

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DARLENE R GASCOIGNE
Claimant

APPEAL NO. 13A-UI-00001-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LAKE MANAWA NISSAN INC
Employer

OC: 09/02/12
Claimant: Respondent (2-R)

Section 96.6-2 – Timeliness of Protest
Section 96.19-18-a – Employment

STATEMENT OF THE CASE:

Lake Manawa Nissan, Inc. filed a timely appeal from a representative's decision dated December 24, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits finding that the employer's protest regarding the claimant's separation from work could not be accepted because it was not timely. After due notice was provided, a telephone hearing was held on February 4, 2013. Claimant participated. The employer participated by Mr. Paul Heimann, Attorney at Law, and witness: Ms. Karen Rice. Employer's Exhibits One and Two were received into evidence.

ISSUE:

The issue is whether the employer filed a timely protest as required by law and whether there was an employment relationship between Lake Manawa Nissan, Inc. and Darlene Gascoigne.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Lake Manawa Nissan, Inc. received a Notice of Claim filed on the claimant, Darlene Gascoigne. The Notice of Claim was sent to Lake Manawa Nissan, Inc. on the claimant, Darlene Gascoigne and on the claim of her husband, Larry J. Gascoigne. The Notice of Claim was sent to the employer on September 11, 2012 at its address of record and was due to be received back by Workforce Development by September 21, 2012. On September 21, 2012, a protest on each of the claims for Darlene Gascoigne and Larry J. Gascoigne were faxed by Mr. Heimann's legal office to Iowa Workforce Development. The faxes were sent at the same time. The protest for the claim of Larry J. Gascoigne was apparently received but the protest for Darlene Gascoigne was not stamped in as received by the agency that day. The employer had received a positive fax confirmation on both protests and reasonably concluded that the error was not on the part of Lake Manawa Nissan, Inc. or the legal firm that handled the protest for the employer.

The employer specifically noted on its protest on the claim of Darlene Gascoigne that "this individual never worked for this employer."

Darlene Gascoigne had never been hired as an employee to perform services for Lake Manawa Nissan, Inc. and had not performed any services in employment for Lake Manawa Nissan, Inc. at any point in time. It appears that Ms. Gascoigne's son had been affiliated in a management position with Lake Manawa Nissan, Inc. and had made an arrangement without the knowledge of higher company management to provide pay and insurance coverage to his mother, Darlene Gascoigne although Ms. Gascoigne was never an employee and never performed services for the company. When the unauthorized pay plan was discovered by company management, no further checks were issued to Ms. Gascoigne and the claimant was informed of the reason. Ms. Gascoigne, nevertheless, filed a claim for unemployment insurance benefits and was deemed qualified to receive unemployment insurance benefits because the employer's protest on her claim had not been stamped in and received on the same timely date in time that the protest for Larry Gascoigne had been forwarded by Lake Manawa Nissan, Inc. and faxed at the same time as the protest for Darlene Gascoigne.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

The administrative law judge concludes that the employer has protested within the time period prescribed by the Iowa Employment Security Law. The delay was due to apparent agency error as the evidence in the record establishes that both the protest for Darlene Gascoigne and Larry Gascoigne were faxed at the same time in a timely fashion by Lake Manawa Nissan, Inc.'s legal representatives. Because the protest is considered timely, the administrative law judge will make a determination with respect to the claimant's eligibility to receive benefits based upon employment with Lake Manawa Nissan, Inc.

Iowa Code section 96.19-18-a provides:

18. "Employment".

a. Except as otherwise provided in this subsection "employment" means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, expressed or implied. Employment also means any service performed prior to January 1, 1978, which was employment as defined in this subsection prior to such date and, subject to the other provisions of this subsection, service performed after December 31, 1977, by: . . .

The evidence in the record clearly establishes that Ms. Gascoigne performed no services in employment for Lake Manawa Nissan, Inc. As the claimant was not employed by this entity, she is not eligible to receive unemployment insurance benefits based upon wage credits that were erroneously credited to her by a scheme involving her family members.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated December 24, 2012, reference 01, is reversed. The employer's protest was timely. Claimant is not eligible to receive unemployment insurance benefits as there was no employment relationship between the claimant and Lake Manawa Nissan, Inc. Benefits paid to the claimant are not benefits paid for service in employment and the claimant was not eligible to receive those unemployment insurance benefits. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs