IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LINDA S CRISWELL
Claimant

TEMPS NOW HEARTLAND LLC
Employer

APPEAL NO. 11A-UI-07511-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/08/09
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Linda S. Criswell (claimant) appealed a representative's December 15, 2009 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Temps Now Heartland, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 5, 2011. This appeal was consolidated for hearing with one related appeal, 11A-UI-07512-DT. The claimant participated in the hearing. The employer's representative responded to the hearing notice by indicating that the employer was not participating in the hearing. 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 December 15, 2009. The claimant did not receive the decision. The address was an apartment, and the claimant had multiple problems properly getting her mail. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by December 25, 2009, extended to December 28, 2009. The appeal was not filed until June 7, 2011, which is after the date noticed on the disqualification decision. The claimant stopped filing for unemployment insurance benefits at about the same time as the disqualification decision went into effect, and so she did not realize that a lock had been placed on her claim due to the disqualification. She did not learn of the entry of the disqualification decision until she received the resulting overpayment decision that was issued on June 2, 2011 (reference 03), the subject of 11A-UI-07512-DT.

The employer is a temporary employment firm. The claimant's first and only assignment with the employer began in late September or early October 2008. She worked full-time as a packager in the warehouse of the employer's Davenport, Iowa, business client, typically on a 6:00 a.m.-to-2:00 p.m. schedule, but frequently from 5:00 a.m. to 4:00 p.m. She had worked the assignment for several weeks, been laid off a week, recalled for a few days, laid off for a week, and recalled for a few days, and again laid off. Her last day on the assignment was on or about December 3, 2008.

The afternoon before her last day, the employer's receptionist had called the claimant and indicated she was to return to the assignment the next day to work 6:00 a.m. to 2:00 p.m., and the claimant agreed. When she arrived at the business client, she was told she was not needed from 6:00 a.m. to 2:00 p.m., but rather from 7:00 a.m. to 3:00 p.m. She was not allowed to start early, but waited until 7:00 a.m. to start. She told the business client's supervisor that she would still need to leave at 2:00 p.m., as she had a doctor's appointment at 3:00 p.m., and the supervisor agreed.

The claimant worked until 2:00 p.m. and then left, saying goodbye to coworkers and the supervisor as she left, indicating she would "see you later," and the supervisor only again said, "Okay." The claimant had not been told that she was to report for other than the one day, so she did not report the next day. When she spoke to the employer's receptionist the next day, the receptionist asked the claimant why she had not reported for work that day, and the claimant responded that she had not been told she was to report. The receptionist indicated that because the claimant had not reported that day, the business client might not ask for the claimant to return again, and in fact it did not. The claimant did check with the employer for other work, but the employer did not have any other assignments available for the claimant.

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 the appellant's failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. 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).

A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

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. A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The employer asserted that the claimant was not discharged or laid off but that she voluntarily quit. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code §96.6-2. As the separation was not a voluntary quit, it must be treated as another form of separation.

871 IAC 24.1(113)a provides:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status (lasting or expected to last more than seven consecutive calendar days without pay) 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 laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

The employer had no work for the claimant after December 3, 2008. The separation was attributable to a lack of work by the employer and was a layoff, either permanent or temporary. Benefits are allowed.

DECISION:

The appeal in this case is treated as timely. The representative's December 15, 2009 decision (reference 01) is reversed. The claimant did not voluntarily quit and the employer laid off the claimant for lack of work. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw