

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

OTONIEL RUIZ
Claimant

APPEAL 19A-UI-00197-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 12/02/18
Claimant: Appellant (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge Misconduct
Iowa Code § 96.11 – Incarceration Disqualification

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 21, 2018, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for excessive unexcused absenteeism. The parties were properly notified about the hearing. A telephone hearing was held on January 24, 2019. Claimant participated and testified. Employer did not participate. Department's Exhibit D-1 was received into evidence.

ISSUES:

Is the claimant's appeal timely?

Is the claimant disqualified from receiving unemployment benefits due to a separation from employment as the result of incarceration?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on June 30, 2018. Claimant last worked as a full-time dehair mechanic. Claimant was separated from employment on November 29, 2018, when he was discharged.

On November 25, 2018, claimant was arrested and taken into custody after being pulled over for a broken taillight. When claimant was pulled over the officer found he had an outstanding warrant, which claimant was unaware of, and was driving without a license, while barred. Claimant was in jail and therefore missed work, November 25, 26, 27, and 28, 2018. Claimant had someone inform the employer he would not be in to work on November 25, but not any of the other dates he missed. When claimant was released from jail and attempted to return to work he was told that he had been discharged for excessive absenteeism. Claimant's criminal cases related to the underlying warrant and a driving while barred charge are still pending,

though he indicated he intends to plead guilty and accept a plea agreement at his next court date.

A disqualifying unemployment insurance decision was mailed to the claimant's last known address of record on December 21, 2018. He was not sure when he received the decision or how long it typically takes mail from Des Moines to reach him. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by December 31, 2018. The appeal was not filed until January 9, 2019, which is after the date noticed on the unemployment insurance decision. Claimant initially waited to file his appeal because he believed he would find work right away. Claimant could not recall for certain how long he put off filing his appeal, but thought it was possible it was just a few days.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal is untimely.

Iowa Code § 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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 96.8, subsection 5.

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. Bd. of Adjustment*,

239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976). 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 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. *Franklin v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The claimant delayed in filing his appeal because he believed he would find work right away. The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

Even if the appeal were timely, the administrative law judge concludes the claimant's separation due to incarceration is disqualifying. Benefits are withheld.

Iowa Code section 96.5(11) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

11. Incarceration--disqualified.

a. If the department finds that the individual became separated from employment due to the individual's incarceration in a jail, municipal holding facility, or correctional institution or facility, unless the department finds all of the following:

- (1) The individual notified the employer that the individual would be absent from work due to the individual's incarceration prior to any such absence.
- (2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the individual was found not guilty of all criminal charges relating to the incarceration.
- (3) The individual reported back to the employer within two work days of the individual's release from incarceration and offered services.
- (4) The employer rejected the individual's offer of services.

b. A disqualification under this subsection shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Under Iowa Code section 96.6(2) provides the claimant has the initial burden to produce evidence showing that he is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11. If it is shown the claimant became separated from employment due to his incarceration he must produce evidence on the whether the four conditions for avoiding incarceration disqualification are met. Here, the claimant notified the employer he would not be in to work on November 25, but failed to contact them regarding his next three scheduled work days. Claimant did return to work immediately upon his release, was not allowed to return to work, but was told he was being separated from employment due to his incarceration. Claimant has not, however, produced evidence to meet the requirement under Iowa Code §96.11(a)(2), as the charges are still pending. It is unlikely that claimant will be able to provide such evidence, as he has indicated he intends on entering a plea of guilty. Accordingly, he is disqualified due to incarceration under Iowa Code §96.11.

DECISION:

The December 21, 2018, (reference 01) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. Even if the appeal were timely, the claimant's separation due to incarceration is disqualifying.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs