

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

TABISHA ASENDE
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 22A-UI-18432-DZ-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 01/03/21
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timely Appeal
Iowa Code § 96.4(3) – Able to and Available for Work

STATEMENT OF THE CASE:

Tabisha Asende, the claimant/appellant, filed an appeal from the Iowa Workforce Development (IWD) February 26, 2021, (reference 01) unemployment insurance (UI) decision. The decision denied REGULAR (state) UI benefits as of January 3, 2021 because IWD concluded that Ms. Asende was on a leave of absence. The parties were properly notified about the hearing. A telephone hearing was held on November 18, 2022. Appeals 22A-UI-18432-DZ-T, and 22A-UI-18433-DZ-T were heard together and formed one hearing record. Ms. Asende participated personally through a CTS Language Link Swahili interpreter. The employer did not participate in the hearing. The administrative law judge took official notice of the administrative record.

ISSUES:

Is Ms. Asende's appeal filed on time?
Is Ms. Asende able to and available for work?
Is Ms. Asende on a leave of absence?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: IWD mailed the UI decision to Ms. Asende at the correct address on February 26, 2021. The UI decision states that it becomes final unless an appeal is postmarked or received by the IWD Appeals Section by March 8, 2021. Ms. Asende was not aware of any issues getting mail, but she did not receive the decision in the mail.

On December 17, 2021, IWD mailed Ms. Asende another UI decision: a reference 02 UI decision. The reference 02 UI decision concluded that Ms. Asende was overpaid REGULAR (state) UI benefits in the gross amount of \$3,717.00 because the February 26, 2021 (reference 01) UI decision had found her not eligible for UI benefits. Ms. Asende received that decision in the mail. She took the decision to a person who speaks Swahili and English. That person told Ms. Asende that overpayment was about taxes and to hold onto the document until she filed her taxes. Ms. Asende did so.

Ms. Asende received more letters from IWD and took the letters to the person monthly. The person kept telling Ms. Asende the issue was taxes. At some point, Ms. Asende took an IWD letter to another person who told her to talk with IWD. Ms. Asende talked with IWD in late October 2022. The IWD told Ms. Asende about her appeal rights. Ms. Asende filed an appeal by fax on October 28, 2022. The appeal was received on October 28, 2022.

The administrative law judge further finds: Ms. Asende began working for the employer on October 2, 2021. Ms. Asende gave birth in November 2021. On advice of her doctor Ms. Asende stayed home from work after she gave birth. Ms. Asende's doctor advised her to stay home because of her increased risk of testing positive for COVID-19. Ms. Asende continued to stay home because she could not find childcare because of the COVID-19 pandemic. After living two months without income, someone told Ms. Asende about UI benefits. Ms. Asende applied for UI benefits effective January 3, 2021. Ms. Asende returned to work in late February 2021 and stopped filing weekly UI claims at that time.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Ms. Asende's appeal of the February 26, 2021 (reference 01) UI decision was filed on time.

Iowa Code § 96.6(2) provides, in pertinent part: “[u]nless 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.”

Iowa Admin. Code r. 871-24.35(1) provides:

2. Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:
 - (2) If transmitted via the United States Postal Service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
 - (b) If transmitted via the State Identification Data Exchange System (SIDES), maintained by the United States Department of Labor, on the date it was submitted to SIDES.
 - (c) If transmitted by any means other than [United States Postal Service or the State Identification Data Exchange System (SIDES)], on the date it is received by the division.

Iowa Admin. Code r. 871-24.35(2) provides:

2. 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 division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

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.¹ Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid.²

Ms. Asende did not receive the February 26, 2021 (reference 01) UI decision by the deadline and, therefore, could not have filed an appeal by the appeal deadline. The notice provision of the decision was invalid. When Ms. Asende received the December 17, 2021 (reference 02) UI decision, she made her best effort, given the language barrier, to figure out what the decision meant and what she needed to do. As soon as she understood her appeal rights in October 2022, she filed an appeal. Ms. Asende's appeal was filed on time.

The administrative law judge further concludes as follows:

Iowa Code section 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. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.23(8) and (10) provide:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(8) Where availability for work is unduly limited because of not having made adequate arrangements for child care.

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

To be 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."³ "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in

¹ *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979).

² *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).

³ *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); Iowa Admin. Code r. 871-24.22(1).

which the individual resides.”⁴ A person claiming benefits has the burden of proof that she is be able to work, available for work, and earnestly and actively seeking work.⁵

In this case, Ms. Asende was on a leave of absence and then not available to work because she did not have childcare. Ms. Asende did what she needed to do to care for her child, but she was not able to and available for work as of January 3, 2021, the effective date of her claim. UI benefits are denied.

DECISION:

Ms. Asende's appeal of the February 26, 2021 (reference 01) UI decision was filed on time. The February 26, 2021 (reference 01) UI decision is AFFIRMED. Ms. Asende is not able to and available for work effective January 3, 2021. Benefits are denied.



Daniel Zeno
Administrative Law Judge

November 22, 2022
Decision Dated and Mailed

scn

⁴ Sierra at 723.

⁵ Iowa Admin. Code r. 871-24.22.

NOTE TO MS. ASENDE:

- If you were unemployed in January and February 2021 because of the COVID-19 pandemic, you may qualify for Pandemic Unemployment Assistance (PUA) benefits. **You must apply for PUA benefits to determine your eligibility under the program.**
- You can contact IWD for help applying for PUA benefits. You can call IWD or go to the IWD Iowa City office. The address and telephone number for the Iowa City office is:
 - 1700 S 1st Avenue
 - Suite 11B
 - Iowa City IA 52240
 - Telephone: 319-351-1035 OR 1-866-227-9874
- You can also apply for PUA benefits online. Here are the steps to do so:
 - First go to <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-appeals>
 - Go to the "WHAT TO EXPECT FROM THE HEARING" section.
 - Go to the last two sentences in that section.
 - The PUA application link is at the end of the second-to-last sentence of the section.
 - The reference number/authorization number is the pin number you used for the appeal hearing: 118432.
- **If IWD finds you eligible for federal PUA benefits, you can use the PUA benefits to pay off the \$3,717.00 REGULAR (state) UI overpayment.**
- **If you do not apply for and are not approved for PUA, you may be required to repay the \$3,717.00 in UI benefits you've received so far.**
- Governor Reynolds ended Iowa's participation in federal pandemic-related unemployment benefit programs, including the PUA program, effective June 12, 2021. **But you can still apply for PUA benefits at the link above if you were unemployed or your hours were reduced because of the COVID-19 pandemic between February 2, 2020, and June 12, 2021.**
- To check on your PUA application contact IWD by phone, email, or online.
 - Phone: 1-866-239-0843
 - Email: uiclaimshelp@iwd.iowa.gov
 - Online: Go to www.iowaworkforce.gov, click on "Contact Us" then click on "Unemployment Help Request" and complete the form.

APPEAL RIGHTS. If you disagree with this decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to **file a petition for judicial review in District Court** within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de **presentar una petición de revisión judicial en el Tribunal de Distrito** dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.