

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

CHENCHEN HARDI
Claimant

HY VEE INC
Employer

APPEAL 22A-UI-15547-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/19/22
Claimant: Appellant (6R)**

Iowa Code § 96.6(2) - Timeliness of Appeal
Iowa Code § 96.5(1) - Voluntary Quit
Iowa Code § 96.5(2)a - Discharge for Misconduct

STATEMENT OF THE CASE:

July 26, 2022, Chenchen Hardi, claimant/appellant, appealed the July 8, 2022, (reference 01) unemployment insurance decision that denied benefits due to a 06/17/22, discharge from work for theft. Notices of hearing were mailed to the parties last known addresses of record for a telephone hearing to be held on September 1, 2022, at 8:00AM. Claimant personally participated. Employer, Hy-Vee, Inc., participated through Mr. Frankie Patterson, party representative, Jared Crumoy, assistant director of fulfillment center, Samantha Nylen, human resources manager, and Lisa Saxon, pharmacy manager. It took approximately thirty minutes to obtain an Indonesian interpreter, Interpreter #270236 participated. Approximately forty-five minutes into the hearing and a fire alarm sounded at Mr. Patterson's location. A postponement was granted. All that had transpired was learning who was participating in the hearing and confirming addresses.

Notices of new postponed hearing were mailed to the parties last known addresses of record for a telephone hearing to be held on September 21, 2022, at 10:00AM. Claimant personally participated. Employer, Hy-Vee, Inc., participated through Mr. Frankie Patterson, party representative, Samantha Nylen, human resources manager, and Lisa Saxon, pharmacy manager. It took approximately twenty-eight minutes to obtain an Indonesian interpreter, Interpreter #10195 participated. Approximately one hour forty-two minutes into the hearing and the interpreter was lost from the call. Fortunately, within two minutes, the same interpreter was rejoined to the hearing and the hearing was continued. Judicial notice was taken of the administrative record. Exhibits were admitted without objection D-1, C-1, and R-1.

ISSUES:

Is the appeal timely?
Was the separation a layoff, discharge for misconduct, or a voluntarily quit without good cause?

FINDINGS OF FACT:

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant's appeal is dated July 26, 2022. To be timely, the appeal needed to be filed on or before July 18, 2022, the first nonholiday weekday ten days after the mailing date. The decision was mailed to claimant's last known addresses on July 8, 2022, which is the same address she used at the time of the hearing. Claimant left the country for one month, returning home on July 21, 2022. This is after the deadline. When claimant checked her mail on July 25, 2022, the denial letter was contained within the accumulated mail. The decision had been timely delivered to claimant, who was out of the country for a month and the deadline to appeal lapsed before they returned home. Claimant did not review her mail and see the decision until July 25, 2022. This delay is not attributable to IWD nor to the US Postal Service.

Claimant started with employer 10/28/13. She was a fulltime certified pharmacy technician with a set schedule. Her last day worked was 06/17/22. The employer discharged claimant in person on 06/17/22 for violation of a known company rule - theft of time. See D-1, page 4.

Employer has an electronic employee handbook that claimant was provided access. Claimant agrees she has had access for a number of years. Employer has a personnel policy that prohibits theft of time. See D-1, page 9. An employee reported that claimant had clocked into work but was just sitting in the break room. Ms. Saxon conducted an investigation into the matter by reviewing the range of dates from May 9, 2022, through June 14, 2022. Claimant's clock-in time was checked, as well as video footage to determine what claimant did once clocked into work. Ms. Saxon established that of the 29 scheduled shifts, only seven of them resulted in claimant clocking in and reporting straight to work. The other 22 times, claimant would clock into work and then sit in the break room for a period of time from 2 minutes to 29 minutes. See D-1, pages 5-6. The times in the break room, (from low to high), before leaving to report to work are as follows: 0, 0, 0, 0, 0, 0, 0, 2, 2, 4, 4, 5, 5, 7, 7, 9, 10, 10, 10, 10, 10, 11, 13, 13, 15, 16, 21, 25, and 29. This totals 238 minutes or 3 hours 58 minutes of time claimant was paid for working but was in the break room not working. When claimant did not immediately report to work after clocking in, she would spend almost eleven minutes on average in the break room. Claimant's offered reason of checking where she is supposed to work is not credible since almost 25% of the time claimant clocks in and immediately leaves, not having to check anything.

Another policy advises how employees are to at work ready to work prior to the start of their shift and can clock into work no more than five minutes prior to the start of their shift and to then report to their workstation.

Ms. Nylen met with claimant, along with Mr. Crumoy on June 17, 2022. Ms. Nylen told claimant about the investigation and its findings of theft of time of almost four hours in the five weeks looked into, which violated policy, that claimant was being discharged. When advised, claimant only asked why she was being fired and not warned. Claimant raised no other issues or concerns with the employer.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is not timely.

Iowa Code § 96.6(2) provides, in pertinent 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:

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:

(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 [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. *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).

Here, claimant received the decision in the mail before the deadline and, therefore, had an opportunity to file an appeal prior to the appeal deadline. Claimant's delay was not due to an error or misinformation from the Department or due to delay or other action of the United States Postal Service. Claimant had left the country and upon her return on July 21, 2022, did not check her mail until July 25, 2022. There was no good cause reason established for the delay. Claimant's appeal date of 07/26/22 is not filed on time. Claimant failed to meet her burden of proof to establish her appeal was timely and the administrative law judge lacks jurisdiction (authority) to decide the other issue in this matter.

DECISION:

The July 8, 2022, (reference 01) unemployment insurance decision that denied benefits due to a 06/17/22, discharge from work for theft remains in effect as the appeal was not timely, and the appeal is **DISMISSED**.

REMAND:

Claimant testified that she was out of the country for a month during June and July 2022. This matter is remanded to the Benefits Bureau for them to determine whether an interview/investigation and a decision with appeal rights is warranted on the issue of able and available regarding claimant travelling out of Iowa in June and July of 2022.



Darrin T. Hamilton
Administrative Law Judge

October 7, 2022
Decision Dated and Mailed

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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 adquiriera 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.