours were 5:00 a.m. to 1:30 p.m. Monday through Friday. Mr. Penelton was also frequently required to work on the weekend. Mr. Penelton last performed work for the employer on March 11, 2019. Jordan Banwart, Manager of Plant Engineers, was Mr. Penelton's supervisor.

If Mr. Penelton needed to be absent or late for work, the employer's attendance policy required that he telephone the workplace at least 30 minutes prior to the scheduled start of his shift. The employer included an absence reporting number on Mr. Penelton's ID badge. Despite the employer's absence reporting policy, it was common practice for the maintenance staff to communicate directly with a maintenance supervisor via text message and for the maintenance management staff to accept text message notice of absences.

Under the employer's attendance policy, if Mr. Penelton needed to be absent from consecutive shifts, he was required to provided daily notice of his need to be absent unless he provided the employer with a medical excuse supporting his need to be off work for multiple days.

The absence that triggered the discharge occurred during the period of March 12 through 19, 2019. The employer considered the entire absence period as a single attendance occurrence.

On March 12, 2019, Mr. Penelton was absent, but did not call the designated absence reporting number. At 3:18 a.m. Mr. Penelton sent a text message to Mr. Jordan. Mr. Penelton wrote that his groin was swollen, that his stomach was bloated, that he might have a hernia, and that he would report to work as soon as he was done at the hospital. At about 5:00 a.m., Mr. Penelton went to an emergency room for medical evaluation and treatment. Mr. Penelton ended up having to stay at the hospital for hours. At 7:45 a.m., Mr. Banwart responded to Mr. Penelton's message via text message. Mr. Banwart wrote that he hoped everything was alright and that Mr. Penelton should keep him posted. Mr. Penelton immediately replied via text message that had undergone blood work, a CT scan, and an ultrasound, and that the doctor thought he might have a hernia. The emergency room doctor subsequently notified Mr. Penelton that he likely had a bacterial infection.

At 10:21 a.m., Mr. Penelton called Mr. Banwart, but had to leave a voicemail message. In the message, Mr. Penelton stated he had just left the emergency room, that he did not have a hernia, that he did not need surgery. Mr. Penelton added that he had some swelling and inflammation, was supposed to rest, and was not supposed to return to work until his primary doctor released him. At 10:48 a.m., Mr. Banwart replied via text message, "Not good, Bernard. We will talk more when you are back in the plant. Take care of yourself." Mr. Penelton replied that he needed to apply for FMLA. Mr. Banwart replied that he was in a meeting and could not speak. Mr. Penelton asked who he should speak to regarding FMLA and Mr. Banwart replied that he should "call the plant and ask for Connie." Mr. Penelton contacted the employer's FMLA administrator to obtain FMLA application materials by email. Mr. Penelton had not worked for the employer long enough to be eligible for FMLA.

At 3:32 p.m. Mr. Penelton sent Mr. Banwart an update by text message. The doctor had contacted Mr. Penelton to let him know that he did indeed have a hernia. Mr. Penelton stated in his text message to Mr. Banwart that the doctor had diagnosed a hernia on Mr. Penelton's bladder, that Mr. Penelton was to see his primary care doctor on Thursday, March 14 for referral to a surgeon.

Mr. Penelton was scheduled to work on March 13, 2019, but did not report for work or make contact with the employer at least 30 minutes prior to the scheduled start of his shift. At 7:46 a.m. Mr. Penelton left a voicemail message for Erin Montgomery, Human Resources Manager. Mr. Penelton stated that had experienced groin and testicular swelling while working on March 11 and had a hernia. Mr. Penelton referenced having exerted himself at work while assembling some shelves. On the afternoon of March 13, Ms. Montgomery called Mr. Penelton back and left a brief message only indicating that she was returning his call.

Mr. Penelton was scheduled to work on March 14, 2019, but did not report for work or make contact with the employer at least 30 minutes prior to the scheduled start of his shift. Sometime

that morning, Mr. Penelton and Ms. Montgomery spoke by telephone. Mr. Penelton told Ms. Montgomery that he had not reported an absence that morning because his doctor had not yet released him to return to work. Mr. Penelton told Ms. Montgomery that he had a doctor appointment set for 1:30 p.m. that day and that he had been diagnosed with a hernia around his bladder. Mr. Penelton told Ms. Montgomery that he had gone to the emergency room on Tuesday morning and that he had communicated with Mr. Banwart via text message to give notice he would be gone from work. Mr. Penelton and Ms. Montgomery discussed Mr. Penelton's belief that his hernia was connected to assembling shelves in the workplace on March 6. Ms. Montgomery told Mr. Penelton that he had not worked for the employer long enough to qualify for FMLA leave or short-term disability benefits and that his injury would not be covered as a worker's compensation injury because he had delayed in reporting the injury.

Mr. Penelton and Ms. Montgomery spoke again by telephone on the afternoon of March 14, following Mr. Penelton's medical appointment. Mr. Penelton reiterated that he had a bladder hernia. Mr. Penelton told Ms. Montgomery that his doctor had released him to return to work without restrictions effective Monday, March 18, 2019. Ms. Montgomery directed Mr. Penelton to bring the medical release when he returned to work. Mr. Penelton also had in his possession a March 12, 2019 note from the emergency room doctor indicating that he should remain off work until his primary care doctor released him.

Mr. Penelton had been scheduled to work on March 15, but did not report to work or make contact with the employer that day. In light of Mr. Penelton's statement that he had a medical excuse that did not release him to return to work until the following Monday, Ms. Montgomery did not expect Mr. Penelton to provide additional notice of his need to be absent on March 15.

On March 18, 2019, Mr. Penelton appeared for work on time, but then spoke to a supervisor about being in pain and needing to leave the workplace. The supervisor approved Mr. Penelton's request to leave. Mr. Penelton left his medical excuses with the supervisor. Mr. Penelton contacted his doctor and his doctor took him off work until March 20, 2019.

On Tuesday, March 19, 2019, Mr. Penelton provided proper notice of his need to be absent from work. Mr. Penelton spoke to Ms. Montgomery. On the following day, Ms. Montgomery discharged Mr. Penelton based on attendance.

Prior to the absences that began on March 12, 2019, Mr. Penelton had most recently been absent on November 23, 2018, when he had been absent due to illness and had properly reported the absences to the employer.

REASONING AND CONCLUSIONS OF LAW:

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, subsections 10 and 11, 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 date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed 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 was 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. See Iowa Administrative Code rule 871-24.35(1)(a). See also *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See Iowa Administrative Code rule 871-24.35(1)(b).

Mr. Penelton's appeal was filed on April 18, 2019, when the Appeals Bureau received the online appeal. 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 appellant 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 the appellant did not have a reasonable opportunity to file an appeal by the April 13, 2019 deadline because he did not receive the decision. The evidence further establishes that Iowa Workforce Development contributed to the late filing of the appeal by omitting the claimant's apartment number from the mailed decision. There is good cause to treat the late appeal as a timely appeal. See Iowa Administrative Code rule 871-24.35(2) (regarding good cause to treat a late appeal as timely where the Agency contributed to the appeal being late). The administrative law judge has jurisdiction to enter a decision on the merits of the appeal.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being 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 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. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in a discharge 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(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). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The evidence in the record establishes a discharge for no disqualifying reason. The evidence establishes that the maintenance staff and supervisors did not follow the employer's absence reporting policy. Mr. Penelton followed the absence reporting practices of the maintenance department in good faith by making timely, appropriate, and reasonable steps to keep the employer informed of his need to be absent in connection with his hernia. Each of the absences for the period of March 12-19, 2019 was an excused absence under the applicable law and cannot serve as a basis for disqualifying Mr. Penelton for unemployment insurance benefits. Because the evidence fails to establish a current act of misconduct, the administrative law judge need not consider the earlier absences. Mr. Penelton was discharged for no disqualifying reason. Accordingly, Mr. Penelton is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The claimant's appeal was timely. The April 3, 2019, reference 01, decision is reversed. The claimant was discharged on March 20, 2019 for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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