

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SANDRA J GAVIN

Claimant

APPEAL NO: 12A-UI-05334-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUBUQUE COMMUNITY SCH DIST

Employer

OC: 01/01/12

Claimant: Appellant (1)

Section 96.4-3 – Able and Available
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed a department decision dated April 20, 2012, reference 01, that held she was not eligible for benefits January 1, 2012, as she was still employed in the same capacity of her on-call job. A telephone hearing was held on May 31, 2012. The claimant participated. Amy Vander Meulen, Coordinator, participated for the employer. Claimant Exhibit A was received as evidence.

ISSUE:

Whether the claimant filed a timely appeal.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The department mailed the decision to claimant's address of record on April 20, 2012, and she received it on April 24. The decision appeal deadline date is April 30. The claimant submitted an appeal to her local workforce center on May 1. Claimant is going thru a grieving process due to the death of her daughter on March 15, and has had an ongoing custody issue.

Claimant began working as a part-time on-call substitute teacher for the employer on January 14, 2011 and has continuously performed the same work thru the date of this hearing. All of her wage credits have been earned with the employer.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.6-2 provides in pertinent part:

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. . . . 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.

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 Supreme 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).

(1) The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes the claimant failed to file a timely appeal.

The claimant did have a reasonable opportunity to file a more timely appeal by noting the deadline date and reading the appeal instructions. The claimant offered no good legal cause for the appeal delay. She received it on April 24 and could have mailed it on any of the next six days to make it timely. The circumstances offered by claimant for her appeal delay do not negate the fact she could have filed a more timely appeal.

Iowa Code section 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 section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 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 section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Code section 96.19-38 provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

An individual shall be deemed partially unemployed in any week in which the individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Even if the appeal is considered timely, she is not eligible for benefits. She may not be considered as partially unemployed.

DECISION:

The department decision dated April 20, 2012, reference 01, is affirmed. The claimant failed to file a timely appeal. The availability disqualification remains in force and effect.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs