

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TAMMY J BROWN
Claimant

IOWA JEWISH SENIOR LIFE CENTER
Employer

APPEAL 21A-UI-20173-S2-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/19/20
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2)i(1) – Substitute Workers
Iowa Admin. Code r. 871-24.22(2)i(3) – On-Call Wage Credits

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 15, 2020, (reference 01) unemployment insurance decision that denied benefits based upon a finding that claimant was on an approved leave of absence. The parties were properly notified of the hearing. A telephone hearing was held on November 8, 2021, and was consolidated with the hearing for appeals 21A-UI-20175-S2-T, 21A-UI-20176-S2-T, and 21A-UI-20178-S2-T. Claimant Tammy J. Brown participated personally. Employer Iowa Jewish Senior Life Center participated through office business office manager Jackie Hoit. Department's Exhibit D-1 was received. The administrative law judge took official notice of the administrative file.

ISSUES:

Is the claimant able to and available for work?
Is the claimant totally or partially unemployed?
Is the claimant an on-call worker?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part time dietary aide from August 23, 2016, until August 8, 2020, when she separated from employment.

On or around April 21, 2020, claimant was exposed to COVID-19 and her employer told her she could not work. Claimant also became ill at this time and was unable to work. Claimant returned to work on May 1, 2020. Claimant did not work between May 17, 2020 and June 21, 2020, but neither claimant nor employer know why she was not working during this time, whether because she was ill or exposed to COVID-19, or because she was not accepting work during those weeks. Claimant works on an as needed basis and is not required to notify employer if she will not be working due to illness, as she is free to accept or decline available work as it suits her.

A disqualification decision was mailed to claimant's last known address of record on October 15, 2020. She did not receive the decision. The first sentence of the decision states, "If this decision denies benefits and is not reversed on appeal, it may result in an overpayment which you will be required to repay." The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by October 25, 2020. The appeal was not filed until September 10, 2021, which is after the date noticed on the disqualification decision. Claimant did not receive the decision in the mail. The first notice of disqualification was the receipt of two overpayment decisions dated September 3, 2021. The appeal was sent within ten days after receipt of those decisions.

An Iowa Workforce Development decision issued October 29, 2020 (reference 03) determined claimant's separation from employment caused her to be ineligible for benefits effective July 28, 2020.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether claimant's appeal is timely. For the following reasons, the administrative law judge concludes it is.

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

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 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 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.

In this case, 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. Claimant appealed the disqualification decision as soon as she learned of it. Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant is an on-call worker. For the reasons that follow, the administrative law judge concludes the claimant is an on-call worker and is not eligible for unemployment insurance benefits.

Iowa Code § 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Iowa Code § 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work...

Iowa Admin. Code r. 871-24.22(2)i(1) and (3) provide:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market....

i. On-call workers.

(1) Substitute workers (i.e., post office clerks, railroad extra board workers), who hold themselves available for one employer and who do not accept other work, are not available for work within the meaning of the law and are not eligible for benefits.

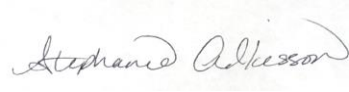
...

(3) An individual whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work, such as a banquet worker, railway worker, substitute school teacher or any other individual whose work is solely on-call work during the base period, is not considered an unemployed individual within the meaning of Iowa Code section 96.19(38)"a" and "b." An individual who is willing to accept only on-call work is not considered to be available for work.

In this case, claimant worked as an on-call employee. Because claimant was hired to work only on-call or as needed, and the wage history consists of only on-call wages, she is not considered to be unemployed within the meaning of the law. When an individual is hired to work on-call, the implied agreement is that they will only work when work is available and that work will not be regularly available. Thus, any drop or variation in claimant's hours, is directly related to the on-call status when work is not available, as no regular hours were guaranteed. Accordingly, benefits are denied.

DECISION:

The appeal is timely. The October 15, 2020, (reference 01) unemployment insurance decision is affirmed. Claimant is an on-call worker and is not eligible for unemployment insurance benefits. Therefore, benefits are denied.



Stephanie Adkisson
Administrative Law Judge
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December 8, 2021
Decision Dated and Mailed

sa/mh