

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHAEL R NOVITSKE**  
Claimant

**APPEAL NO. 10A-UI-06008-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PANDA EXPRESS INC**  
Employer

**Original Claim: 09-06-09  
Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Leaving  
871 IAC 24.26(1) – Voluntary Leaving - Change in Contract of Hire  
Iowa Code § 96.6(2) – Timeliness of Appeal

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the October 8, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 3, 2010. The claimant did participate. The employer did not participate.

**ISSUES:**

Did the claimant file a timely appeal?

Did the claimant voluntarily quit his employment with good cause attributable to the employer?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a cook, full-time, beginning in February 2009 through March 21, 2009, when he voluntarily quit. When the claimant was hired, he told the employer that he would be leaving for basic military training beginning on April 20, 2009 that would last through early September 2009. The claimant and the employer both planned that the claimant would return to work after he completed basic training. When he was hired, the claimant told the employer that he would need the weekend off during his last month and that he would need the week before he left for basic training off to spend time with his family before he left for an extended period of time. The employer agreed to the claimant having weekends off during his last month and to give him the week prior to April 20, off to spend time with his family. When the work schedule was posted on March 21 the claimant was scheduled to work every single day up until he left for basic training. He was not given any weekends off, nor was he given the week before he left for basic training off as had been agreed at the time of his hire. The claimant approached the manager and asked her why he was not only not given the time off he had been promised, but why he was scheduled to work every single day until the day before he left for basic training. The manager told him she was short handed and he would have to cancel his plans to be off work and work every single day. The claimant quit because the employer reneged on their agreement to give him weekends and vacation.

When the claimant returned from basic training, he applied for unemployment insurance benefits. The claimant got the fact-finding decision telling him he was denied due to separation from Panda Express. He contacted his local workforce office and was told that it was a mistake and that he was eligible. Believing that the local office was going to correct their mistake, the claimant continued to receive benefits despite the fact-finding decision that denied him benefits. The claimant timely appealed the overpayment decision that was issued on April 13, 2010.

### **REASONING AND CONCLUSIONS OF LAW:**

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines 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.

Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant was given incorrect information by his local office, leading him not to appeal. This is supported by the fact that his claim was not locked after the October 8, 2009 fact-finding decision that denied benefits was issued. The claimant timely appealed the overpayment decision, which was the first accurate notice of disqualification. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant did voluntarily leave the employment with good cause attributable to the employer.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.26(1) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

When the employer hired the claimant, they agreed to give him every weekend off work during the last month before he left for basic training and they agreed to give him off as vacation the final week before he left for basic training. The employer reneged on their agreement and scheduled the claimant to work every single day for the last five weeks of his employment, including the day before he was to leave for basic training. Such changes represent a substantial change in the contract of hire to the claimant's detriment. Thus, the separation was with good cause attributable to the employer. Benefits are allowed.

**DECISION:**

The October 8, 2009 (reference 01) decision is reversed. The claimant's appeal is timely. The claimant voluntarily left his employment with good cause attributable to the employer. Benefits are allowed, provided the claimant is otherwise eligible.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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