

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KATHY J SMITH
Claimant

SISTERS HOMESTYLE ENTREES INC
Employer

APPEAL 18A-UI-05120-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/25/18
Claimant: Respondent (1)

Iowa Code § 96.6(2) – Timeliness of Protest

STATEMENT OF THE CASE:

Employer filed an appeal from the April 25, 2018, (reference 03) unemployment insurance decision that found the protest untimely and allowed benefits. After due notice was issued, a hearing was held by telephone conference call on May 21, 2018. The claimant participated and testified. The employer participated through General Manager Mary Catherine Ferry. Employer's Exhibit 1 and Department's Exhibit D-1 were received into evidence.

ISSUE:

Is the employer's protest timely?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Claimant's notice of claim was mailed to employer's address of record on April 4, 2018, and was received by employer within ten days. The notice of claim contains a warning that the employer protest response is due ten days from the initial notice date and gave a response deadline of April 16, 2018. The form advises any protest must be postmarked, faxed or returned not later than April 16, 2018. The employer did not file a protest response until April 23, 2018, which is after the ten-day period had expired. The employer first attempted to fax in its protest on Friday, April 13, 2018. (Exhibit 1). The employer first attempted to send in their protest via fax at 1:03 p.m. The employer received a transaction report at 1:08 p.m. indicating the fax had failed to send. The employer tried the second fax number on the hearing notice at 2:35 p.m. and received a report back at 2:40 p.m. indicating the fax did not go through. The employer tried to third number at 3:22 p.m. and received notice back at 3:28 p.m. that the fax did not go through.

Ferry testified she did not stand by the fax machine to see if the fax went through and was not aware that it had failed until the failed transmissions came to her desk on April 17, 2018. Ferry again tried to transmit the protest at 3:01 p.m. and 4:39 p.m. on April 17, 2018. Both message failed to send and a transmission report notified the employer of such each time in less than ten minutes from when the fax was sent. Ferry tried to fax the document in one more time on April 18, 2018 at 5:22 p.m., but received a notice back at 5:27 p.m. indicating the transmission

had failed. Ferry then decided just to mail the protest in. The protest was postmarked April 23, 2018. Ferry did not have an explanation for the delay in the final fax attempt on April 18 and the protest actually being mailed on April 23, 2018.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes that employer has failed to protest response within the time period prescribed by the Iowa Employment Security Law.

Iowa Code § 96.6(2) provides, in pertinent part:

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.

Another portion of this same Code section dealing with timeliness of an appeal from a representative's decision states that such 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 Supreme Court held that this statute prescribing the time for notice of appeal clearly limits the time to do so, and that 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 that court in that decision to be controlling on this portion of that same Iowa Code section which deals with a time limit in which to file a protest after notification of the filing of the claim has been mailed. The employer has not shown any good cause for not complying with the jurisdictional time limit. Therefore, the administrative law judge is without jurisdiction to entertain any appeal regarding the separation from employment.

Here, the employer made a good faith effort on April 13, 2018 to send in its protest within the period before the deadline. However, each time the fax failed to transmit, the employer received notification of such within six minutes or less. While faxing the documents in may have been the most convenient method of submitting the protest for the employer, it had notice on April 13, 2018 that this method was, for some reason, not working. The employer had ample opportunity to utilize a different method, such a U.S. mail either on April 13, 14, or 16. The employer did not take advantage of these alternative methods, however, until April 23, 2018, approximately ten days after the first failed fax attempt. Therefore, the delay 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).

No other good cause reason has been established for the delay. The administrative law judge further concludes that the employer has failed to timely protest 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 claimant's termination of employment. See, *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979); *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979) and *Pepsi-Cola Bottling Co. v. Emp't Appeal Bd.*, 465 N.W.2d 674 (Iowa Ct. App. 1990).

DECISION:

The April 25, 2018, (reference 03) unemployment insurance decision is affirmed. Employer has failed to file a timely protest response, and the decision of the representative shall stand and remain in full force and effect.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs