IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SCOTT D SCHULZ
Claimant

BARRON EQUIPMENT COMPANY INC
Employer

APPEAL NO: 12A-UI-03482-DT

ADMINISTRATIVE LAW JUDGE DECISION

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

Section 96.5-1 – Voluntary Leaving
Section 96.7-2-a(2) – Charges Against Employer's Account
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Scott D. Schulz (claimant) appealed a representative's April 7, 2010 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Barron Equipment Company, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 19, 2012. This appeal was consolidated for hearing with one related appeal, 12A-UI-03483-DT. The claimant participated in the hearing. Tom Huygens appeared on the employer's behalf. During the hearing, Exhibit A-1 was entered into evidence. 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.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it should be treated as timely?

Did the claimant voluntarily quit for a good cause attributable to the employer?

Is the employer's account subject to charge?

OUTCOME:

Reversed. Benefits allowed. Employer's account not subject to charge.

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last known address of record on April 7, 2010. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by April 17, 2010. The appeal was not filed until it was postmarked on April 4, 2012, which is after the date noticed on the disqualification decision. The claimant did not file a written appeal until he received the resulting

overpayment decision which had been issued on March 30, 2012, the subject of 12A-UI-03483-DT.

The claimant testified that within a few days of receiving the representative's decision in April 2010 he went in person to his local Agency office in Mason City. He testified that he showed an Agency representative the decision, and that the Agency representative took information from him, indicating that the decision was incorrect insofar as the employer was not a chargeable employer, and that the claimant appeared to have had good cause for leaving the employment. The claimant understood that the matter was or would be resolved. He did not realize that the decision had remained in place and that his claim became locked because after the week ending April 3, 2010 he did not seek any further benefits as he had obtained new employment.

The claimant started working for the employer on December 1, 2009. He worked full time as an installer working out of the employer's Des Moines, Iowa office. His last day of work was Friday, February 19, 2010. On that date he indicated to his supervisor he needed a few days off to take care of some personal issues. He spoke to the employer's president and co-owner, Huygens, on Monday, February 22, confirming he did need one or two personal days, which were granted. On February 23 he again spoke with Huygens and indicated that he was contemplating moving back to Mason City to work on his marriage, that he was willing to give a two-week notice, but that he wanted to make the move as soon as possible. The employer determined that it was willing to waive the two week notice.

Contributing to the claimant's decision to move back to Mason City was that since shortly after starting his employment he had been disturbed by the treatment he and the rest of the crew were receiving from the crew supervisor. The crew supervisor would routinely use vulgar language toward the claimant and others on the crew, calling him and other a "dumb f - - -" and a "dumb a - -," as well as regularly referring to their work as "g - - d - - - s - - -." The claimant had expressed his objections regarding this language being addressed to him and others on the crew both directly with the crew supervisor and with the co-owner who managed the Des Moines office. In about January 2010 the co-owner had indicated to the claimant that he would mention something to the supervisor about the problem, but also indicated to the effect that that was just the way the supervisor was.

The problem did not change, and continued through the claimant's work in February 2010. If that problem had not existed, the claimant would not have decided to move to Mason City, but would have decided to remain in his employment and work on his marriage from where he was. He did not say anything to Huygens about the problem when he spoke to him on February 22 or February 23 as Huygens was not the co-owner who handled the Des Moines office. As the claimant had already discussed the issue with the co-owner who was in the Des Moines office and it appeared that he was not willing or able to take effective remedial action, he did not believe it would be any more effective to bring the issue to the co-owner who was not in that office. Huygens indicated that he had some knowledge that the supervisor did make use of such language, and that he and his partner had made some reference to the supervisor for him to curtail the usage.

The claimant established an unemployment insurance benefit year effective November 1, 2009, after a separation from employment with some other employer. After the employment with this employer ended, he reopened the claim by filing an additional claim effective February 28, 2010.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

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. Board of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976). Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983).

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 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. IDJS*, 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. IDJS*, 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. IESC*, 217 N.W.2d 255 (Iowa 1974); *Smith v. IESC*, 212 N.W.2d 471, 472 (Iowa 1973).

The administrative law judge finds it nearly incredible that an Agency representative would have given the claimant information that the matter could be resolved without some reversal or modification of the decision which had been issued. Even though it was correct that the employer was not a base period employer and was not subject to charge; such resolution would always need to be done through some superseding decision, usually through the formal filing of an appeal with a resulting appeal decision, but at the least through issuance of some overriding written amended decision; to suggest otherwise would be astoundingly incorrect. However, the administrative law judge does not have any direct information to contradict the claimant's testimony as to what he says he was told. Assuming he was told as he has testified, this incorrect information on the part of the Agency representative unreasonably interfered with the claimant's attempt and opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal should therefore be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

If the claimant voluntarily quit his employment, he is not eligible for unemployment insurance benefits unless it was for good cause attributable to the employer. Iowa Code § 96.5-1. Intolerable or detrimental working conditions are good cause for quitting attributable to the employer. 871 IAC 24.26(4). Where a claimant gives several different reasons for leaving

employment, all stated reasons which might have combined to give the claimant good cause to quit must be considered in determining whether any of those reasons alone or in combination constituted good cause attributable to the employer. *Taylor v. IDJS*, 362 N.W.2d 534 (Iowa 1985). While moving to be with a spouse would not alone result in eligibility, here the claimant's decision to move was substantially influenced by his work conditions. 871 IAC 24.25(10).

"Good cause attributable to the employer" does not require fault, negligence, wrongdoing or bad faith by the employer, but may be attributable to the employment itself. *Dehmel v. Employment Appeal Board*, 433 N.W.2d 700 (Iowa 1988); *Raffety v. Iowa Employment Security Commission*, 76 N.W.2d 787 (Iowa 1956). While the employer may have had a good business reason for not effectively addressing the abusive language used by the crew supervisor, the claimant has demonstrated that a reasonable person would find the employer's work environment detrimental or intolerable. *O'Brien v. EAB*, 494 N.W.2d 660 (Iowa 1993); *Uniweld Products v. Industrial Relations Commission*, 277 So.2d 827 (FL App. 1973). Benefits are allowed.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period for his November 9, 2009 claim year began July 1, 2008 and ended June 30, 2009. The employer did not employ the claimant during this time, and therefore the employer was not a base period employer for this claim year, so its account was not chargeable for benefits paid to the claimant. Further, as the claimant has had no new claim year since the November 9, 2009 claim year, even if the claimant were to establish a new claim year now or sometime in the future, the base period for such new or future claim year would not reach back to include the period of the his employment with the employer. Therefore, the employer will never be subject to charge due to the wages it paid to the claimant during his employment.

DECISION:

The appeal in this case is treated as timely. The representative's April 7, 2010 decision (reference 02) is reversed. The claimant voluntarily quit for good cause attributable to the employer. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The employer's account is not subject to charge.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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