

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIANNA WINTERS

Claimant

APPEAL NO: 14A-UI-04853-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SUNNYBROOK LIVING CARE CENTER LC

Employer

OC: 12/01/13

Claimant: Respondent (3)

Section 96.6-2 – Timeliness of Protest

Section 96.4-3 – Able and Available

871 IAC 24.22(2)j – Leave of Absence

STATEMENT OF THE CASE:

Sunnybrook Living Care Center, L.C. (employer) appealed a representative's May 2, 2014 decision (reference 04) that concluded Brianna Winters (claimant) was qualified to receive unemployment insurance benefits because of a separation from which was asserted to have occurred in November 2013. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 27, 2014. The claimant participated in the hearing and was represented by Jim Hamilton, paralegal. Michelle Hanson appeared on the employer's behalf. This appeal was consolidated for hearing with two related appeals, 14A-UI-05173-DT and 14A-UI-05174-DT. During the hearing, Exhibits A-1, A-2, and A-3 were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision affirming the representative's decision and allowing the claimant benefits.

ISSUES:

Was the employer's protest timely or are there legal grounds under which it should be treated as timely?

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The claimant established a claim for unemployment insurance benefits effective December 1, 2013. A notice of claim was mailed to the employer's last-known address of record on December 9, 2013. The employer received the notice. The notice has an area for the employer to designate any "statement of protest" to assert that the named claimant could be "subject to disqualification because of the following selected item(s)." Options include a space to designate that the employer asserts that the claimant voluntarily quit, was discharged for misconduct, or refused suitable work or recall to work. Another area is to assert that the claimant is "still employed" with other options to be marked to further explain the status, such as being on leave

of absence. The notice contained a warning that a protest must be postmarked or received by the Agency by December 19, 2013. The protest was not filed until it was faxed to the Claims Section on April 14, 2014 and marked as received by the section on April 15, 2014, which is after the date noticed on the notice of claim. No explanation was offered as to why there had been no protest made in December, or otherwise not until April 14. The information included by the employer on the protest was only to mark the box of "other" under the "still employed" option, into which the employer specified, "Non work-related restrictions."

Apparently prompted by the employer's protest received on April 15, the Claims Section issued a new notice of claim, mailed to the employer on April 17, 2014, with a deadline of April 28, 2014. The employer received this notice as well, and replied by submitting a responsive protest on April 24. The employer again only marked the box of "other" under the "still employed option, into which the employer specified, "We do not make accommodation to non-work related restrictions."

The claimant started working for the employer on August 7, 2013. She worked full time as a certified nursing aide (CNA). Her last day of work was the shift from the evening of November 20 into the morning of November 21. On November 21 she indicated to the employer she needed to have light duty work due to pregnancy. The employer declined to allow her to continue working with the non-work-related restrictions. On December 5 she brought another doctor's note to the employer indicating her restrictions were no pushing, pulling, or lifting over 25 pounds, and that this was to continue until her post-partum release from care. The employer again declined to allow the claimant to continue working with the non-work-related restrictions. The claimant did not request a leave of absence.

On April 14 the employer's acting administrator called the claimant and told her she was "terminated." On April 21 he called her again and said that she was "reinstated." While the employer may be willing to return the claimant to her employment when she is released without any work restrictions, as of mid-April 2014 the claimant has been performing a search for other employment, including as a cashier or in a fast-food restaurant. The work for which she has been applying is within her work restrictions.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this appeal is whether the employer timely raised the question as to whether there had been a disqualifying separation from employment. The law provides that all interested parties shall be promptly notified about an individual filing a claim. The parties have ten days from the date of mailing the notice of claim to protest payment of benefits to the claimant. Iowa Code § 96.6-2. Another portion of Iowa Code § 96.6-2 dealing with timeliness of an appeal from a representative's decision states an appeal must be filed within ten days after notification of that decision was mailed. In addressing an issue of timeliness of an appeal under that portion of this Code section, the Iowa court has held that this statute clearly limits the time to do so, and compliance with the appeal notice provision is mandatory and jurisdictional. *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979).

The administrative law judge considers the reasoning and holding of the *Beardslee* court controlling on the portion of Iowa Code § 96.6-2 which deals with the time limit to file a protest after the notice of claim has been mailed to the employer. Compliance with the protest provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), protests are

considered filed when postmarked, if mailed. *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983). The question in this case thus becomes whether the employer was deprived of a reasonable opportunity to assert a protest 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 employer did have a reasonable opportunity to file a timely protest.

Rule 871 IAC 24.35(2) provides in pertinent part:

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 department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

The employer has not shown that the delay for not complying with the jurisdictional time limit was due to department error or misinformation or delay or other action of the United States Postal Service. Since the employer filed the protest late without any legal excuse, the employer did not file a timely protest. The Agency's de facto determination in December 2013 therefore was that claimant's November 2013 separation was non-disqualifying, so that the claimant should be eligible for unemployment insurance benefits. This becomes the final determination regarding the at least temporary separation from employment. Since the administrative law judge concludes that the protest was not timely filed pursuant to Iowa Code § 96.6-2, Agency lacked jurisdiction to make a determination with respect to the nature of the protest and the reasons for the claimant's at least separation from employment, regardless of the merits of the employer's protest as to an at least temporary separation from employment. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979); *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979) and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

The remaining issue is whether the claimant is and has been able and available for work. As this is a week-to-week determination, it can be raised by the employer at any time. Iowa Code § 96.4-3. The employer could have raised that issue immediately in December by so making a timely protest. For the reasons discussed above, the administrative law judge finds that the employer is foreclosed from raising that issue for the period of time from December 1, 2013 through the benefit week ending April 12, 2014. However, beginning April 13, 2014, the week in which the employer first raised the question, the issue can be considered.

For each week for which a claimant seeks unemployment insurance benefits, she must be able and available for work. In general, an employee who is only temporarily separated from her employment due to being on a leave of absence is not "able and available" for work during the period of the leave, as it is treated as a period of voluntary unemployment. Rules 871 IAC 24.22(2); 871 IAC 24.23(10). However, implicit in this conclusion is that the leave is "voluntary" with mutual consent, not a unilateral decision made by the employer. Rules 871 IAC 24.22(2); 871 IAC 24.23(10). Here the claimant did not request a leave of absence, she only sought accommodation. Her involuntary at least temporary period of separation is not due to the type of leave of absence which would render her unable or unavailable for work.

She would still need to be otherwise able and available for work. To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Rule 871 IAC 24.22(1).

The claimant has demonstrated that since the week of April 13, 2014 she has been and is able to work in some gainful employment. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The May 2, 2014 (reference 04) decision is modified in favor of the claimant. The employer's protest in this case was not timely as to any separation from employment or as to the claimant being able and available prior to April 13, 2014, and so there is no determination as to there being a potentially disqualifying separation from employment. The determination is only that the claimant has been able and available for work. Benefits are allowed, provided the claimant is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs