

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KATIE L OBERHART
Claimant

HY-VEE INC
Employer

APPEAL 17A-UI-04033-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/06/16
Claimant: Appellant (4R)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.4(3) – Able and Available
Iowa Admin. Code r. 871-24.23(26) – Able & Available – Part time, same hours and wages

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the December 7, 2016 (reference 07) unemployment insurance decision that found claimant was ineligible for unemployment benefits because she was still employed for the same hours and wages as in her original contract of hire. The parties were properly notified of the hearing. A telephone hearing was held on May 5, 2017. The claimant, Katie L. Oberhart, participated personally. The employer, Hy-Vee Inc., was represented by Hearing Representative Keith Mokler. The employer participated through witnesses Nancy Richardson and Marilyn Cook. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records including the fact-finding documents.

ISSUES:

Is the claimant's appeal timely?
Is the claimant able to work and available for work effective November 20, 2016?
Is claimant employed for the same hours and wages?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant did not receive a copy of this decision. Claimant filed her appeal of this decision when she received the corresponding overpayment decision in the mail. Claimant was employed part-time for this employer from April 21, 2016 until February 5, 2017. Claimant was employed as a gas clerk at this employer's gas station. Claimant's job duties included operating the cash register, helping customers, and assisting with inventory. Her working hours varied and ranged between 24 and 30 hours per week. However, claimant was never guaranteed a certain number of hours per week when hired. Her hours worked each week fluctuated with the employer's needs.

There has been no initial investigation and determination regarding claimant's separation from this employer. The question of whether the claimant is separated from employment will be

remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

The first issue involves whether the claimant filed a timely appeal to this matter. 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 claimant has ten days from the date of mailing of the decision to file an appeal. Iowa Code § 96.6(2). In addressing an issue of timeliness of an appeal, the Iowa Supreme 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. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979). The claimant did not have an opportunity to appeal the decision because she never received the decision. Without timely notice, no meaningful opportunity for appeal exists. *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant filed the appeal when she received the decision regarding overpayment. Therefore, the appeal shall be accepted as timely.

Iowa Code § 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 § 96.19,

subsection 38, paragraph "b", subparagraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.23(26) provides:

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

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

As of November 20, 2016, claimant was still employed on a part-time basis as contemplated in her original contract of hire with this employer. However, the separation issue delineated in the findings of fact must be remanded to the Benefits Bureau.

DECISION:

The claimant's appeal is timely. The December 7, 2016 (reference 07) decision is modified in favor of appellant. Claimant was still employed in her part-time job at the same hours and same wages as in her original contract of hire as of November 20, 2016 and was therefore not partial unemployed. However, claimant separated from employment as of February 5, 2017 and was no longer employed at the same hours and same wages as of February 5, 2017.

REMAND: The separation issue delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs