

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

RUBY J TIMMINS
11878 SPENCER ST
MONROE IA 50208

AMERICAN LEGION #363
124 N COMMERCE
PO BOX 837
MONROE IA 50170-0837

Appeal Number: 05A-UI-05990-RT
OC: 02/27/05 R: 02
Claimant: Respondent (4)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.6-2 – Initial Determination (Timeliness of Protest)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, American Legion Post No. 363, filed a timely appeal from an unemployment insurance decision dated May 24, 2005, reference 06, allowing unemployment insurance benefits to the claimant, Ruby J. Timmins, and providing that the employer's account may be charged for benefits paid. After due notice was issued, a telephone hearing was held on June 23, 2005, with the claimant participating. Dick Van Wyk, Post Commander, participated in the hearing for the employer. This appeal was consolidated with appeal number 05A-UI-05991-RT, for the purposes of the hearing with the consent of the parties. Department Exhibits One and Two were admitted into evidence. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

At 2:24 p.m. on June 10, 2005, the administrative law judge received a telephone call from Kenneth Neff for the employer, requesting that the hearing be rescheduled because Mr. Neff was going to be out of town. However, because Mr. Neff indicated that there were other witnesses that could participate in the hearing, the administrative law judge denied the employer's request to reschedule the hearing. Another witness, Dick Van Wyk, Post Commander, participated in the hearing for the employer.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, the administrative law judge finds: The claimant filed a claim for unemployment insurance benefits effective February 27, 2005, and reopened her claim for benefits effective April 10, 2005, and May 1, 2005. A notice of the claimant's reopened claim was sent to the employer on May 9, 2005. The deadline for a protest, if any, was May 19, 2005. The employer prepared a protest on May 18, 2005, dated it the same day, and mailed it with the U.S. Postal Service on May 19, 2005, as shown by the postmark on the envelopes attached to the two protests at Department Exhibits One and Two. The two protests are actually the same protest. The employer's protest(s) is(are) timely.

Because the administrative law judge hereinafter concludes that the employer's protest was timely, the administrative law judge further finds: The claimant was employed by the employer as a part-time waitress and cook from the latter part of March of 2005, until she voluntarily quit on or about May 7, 2005, because she thought she had a job with Wal-Mart Stores, Inc. The claimant even took a drug test, but before the results of the drug test were returned, the claimant learned that the employer had put a freeze on the claimant's position and that Wal-Mart Stores, Inc., could not hire the claimant. The claimant's drug test was returned acceptable. When the claimant was prohibited from working for Wal-Mart Stores, Inc., the claimant returned to the employer at her old job after three weeks, on or about May 28, 2005. At all material times hereto, both before and after her separation, the claimant's work with the employer was part-time, between 17 and 20 hours per week. The claimant is continuing to work for the employer part time, but is seeking full-time employment. The claimant is properly reporting any and all wages from the employer. Pursuant to her claim for unemployment insurance benefits filed effective February 27, 2005, and reopened effective April 10, 2005, and May 1, 2005, the claimant has received unemployment insurance benefits in the amount of \$2,124.00 since separating from her employer on or about May 7, 2005, and reopening her claim for benefits effective May 1, 2005. None of those benefits have been charged to the account of the employer herein.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely protest of the claimant's claim or, if not, whether the employer can demonstrate good cause for such delay. The administrative law judge concludes that the employer's protest was timely and the employer's protest is accepted and the administrative law judge has jurisdiction to reach the remaining issues.

2. Whether the claimant's separation from employment was a disqualifying event. It was not, because the claimant's separation was from part-time employment and she is otherwise monetarily eligible to receive unemployment insurance benefits based on wages paid by other employers, but any benefits to which the claimant is entitled shall not be charged to the account of the employer herein.

3. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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.

871 IAC 24.35(1) provides:

(1) Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

a. If transmitted via the United States postal service, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

b. If transmitted by any means other than the United States postal service on the date it is received by the division.

The administrative law judge concludes that the employer has the burden to prove that its protest was timely or that it had good cause for delay in the filing of its protest. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that its protest was timely. As shown at Department Exhibits One and Two, and as set out in the findings of fact, the employer prepared a protest on May 18, 2005, and sent it to Iowa Workforce Development in an envelope bearing a postmark of May 19, 2005. That protest is considered received and filed on the date it is mailed, as shown by the postmark. The protest was due May 19, 2005, and, accordingly, the administrative law judge concludes that the employer's protest was timely. Since the employer's protest was timely, the administrative law judge concludes that the employer's protest should be accepted and he has jurisdiction to reach the remaining issues.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.27 provides:

Voluntary quit of part-time employment and requalification. An individual who voluntarily quits without good cause part-time employment and has not requalified for benefits following the voluntary quit of part-time employment, yet is otherwise monetarily eligible for benefits based on wages paid by the regular or other base period employers, shall not be disqualified for voluntarily quitting the part-time employment. The individual and the part-time employer which was voluntarily quit shall be notified on the Form 65-5323 or 60-0186, Unemployment Insurance Decision, that benefit payments shall not be made which are based on the wages paid by the part-time employer and benefit charges shall not be assessed against the part-time employer's account; however, once the individual has met the requalification requirements following the voluntary quit without good cause of the part-time employer, the wages paid in the part-time employment shall be available for benefit payment purposes. For benefit charging purposes and as determined by the applicable requalification requirements, the wages paid by the part-time employer shall be transferred to the balancing account.

Iowa Code section 96.7-2-a(2) provides:

2. Contribution rates based on benefit experience.

a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The parties agree, and the administrative law judge concludes, that the claimant left her employment voluntarily on or about May 7, 2005. The issue then becomes whether the claimant left her employment without good cause attributable to the employer. The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. Both witnesses credibly testified that the claimant left her employment with the employer herein because she thought she had a job with Wal-Mart Stores, Inc. This was not good cause attributable to the employer. The claimant did not have the job in hand, although she had taken her drug test. Before the results of the drug test were returned, and before the claimant was hired, she was informed that Wal-Mart Stores, Inc., had placed a freeze on hiring and she could not be hired. After several weeks, the claimant returned to the employer, and began working again part time for it, as she had in the past. Because the claimant left her employment voluntarily without good cause attributable to the employer, the claimant's separation is potentially disqualifying. However, because the claimant's employment was at all material times hereto part time, and the claimant is otherwise monetarily eligible to receive unemployment insurance benefits based on wages paid by other base period employers, the claimant shall not be disqualified to receive unemployment insurance benefits. However, benefit payments shall not be made based on the wages paid by the part-time employer herein and benefit charges shall not be assessed against the account of the part-time employer herein. The administrative law judge notes that the wages earned by the claimant from the part-time employer were not used to determine her benefits for the current benefit year nor have any unemployment insurance benefits received by the claimant been charged to the account of the employer herein. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible, but those benefits shall not be based on wages paid by the part-time employer herein, nor shall the account of the part-time employer herein be charged for any unemployment insurance benefits to which the claimant is entitled.

Although the part-time employer herein is not in the base period, the administrative law judge notes that the claimant is receiving the same employment from the employer that she has always received, part-time employment, at the same hours that she has always received and, as a result, any unemployment insurance benefits paid to the claimant shall not be charged to the account of the part-time employer herein for those reasons as well.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,124.00 since separating from the employer herein on or about May 7, 2005, and reopening her claim for benefits effective May 1, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of May 24, 2005, reference 06, is modified. The claimant, Ruby J. Timmins, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because, although she left her employment voluntarily without good cause attributable to the employer, her employment was part time and she is otherwise monetarily eligible for unemployment insurance benefits. Benefit payments to the claimant shall not be made based on wages paid by the part-time employer herein, and any unemployment insurance benefits to which the claimant is entitled shall not be charged to the account of the part-time employer herein. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein. The employer's protest is timely.

kjw/pjs