IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOSE ROMERO Claimant **IOWA PREMIUM LLC** Employer	**APPEAL 21A-UI-07703-WG-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/27/20** **Claimant: Appellant (1)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Admin. Code r. 871-24.25(1) – Voluntary Quit for Lack of Transportation
Iowa Admin. Code r. 871-24.25(4) – Voluntary Quit No Call/No Show
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant/appellant, Jose Romero, filed an appeal from the February 4, 2021, (reference 01) unemployment insurance decision that concluded he was not eligible for unemployment insurance benefits. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled on May 13, 2021. Claimant appeared personally and testified through an interpreter. Mr. Romero's wife also testified with the assistance of an interpreter. The employer participated through its Human Resources Clerk, Veronica Hernandez. Claimant offered Exhibit 1, which was received without objection.

ISSUE:

Whether claimant appeal was filed timely?
Did claimant voluntarily quit his employment without due cause attributable to the employer?
Was claimant discharged for misconduct and specific excessive, unexcused absenteeism?

FINDINGS OF FACT:

The underlying decision was field on February 4, 2021. Claimant went to his local Iowa Workforce Development office to seek assistance in filing an appeal of that decision. The undersigned took administrative notice of the fact that the local IWD representative sent an e-mail to the appeals bureau confirming that claimant presented to his office on February 11, 2021 and that he attempted to e-mail the appeal information for claimant on that same date. Although the appeal was not actually received by the Appeals Bureau until April 13, 2021, I find that claimant attempted to file the appeal in a timely manner, left it with an IWD representative with the understanding that the IWD representative would file the appeal on the same date, February 11, 2021. Any error or delay in the filing of claimant's appeal was the result of the agency. Claimant acted diligently and timely to file his appeal and understood that the appeal would be filed by an IWD representative on February 11, 2021.

Claimant worked full-time on an assembly line processing meat for the employer. During his employment, Mr. Romero was absent for various reasons and incurred significant "points" under the employer's absenteeism policy. While some of the absences were clearly for medical treatment and medical reasons, claimant incurred significantly in excess of the absences permitted by the employer. Prior to the final absence, the employer gave claimant notice that it considered his absences to be excessive. Shortly before his employment separation, the employer provided written notice, which claimant was required to sign, that claimant could not miss further work or even be tardy to work without risking the loss of his job.

The employer reports that claimant subsequently missed work without calling in to report his absence on December 28, 2020, December 29, 2020, December 30, 2020, and December 31, 2020. The employer formally separated claimant from employment on January 2, 2021 given these no call/no show events. The employer also explained that the no call/no show violated its attendance policy and resulted in a voluntary quit under its policy.

Mr. Romero disputes whether he voluntarily quit his employment and argues he was discharged from his employment by the employer. However, Mr. Romero acknowledges that he received a written notice and warning about his attendance and that he knew prior to his final absences that additional absences would result in his termination from employment. Mr. Romero testified that he missed work on December 27, 2020 (probably actually December 28, 2020 according to the employer's records). He explained that his car would not start on that date and that he missed work.

Claimant also acknowledges that he knew he was required by company policy to call-in if he was going to be absent from work. In spite of this knowledge, Mr. Romero did not call in to report his absence on December 28, 2020. Although work was available, he did not report to work on December 28, 2020 through December 31, 2020.

I find that claimant no called and no showed to work four days in late December and violated the company's attendance policy. I find that claimant knew he was required to call in if he was to be absent. He did not comply with that policy. Therefore, I find that Mr. Romero voluntarily quit pursuant to the company's attendance policy and Iowa law.

However, even if a reviewing authority were to determine that his employment separation should be categorized as a discharge, I find that the final incident of absenteeism that occurred on December 28, 2020 was the result of a lack of transportation. Claimant was warned in December 2020, that he faced termination from employment upon another incident of unexcused absenteeism. Nevertheless, claimant failed to present for work for personal reasons (lack of transportation) on December 28, 2020 and failed to call in to report his absence in violation of a company policy. Therefore, even if the separation were considered as a discharge, I would find that the employer proved a discharge for misconduct resulting from excessive, unexcused absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that claimants' notice of appeal was filed timely. However, the undersigned concludes that claimant voluntarily quit his employment as a result of four days of no calls and no shows at work from December 28, 2020 through December 31, 20202. Even if considered as a discharge, the undersigned concludes the employer proved the discharge was the result of misconduct and disqualifying.
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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 96.8, subsection 5.

(emphasis added).

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the 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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

The appeal in this case was filed online on April 13, 2021. The record in this case shows that 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the claimant acted diligently to file his appeal, enlisting the assistance of an employee of IWD to file the appeal by e-mail. Any delay in the actual filing of the appeal with the Appeals Bureau was the result of Agency error or misinformation or delay. Therefore, I conclude that claimant was deprived of a reasonable opportunity to assert his appeal in a timely fashion and that his April 13, 2021 appeal must be accepted as timely because he attempted to file it and believed it was filed with

an IWD representative on February 11, 2021, within the allotted 10-day window for appeal. I conclude the appeal must be heard and decided.

The next issue for determination is whether claimant voluntarily quit his employment.

Iowa Code §96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

In this case claimant was absent from work on December 28, 2020, December 29, 2020, December 30, 2020, and December 31, 2020. Claimant knew that he was supposed to report any absences prior to his scheduled shift start time. Claimant failed to report these absences in violation of the employer's policy.

Iowa Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (1) The claimant's lack of transportation to the work site unless the employer had agreed to furnish transportation.
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

In this case, Mr. Romero concedes that his absence on December 28, 2020 was the result of a lack of transportation. The evidence further demonstrates that he was gone from December 28, 2020 through December 31, 2021, a period of four days, without giving notice to his employer of his intended absences. For these reasons, I conclude that claimant is considered to have voluntarily quit his employment without good cause attributable to the employer as a matter of law.

However, even if the employment separation were considered a discharge by the employer and not a voluntary quit, I conclude that the employer proved the discharge was for misconduct that disqualifies claimant from benefits.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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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 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.

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 absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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. 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."

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10.

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 Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). When no excuse is given for an absence at the time of the absence and no reason is given in the record, an absence is deemed unexcused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984). *See also Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. However, 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 warned that further improperly reported or unexcused absences could result in termination of employment and the final absence was not properly reported or excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The February 4, 2021, (reference 01) unemployment insurance decision is affirmed. Claimant voluntarily quit his employment and is disqualified form benefits. 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.

William H. Grell
Administrative Law Judge

May 21, 2021
Decision Dated and Mailed

whg/kmj