IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NICHOLAS P WISELY
Claimant

EMPLOYER'S SERVICE BUREAU INC
Employer

APPEAL NO: 09A-UI-18557-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/01/09
Claimant: Appellant (2)

871 IAC 24.1(113)a – Layoff
Section 96.5-1 – Voluntary Leaving
Section 96.6-2 – Timeliness of Protest

STATEMENT OF THE CASE:

Nicholas P. Wisely (claimant) appealed a representative's December 9, 2009 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Employer's Service Bureau, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 28, 2010. The claimant participated in the hearing. John Rausenberger appeared on the employer's behalf. 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.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

After a prior period of employment with the employer, the claimant most recently started working for the employer on March 9, 2009. He worked full time as a contract laborer for the employer's exclusive business client in Clinton, Iowa, working on the second shift. His last day of work was May 4, 2009.

On May 5 the claimant reported to the worksite as scheduled but was met at the gate by the employer's representative. He was informed the business client was doing a partial layoff for seasonal retooling and that he would not be needed again until he was recalled. He was advised that this could be at least two to three weeks. He was not recalled. On May 18, 2009, he called the employer's office and the employer's representative advised him that if he had not yet been recalled, he was not yet needed, and should continue to wait to be recalled.

However, also on May 18, a business client representative contacted Mr. Rausenberger, the employer's vice president, and indicated that the claimant had been a no-call/no-show for work

for two weeks beginning May 5, and that the employer should replace the claimant on the assignment. As a result, the employer deemed the claimant to have voluntarily quit and replaced him on the assignment.

The claimant had established an original unemployment insurance benefit year effective November 2, 2008. Upon being told by the employer's representative on May 5 that he was being laid off, he reopened the claim by filing an additional claim effective May 10, 2009. A notice of the claimant's reopening of the claim was mailed to the employer's address of record on May 13, providing a deadline of May 26 for the employer to protest the claimant's eligibility for unemployment insurance benefits. The employer did not protest this claim. As a result, benefits were allowed. When the claimant's original claim year expired on November 1, 2009, he established a second claim year effective November 2. Notice of this claim was also sent to the employer's address of record, but this time the employer did respond by protesting that the claimant had quit as of May 5.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993); Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that he quit by abandoning the position. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code § 96.6-2.

871 IAC 24.1(113)a provides:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status (lasting or expected to last more than seven consecutive calendar days without pay) initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

The separation between the claimant and the employer was a layoff by the employer due to the seasonal retooling, from which the employer never recalled the claimant; the employer had no work it could provide to the claimant. As there was not a disqualifying separation, benefits are allowed if the claimant is otherwise eligible.

This conclusion is further true because the employer failed to make a timely protest of the claimant's filing immediately after the May 5 separation. 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.

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. If the employer had a dispute with whether or not the claimant should have been disqualified as a result of the May 2009 separation from the employer, then it needed to have filed a protest to the notice of the claimant's May claim within the deadline for that response; by failing to protest in May 2009, the separation was deemed to be non-disqualifying. Iowa Code § 96.6-2. Since the administrative law judge concludes that the employer failed to timely protest the claimant's May separation when the claim was reopened, the Agency actually lacked jurisdiction to make a new determination upon the employer's November 2009 protest with respect to the reasons for the claimant's May 2009 separation from employment, regardless of the merits of the employer's protest. The de jur determination that the separation was non-disqualifying which resulted from the employer's failure to protest the May 2009 claim notice should have been treated as final and not subject to review in a subsequent claim year. 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).

DECISION:

The representative's December 9, 2009 decision (reference 01) is reversed. The claimant did not voluntarily quit but rather the employer did lay off the claimant. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/css