

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TAMAKIA Q SMITH-WINSTON
Claimant

APPEAL NO. 09A-UI-10785-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**Original Claim: 06/21/09
Claimant: appellant (2)**

Section 96.5(1)d – Separation Due to Illness/Injury
Section 96.6(2) – Timeliness of Appeals

STATEMENT OF THE CASE:

Tamakia Smith-Winston filed an appeal from a representative's decision dated July 17, 2009, reference 01, which denied benefits based on her separation from Tyson Fresh Meats, Inc. (Tyson). After due notice was issued, a hearing was held by telephone on August 27, 2009. Ms. Smith-Winston participated personally and was represented by Mary Hamilton, Attorney at Law, who offered additional testimony from Jill Freed, Paralegal. The employer participated by Will Sager, Human Resources Manager.

ISSUE:

The first issue in this matter is whether Ms. Smith-Winston's appeal should be considered timely filed. If it is, the issue then becomes whether she was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: The representative's decision that is the subject of this appeal was mailed to Ms. Smith-Winston on July 17, 2009. She received the decision and it was agreed that her attorney would file an appeal on her behalf. The attorney's paralegal made several attempts to transmit the appeal by fax on July 27, the date on which it was due. However, the appeal would not transmit. By the time the paralegal left at 5:00 p.m., the appeal still had not gone through. By then, the local post office was closed. The appeal was faxed successfully the following day, July 28, 2009.

Ms. Smith-Winston began employment with Tyson September 18, 2007 as a full-time production worker. Her last day at work was June 15, 2009. She was off work for a period of time thereafter because of back problems. When she attempted to return to work, the employer indicated she would need a release from her doctor. She was not told she needed to call in each day until she received the release and, therefore, did not do so. She returned with a full release on or about June 21 but was told she no longer had a job because she had not called in on the days she was waiting for a doctor's release.

Because of a misunderstanding as to whether Ms. Smith-Winston knew she was to report the above absences, the employer reinstated her employment effective June 29. She was not allowed to return to work immediately, because the employer requested that she be seen by the company doctor. She saw Dr. Archer on July 8 but has not been contacted about a return to work. The employer placed Ms. Smith-Winston on a leave of absence at the directive of the corporate office on June 30.

Ms. Smith-Winston subsequently began working for Sparky's on July 18 and works approximately 24 hours each week. She last claimed job insurance benefits the week ending July 18, 2009.

REASONING AND CONCLUSIONS OF LAW:

An individual has ten days in which to appeal from a representative's decision. Iowa Code section 96.6(2). The claimant's attorney made a good-faith attempt to file a timely appeal. It was learned that the appeal was not transmitting by fax at a point when it was too late to take the appeal to the post office and obtain a timely postmark. The attorney acted with due diligence in filing the appeal by fax on July 28, 2009. For the above reasons, the appeal shall be deemed timely filed. As such, the administrative law judge has jurisdiction over the separation issue.

Ms. Smith-Winston left employment on June 15, 2009 because of a back injury. She returned to work with a full release on June 21 as requested by the employer. Through no fault of hers, she has not been allowed to resume working in spite of being released. In fact, the employer sent her to be seen by Dr. Archer on July 8, 2009 but provided no information concerning that visit. Inasmuch as the employer has not offered Ms. Smith-Winston suitable, comparable work since she returned with a complete release on June 21, it is concluded that she is entitled to benefits pursuant to Iowa Code section 96.5(1)d.

DECISION:

The representative's decision dated July 17, 2009, reference 01, is hereby reversed. Ms. Smith-Winston was separated from Tyson on June 21, 2009 for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw