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

JOSH A JOFFER Claimant **VER HOEF AUTOMOTIVE INC** Claimant	**APPEAL 22A-UI-10423-DZ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/08/20** **Claimant: Appellant (2)**

Iowa Code § 96.6(2) – Timely Appeal
Iowa Code § 96.5(2)A – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Josh A Joffer, the claimant/appellant, filed an appeal from the March 29, 2021 (reference 01 unemployment insurance (UI) decision that denied REGULAR (state) UI benefits because of a March 10, 2020 discharge from work. The parties were properly notified of the hearing. A telephone hearing was held on June 9, 2022. Mr. Joffer participated personally. Sarah Kleber, attorney, represented Mr. Joffer. Lois Joffer, Mr. Joffer's mother, testified in Mr. Joffer's favor. The employer participated through Jasmin Sneller, finances and human resources. The administrative law judge took official notice of the administrative record.

ISSUES:

Is Mr. Joffer's appeal filed on time?
Did the employer discharge Mr. Joffer for disqualifying, job-related misconduct?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: The Unemployment Insurance Decision was mailed to Mr. Joffer at the correct address on March 29, 2021. The UI decision states that it becomes final unless an appeal is postmarked or received by Iowa Workforce Development (IWD) Appeals Section by April 8, 2021.

Mr. Joffer's claim year had ended on March 7, 2021. Mr. Joffer had filed a new claim effective March 7, 2021. On March 22, 2021, IWD had issued a reference 02 UI decision in Mr. Joffer's second claim year that concluded Mr. Joffer was not eligible for REGULAR (state) UI benefits as of March 7, 2021 because he had not earned at least eight times the prior claim year's weekly benefit amount in insured wages during or after the prior claim year. On March 30, 2021, IWD issued another UI decision, a reference 01 decision in Mr. Joffer's second claim year, that denied Mr. Joffer REGULAR (state) UI benefits in his second claim year because a decision on his March 10, 2020 separation from employment with the employer had been made on a prior claim and that decision remained in effect.

Mr. Joffer did not receive any of the decisions IWD issued in 2021. Mr. Joffer's address had not changed, and he was not aware of any issues receiving mail at that time.

On April 14, 2022, IWD issued another UI decision finding Mr. Joffer was overpaid REGULAR (state) UI benefits, Pandemic Emergency Unemployment Compensation (PEUC) benefits, Federal Pandemic Unemployment Compensation (FPUC) benefits and Lost Wage Assistance Payments (LWAP) benefits. Mr. Joffer received that decision in the mail. Mr. Joffer filed an appeal online on April 25, 2022. IWD Appeals Bureau received the appeal on April 25, 2022. IWD set up appeals for the overpayment UI decision, the March 29, 2021 (reference 01) UI decision in Mr. Joffer's first claim year, and the March 30, 2021, (reference 01) UI decision in Mr. Joffer's second claim year.

The administrative law judge further finds: Mr. Joffer began working for the employer in March 2017. He worked as full-time detailer. His employment ended on March 10, 2020.

In August 2018, and September 2018, the employer talked with Mr. Joffer about work performance issues. The employer talked with Mr. Joffer again about work performance issues in November 2018 during his annual review. In January 2019 and again in November 2019 during his annual review, the employer talked with Mr. Joffer about work performance issues.

At some point in 2020, customers reported to the employer that Mr. Joffer was not properly applying a product on their vehicle windshields. The employer talked with Mr. Joffer about this issue. Mr. Joffer was doing his best, but he would sometimes skip things because he was very busy and did not want to get behind. Ms. Sneller testified that the issue with the windshield product was the last straw for the employer. The employer concluded that they could not trust Mr. Joffer to do the job properly.

On February 24, the owner called Mr. Joffer in the office and told him that the employer was letting him go because Mr. Joffer was not getting along with another employee. Mr. Joffer asked the owner for an explanation. The owner repeated that the employer was letting him go because Mr. Joffer was not getting along with another employee. The owner did not bring up any other issues during the conversation. The owner told Mr. Joffer that he could continue to work for two more weeks so Mr. Joffer could find a new job. Mr. Joffer did so, and his job ended on March 10, 2020.

Ms. Sneller testified that the employer also terminated Mr. Joffer for attendance issues. The employer's policy provides that employees must communicate with the employer when the employee is not able to attend work. The employer is flexible and simply asked employee to communicate in some way with the employer. Sometime Mr. Joffer would not attend work because of medical issues. Mr. Joffer would tell his co-worker when he could not attend work. The employer talked with Mr. Joffer about attendance during his annual performance reviews, but the employer never disciplined Mr. Joffer in any way about attendance issues.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Mr. Joffer's appeal of the March 29, 2021, (reference 01) UI decision was filed on time.

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:

> 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 Date 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).

Mr. Joffer did not receive the March 29, 2021, (reference 01) UI decision before the deadline and, therefore, could not have filed an appeal by the appeal deadline. The notice provision of the decision was invalid. Mr. Joffer filed an appeal within ten days of when he received the April 14, 2022 overpayment decision and learned that there was an issue with his UI claim. Mr. Joffer's appeal was filed on time.

The administrative law judge further concludes the employer discharged Mr. Joffer from employment for no disqualifying reason.

Iowa Code section 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.

871 IAC 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.

The Iowa Supreme Court has held that this definition accurately reflects the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

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 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.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Where a person is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

In this case, the employer has not established that work performance issues that it discussed with Mr. Joffer rose to the level misconduct. Mr. Joffer attempted to perform the job to the best of his ability, but he was unable to meet the employer's expectations. This is not misconduct.

Regarding attendance, the employer never warned Mr. Joffer about this issue. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. In this case, the employer has not met the burden of proof to establish that Mr. Joffer acted deliberately or with recurrent negligence in violation of company policy, procedure, or warning. Benefits are allowed.

DECISION:

Mr. Joffer's appeal of the March 29, 2021, (reference 01) UI decision was filed on time. The March 29, 2021, (reference 01) unemployment insurance decision is REVERSED. The employer discharged Mr. Joffer from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Daniel Zeno
Administrative Law Judge

August 12, 2022
Decision Dated and Mailed

dz/lj

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.