

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

**ADAM J MERRITT**  
Claimant

**WALMART INC**  
Employer

**APPEAL 24A-UI-01926-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 01/14/24**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The appellant/claimant filed an appeal from the January 31, 2024 (reference 01) unemployment insurance decision that concluded the claimant was not eligible for unemployment insurance benefits following a separation from employment. A notice of hearing was mailed to the parties last known address of record for a telephone hearing scheduled for March 12, 2024. The appellant participated personally. The employer participated through witness Kieran Erwin. The administrative law judge took official notice of the claimant's administrative records.

**ISSUES:**

Is the appeal timely?  
Is the separation from employment disqualifying?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: An unemployment insurance benefits decision dated January 31, 2024 (reference 01) was mailed to the claimant's correct address of record. The claimant received it in the mail on February 14, 2024, which was after the February 10, 2024 deadline to file an appeal. Claimant filed an appeal two days after he received the decision in the mail.

Claimant began working for this employer on October 7, 2021. He worked full-time as an overnight stocker. He was discharged from employment on January 4, 2024 for violation of the employer's attendance policy. The employer's attendance policy states that if an employee has five or more attendance violations within a rolling 6-month period, they can be subject to discharge.

Claimant was absent from work on July 16, 2023; August 7, 2023; September 24, 2023; and December 31, 2023. He was absent due to illness on each of these dates and properly reported that he would be off of work on those dates.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

The first issue is whether the claimant's appeal shall be considered timely. I find that the claimant's appeal shall be considered timely.

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 issuance of the notice of the filing of the claim to protest payment of benefits to the claimant. All interested parties shall select a format as specified by the department to receive such notifications. 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 issued, 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.

An appeal must be filed within ten days after notification of that decision was mailed. The Iowa Supreme Court has held that this statute prescribing the time for notice of appeal clearly limits the time to do so, and that compliance with the appeal notice provision is mandatory and jurisdictional.<sup>1</sup> However, an appeal may be considered timely if it meets the following administrative code exceptions.

Iowa Admin. Code r. 871-24.35(1) provides:

Date of submission and extension of time for payments and notices.

(1) 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:

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<sup>1</sup> *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979).

- a. 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 Data 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 those outlined in paragraphs 24.35(1)"a" and "b", on the date it is received by the division.

Iowa Admin. Code r. 871-24.35(2) provides:

Date of submission and extension of time for payments and notices.

(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.

- a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
- b. The division shall designate personnel who are to decide whether an extension of time shall be granted.
- c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
- d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

In this case, the claimant did not receive the initial decision in the mail until February 14, 2024 and he filed his appeal within two days of that date. The delay in filing a timely appeal was due to postal service delay pursuant to Iowa Admin. Code r. 871-24.35(2). As such, the appeal shall be considered timely. T

The next issue is whether the separation from employment on January 4, 2024 was disqualifying. I find that it was not disqualifying and benefits are allowed, provided the claimant remains otherwise eligible.

Iowa Code section 96.5(2)a & d provide in pertinent part:

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

- 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.

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 interest as is found in deliberate violation or disregard of the 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 obligation to the employer. Misconduct by an individual includes but is not limited to all of the following: ...

(9) Excessive unexcused tardiness or absenteeism. ...

The employer has the burden of proof in establishing disqualifying job-related misconduct.<sup>2</sup> In unemployment insurance benefits cases, the issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits.<sup>3</sup> What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions.<sup>4</sup>

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits.<sup>5</sup> Such misconduct must be "substantial."<sup>6</sup> The discharge must also be based upon a current act of misconduct.

Iowa Admin. Code r.871-24.32(8) provides:

(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.

Iowa Admin. Code r. 871-24.32(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.

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**

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

<sup>3</sup> *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

<sup>4</sup> *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

<sup>5</sup> *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

<sup>6</sup> *Id.*

**grounds** for which the employee was absent and that were properly reported to the employer.<sup>7</sup> The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive.<sup>8</sup> The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings.<sup>9</sup>

Second, the absences must be unexcused.<sup>10</sup> The requirement of “unexcused” can be satisfied in two ways.

An absence can be unexcused either because it was not for “reasonable grounds”.<sup>11</sup> Or, because it was not “properly reported.”<sup>12</sup> Excused absences are those “with appropriate notice.”<sup>13</sup>

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.<sup>14</sup> Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused.<sup>15</sup>

Absences due to illness or injury must be properly reported in order to be excused.<sup>16</sup> Absences in good faith, for good cause, with appropriate notice, are not misconduct.<sup>17</sup> They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer’s interest is not shown and this is essential to a finding of misconduct.<sup>18</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>19</sup>

In this case, the claimant properly reported each of his absences and each of the absences were due to illness. As such, none of the absences are considered unexcused for purposes of unemployment insurance benefits and there is no final act of substantial misconduct that would disqualify the claimant from receipt of benefits. The discharge from employment is not disqualifying and benefits are allowed, provided the claimant remains otherwise eligible.

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<sup>7</sup> Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep’t of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding “rule [2]4.32(7)...accurately states the law.”

<sup>8</sup> *Sallis v. Emp’t Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989).

<sup>9</sup> *Higgins*, 350 N.W.2d at 192 (Iowa 1984).

<sup>10</sup> *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

<sup>11</sup> *Higgins*, 350 N.W.2d at 191 (Iowa 1984).

<sup>12</sup> *Id.* and *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

<sup>13</sup> *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

<sup>14</sup> *Higgins*, 350 N.W.2d at 190 (Iowa 1984).

<sup>15</sup> *Id.* at 191.

<sup>16</sup> *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982).

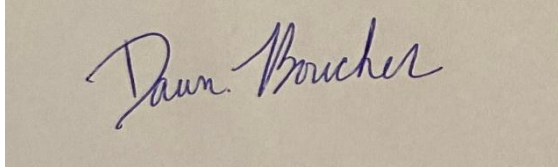
<sup>17</sup> *Id.* at 10.

<sup>18</sup> *Id.*

<sup>19</sup> See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep’t of Job Serv.*, 321 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).

**DECISION:**

The appeal is considered timely. The January 31, 2024 (reference 01) unemployment insurance decision is reversed as the separation from employment with this employer on January 4, 2024 is not disqualifying. Benefits are allowed, provided the claimant is otherwise eligible.



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Dawn Boucher  
Administrative Law Judge

March 13, 2024  
Decision Dated and Mailed

DB/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](http://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**  
**Online: [eab.iowa.gov](http://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.