

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

MACEN P GINTHER
Claimant

WALMART INC.
Employer

APPEAL 23A-UI-08525-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/25/22
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Macen P. Ginther, the claimant/appellant,¹ appealed the Iowa Workforce Development (IWD) January 27, 2023 (reference 03) unemployment insurance (UI) decision. IWD found Mr. Ginther not eligible for REGULAR (state) UI benefits because IWD concluded the employer discharged him from work on December 29, 2022 for excessive unexcused absenteeism and tardiness after the employer warned him. On September 11, 2023, the Iowa Department of Inspections, Appeals and Licensing (DIAL), UI Appeals Bureau mailed a notice of hearing to Mr. Ginther for a telephone hearing scheduled for September 22, 2023.

The undersigned administrative law judge held a telephone hearing on September 22, 2023. Mr. Ginther participated in the hearing personally. Chad Ginther, Mr. Ginther's father, participated in the hearing as a witness. The employer did not participate in the hearing. The undersigned took official notice of the administrative record and the record in Appeal 23A-UI-08526-DZ-T.

ISSUES:

Did Mr. Ginther file his appeal on time?

Did the employer discharge Mr. Ginther from employment for disqualifying, job-related misconduct?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the undersigned finds: IWD mailed the January 27, 2023 (reference 03) UI decision to Mr. Ginther at his correct address. The UI decision states that it becomes final unless an appeal is postmarked or received by the IWD Appeals Section by Friday, February 6, 2023. Mr. Ginther did not receive the decision in the mail.

On February 17, 2023, IWD mailed Mr. Ginther another UI decision, a reference 04 decision. This decision concluded that IWD overpaid Mr. Ginther REGULAR (state) UI benefits in the total gross amount of \$1,056.00 for three weeks between January 1, 2023 and January 21, 2023 because the reference 03 UI decision denied Mr. Ginther UI benefits based on how his job

¹ Claimant is the person who filed the UI claim with IWD. Appellant is the person or employer who filed the appeal.

ended with this employer. The appeal deadline in this decision was Monday, February 27, 2023. Mr. Ginther did not receive this decision in the mail.

IWD then mailed Mr. Ginther at least two overpayment statements, which are bills, telling Mr. Ginther that he owes IWD \$1,056.00. The statements do not include appeal rights. Mr. Ginther called IWD and asked why he owed IWD money. The IWD representative told Mr. Ginther he owed IWD money because employer Walmart had protested his claim and IWD found him not eligible for UI benefits based on this protest. This was the first time Mr. Ginther learned this information. Mr. Ginther talked with his father about the situation sometime in July 2023. On, or about, August 7, 2023, Mr. Ginther called IWD again and asked how he to file an appeal. The IWD representative told Mr. Ginther about his appeal rights. Mr. Ginther appealed via email on August 14, 2023. The DIAL UI Appeals Bureau received the appeal the same day.

The undersigned further finds: Mr. Ginther began working for the employer in June 2022. He worked as a full-time cart pusher/asset protection. His employment ended on December 29, 2022. On December 29, the employer told Mr. Ginther that his employment was over because he stole time on December 27.

On December 27, Mr. Ginther asked his manager if he could leave work early. The manager approved. Mr. Ginther clocked out and left. The employer later told Mr. Ginther that he did not clock out and by doing so he stole time from the employer. Mr. Ginther had no prior discipline record.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the undersigned concludes Mr. Ginther appealed the January 27, 2023 (reference 03) UI decision 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 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 [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.² Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid.³

Mr. Ginther did not receive the January 27, 2023 (reference 03) UI decision before the appeal deadline and, therefore, could not have filed an appeal by the deadline. The notice provision of the decision was invalid. Mr. Ginther filed his appeal within one week of when he knew about his appeal rights. Mr. Ginther filed his appeal on time.

The undersigned further concludes the employer discharged Mr. Ginther from employment for a reason that does not disqualify him from receiving UI benefits.

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 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:

...

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

³ *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).

(9) Excessive unexcused tardiness or absenteeism.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct.⁴ 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.⁵ Misconduct must be "substantial" to warrant a denial of job insurance benefits.⁶

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation of the employer's policy or rule is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

In this case, the evidence establishes the employer terminated Mr. Ginther's employment for alleged time theft. But Mr. Ginther asked for and received approval to leave early on December 27, and he clocked out. The employer did not participate in the hearing provided no evidence of misconduct on the part of Mr. Ginther. Mr. Ginther is eligible for UI benefits.

⁴ *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

⁵ *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

⁶ *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

DECISION:

Mr. Ginther appealed the January 27, 2023 (reference 03) UI decision on time. The January 27, 2023 (reference 03) UI decision is REVERSED. The employer discharged Mr. Ginther from employment for a reason that does not disqualify him from receiving UI benefits. Mr. Ginther is eligible for UI benefits, as long as no other decision denies him UI benefits. Any UI benefits Mr. Ginther claimed and IWD withheld on this basis must be paid.



Daniel Zeno
Administrative Law Judge

September 25, 2023
Decision Dated and Mailed

scn

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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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.