

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GERALD C MARDIS

Claimant

APPEAL NO. 17A-UI-00189-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 11/27/16

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Overpayment

Section 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

Gerald Mardis (claimant) appealed a representative's December 23, 2016, decision (reference 03) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Swift Pork Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 26, 2017. The claimant participated personally. The employer participated by Rogelio Bahena, Human Resources Supervisor. Exhibit D-1 was received into evidence. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 2, 2016, as a full-time belly hanger. The claimant signed for receipt of the employer's handbook and attendance policy on May 3, 2016. The policies indicate an employee who accumulates ten attendance points in a rolling twelve month period will be terminated.

The claimant properly reported all his absences. The claimant properly reported his absence due to medical issues on June 16, 17, July 20 and 23, 2016. On October 7 and 8, 2016, the claimant was absent from work after the premature birth of his child on October 6, 2016. On May 13, October 10, and 11, 2016, the claimant was absent for an unknown reason. The employer issued the claimant written warnings on August 15, and October 14, 2016, for accumulating six and eight attendance points respectively. The employer notified the claimant that further infractions could result in termination from employment.

The claimant received word that his grandmother in Maryland was dying and facility was planning to unplug life sustaining equipment. The claimant wanted to see his grandmother

before she died and explained this to the employer. The employer told the claimant he could only have time off if she were dead. If she were dead, the claimant could have five days funeral leave. The claimant had to provide documentation of the death to the employer. The employer allowed the claimant to take time off after November 21, 2016, knowing his grandmother's condition. The claimant was absent from work on November 23, 25, and 28, 2016. He returned to work on November 29, 2016. The employer terminated the claimant for accumulating ten or twelve attendance points. His grandmother passed away on December 1, 2016.

A disqualification decision was mailed to the claimant's last-known address of record on December 23, 2016. The claimant did receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by January 3, 2017. The appeal was not filed until January 5, 2017, which is after the date noticed on the disqualification decision.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

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 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, subsection 10, 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 claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472

(Iowa 1973). The claimant filed his appeal on the day he discovered it. The appeal shall be accepted as timely.

The next issue is whether the claimant was discharged for misconduct. The administrative law judge concludes he was not.

Iowa Code § 96.5-2-a provides:

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.

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

Discharge for misconduct.

(1) Definition.

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).

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.

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 Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The claimant properly reported his leave to visit his dying grandmother. The employer granted the leave. The grounds for the claimant's absence were reasonable. The employer has not proven intentional disregard for the employer or unreasonable grounds for the leave. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's December 23, 2016, decision (reference 03) is reversed. The appeal in this case was timely. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs