IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DENNIS STEVENSON
Claimant

ASSOCIATED MATERIALS LLC
Employer

APPEAL NO: 13A-UI-06284-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/21/13
Claimant: Appellant (2)

Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Dennis Stevenson (claimant) appealed a representative's May 14, 2013 decision (reference 01) that concluded Dennis Stevenson (claimant) was not qualified to receive unemployment insurance benefits in connection with his employment with the employer. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 2, 2013. The claimant participated in the hearing. The employer's representative received the hearing notice and responded by sending a statement to the Appeals Section indicating that the employer was not going to participate in the hearing. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it should be treated as timely? Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on May 14, 2013. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 24, 2013, a Friday. The appeal was not filed until it was postmarked on May 25, 2013, which is after the date noticed on the disqualification decision. The reason for the delay was that early on May 24, prior to the mail being picked up at the claimant's then apartment building, he had clipped the completed appeal in an envelope to the mailbox area, which was where and how he typically left mail for the postal carrier to pick up when the carrier delivered mail to the mailboxes. However, when he returned to the area the next day, May 25, while the postal carrier had delivered mail into the boxes on May 24, the postal carrier had not picked up the outgoing mail. The claimant then

took the appeal letter and dropped it into a mailbox at a post office so that it would at least be postmarked that day.

The claimant started working for the employer on October 16, 2011. He worked full time as a maintenance technician in the employer's Cedar Rapids, Iowa window manufacturing business. His last day of work was December 11, 2012. He went of a medical leave of absence as of that date. He exhausted his FMLA (Family Medical Leave) eligibility, but was granted extensions to the medical leave. However, on April 19 the claimant was informed that he needed to return to work on the morning of April 23 with a release to return to work without restriction or he would no longer have a job.

Upon learning this on April 19, a Friday, the claimant called his doctor's office to seek to get in to get a release. However, the claimant's doctor was out of the office until April 23, and no other doctor could give the claimant a release. On Monday, April 22 the claimant went to the employer's workplace and explained that he could not get into see his doctor to get a release until sometime later in the day on April 23, and so he would not be able to report for work in the morning with a doctor's release. He was informed that the employer was not willing to wait the additional day to get the doctor's release, and since the claimant was not going to be able to report for work first thing in the morning with a doctor's release, his employment would be ended.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

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. Board of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983).

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 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). 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. IESC*, 217 N.W.2d 255 (Iowa 1974); *Smith v. IESC*, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to error, misinformation, delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

The claimant may have had a temporary separation from employment prior to April 22, but he did not seek unemployment insurance benefits for that period. His separation became permanent as of April 22, 2013. Considering the claimant's status as of that date, there are only three provisions in the law which disqualify claimants from unemployment insurance benefits (until they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount). An individual is subject to such a disqualification if the individual (1) is discharged for work-connected misconduct (Iowa Code § 96.5-2-a); (2) "has left work voluntarily without good cause attributable to the individual's employer." (Iowa Code § 96.5-1); or (3) refuses to accept an offer of suitable work without good cause (Iowa Code § 96.5-3). Here, there is no question of an actual offer of work or refusal of work, so the focus will be on whether there was a disqualifying separation from employment.

Separations are categorized into four separate categories under Iowa law. Rule 871 IAC 24.1(113) defines "separations" as:

> All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of labor-saving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
>
> b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.
>
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
>
> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

As the employer at one point characterized the separation in this case as a voluntary quit, I will first determine whether Iowa Code § 96.5-1 regarding voluntary quits applies in this case. Rule 871 IAC 24.25 provides that, 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 claimant had been willing to continue working, but the employer was unable or unwilling to provide work.

Further, Iowa Code § 96.5-1-d provides an exception that an individual who otherwise could be subject to disqualification is not disqualified:

> If the individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury, or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available.

The Agency rule implementing this section explains that "[r]ecovery is defined as the ability of the claimant to perform all of the duties of the previous employment." 871 IAC 24.26(6)a.

The issue then is whether a person is subject to voluntary quit disqualification under Iowa Code § 96.5-1 under the following circumstances: The person is actively working but then is suffers a medical condition that prevents him from performing his normal job duties. The person has never stated that he is quitting the employment. The employer has not formally discharged the claimant from employment but has stated that the employee cannot return to work until he can return with a doctor's release without restriction, and ultimately determines it can no longer hold the position for the claimant.

The problem is that the case law points in several directions and has not addressed this issue head on. Additionally, the statute and rules are unclear as to this issue. For example, in *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989), the Iowa court considered the case of a pregnant certified nursing assistant (CNA) who went to her employer with a physician's release that limited her to lifting no more than 25 pounds. Wills filed a claim for benefits because the employer would not let her return to work because of its policy of never providing light-duty work. The court ruled that Wills became unemployed involuntarily and was able to work because the weight restriction did not preclude her from performing other jobs available in the labor market. *Id*. at 138. The court characterized the separation from employment as a termination by the employer, but in essence the employer informed the claimant that it did not have any jobs available meeting her restrictions and would not create a job to accommodate her restrictions. The court does not mention Iowa Code § 96.5-1-d at all. Perhaps significantly, the facts do not indicate that the claimant had stopped working at any point, and it was the employer who requested that she go to her doctor to get a release to continue working.

On the other hand, in *White v. Employment Appeal Board*, 487 N.W.2d 342, 345 (Iowa 1992), the Iowa court considered the case of the truck driver who was off work due to a heart attack for about three months, returned to work for a month, and then was off work for seven months after a second heart attack. He then returned to his place of employment and informed management that his doctor had instructed him that he was unable to drive because of his pacemaker device. The employer told the claimant that there was no available work for him with his restriction. The claimant then applied for unemployment insurance benefits. *Id*. at 343. The facts did not indicate whether the claimant stated that he was quitting employment or intended to permanently sever the employment relationship at any point. In *White*, the court reversed the district court's decision that the claimant quit work involuntarily due to a physical disability and stated that "unemployment due to illness raises policy considerations which call for a continuation of the rules laid out in cases antedating [the cases relied on by the district court] …

Under these rules, if White's disability was not work related, the agency properly imposed the disqualification. If, however, the cause of White's disability was work related, the disqualification was improper." *Id*. at 345. The court decided that there had been no finding as to whether the disability was or was not work related and remanded the case. The court does not refer to or distinguish the *Wills* case. It does not explain how the first prong of the voluntary quit disqualification test set forth earlier in its decision—"it must be demonstrated that the individual left work voluntarily"—had been met.

To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship, and chooses to leave the employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. *Wills* supra at 138; *Peck v. Employment Appeal Board*, 492 N.W.2d 438, 440 (Iowa App. 1992). In my judgment, the facts of the *Wills* case more closely resemble this case. The claimant was actively employed until the restrictions from his non-work-related medical condition prevented him from performing his normal job duties. He did not intend to quit his employment. The employer informed the claimant that no work was available for him as of April 23 because he had not been able to get a release within a few days' notice so that he could return to work that day, even if he could get a release without restrictions later that day. The action initiating the separation was therefore taken by the employer, and the separation therefore could be considered for unemployment insurance purposes as a discharge, but not for disqualifying misconduct.[1]

Perhaps this type of separation would meet the definition of "other separations" found in 871 IAC 24.1(113)(d): "Termination of employment for military leave lasting or expecting to last longer than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required." The problem with this definition section is that it does not provide guidance on whether such a separation is qualifying or disqualifying. Obviously, if a person terminates employment because he decides to retire, it is a voluntary quit and a disqualification would be imposed. On the other hand, if the employer mandates that an employee retire due to reaching a certain age, the termination is involuntary and initiated by the employer and is a discharge for reasons other than misconduct and no disqualification is imposed. Likewise, if a claimant decides that he no longer meets the physical standards required by the job and leaves employment, it should be treated as a quit and benefits will only be awarded if the person meets the exceptions to the voluntary quit statute.

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[1] In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer has not asserted the claimant committed conduct that could be characterized as misconduct under these criteria.

Further guidance is provided by 871 IAC 24.22(2) which provides:

> j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee—individual, and the individual is considered ineligible for benefits for the period.
>
> (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the individual, the individual is considered laid off and eligible for benefits.
>
> (2) If the employee—individual fails to return at the end of the leave of absence and subsequently become unemployed the individual is considered having voluntarily quit and is therefore ineligible for benefits.
>
> (3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

In this case, apparently there was a mutually agreed upon leave of absence, at least initially. The leave of absence extended beyond what the employer or the claimant initially anticipated for the length of the leave of absence. As such, even though the separation is considered an "Other Separation," it is ultimately treated as a layoff, because it was initiated by the employer. There is no valid reason to disqualify the claimant from benefits for being laid off for a lack of work upon.

The claimant, therefore, is not subject to the voluntary quit statute since he has not quit. He is not disqualified under the discharge statute since his separation was not due to misconduct. The refusal of suitable work statute does not apply here.

DECISION:

The appeal in this case was timely. The representative's May 14, 2013 decision (reference 01) is reversed. The claimant did not voluntarily quit and was not discharged for misconduct. Benefits are allowed, if the claimant is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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