

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANE S VETTER

Claimant

APPEAL NO: 09A-UI-05784-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY

Employer

OC: 11/09/08

Claimant: Appellant (5)

Section 96.5-1 - Voluntary Quit
871 IAC 24.27 - Voluntary Quit of Part-time Job
Section 96.4-3 - Able and Available
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Jane S. Vetter appealed an unemployment insurance decision dated January 21, 2009, (reference 07), that concluded she was not eligible after a separation from employment from Casey's Marketing Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 11, 2009. This appeal was consolidated for hearing with one related appeal, 09A-UI-05785-DT. The claimant participated in the hearing. Margaret Highland appeared on the employer's behalf. Administrative notice is being taken of the Agency's wage records and other previously issued representative's decisions. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely or is there some legal ground under which it can be treated as timely? Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct? Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on January 23, 2009. The claimant received the decision on or around January 23, 2009. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by January 31, 2009. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, February 2. The appeal was not filed until April 10, 2009, after the claimant received a resulting overpayment decision issued on April 7, 2009 (reference 09). The claimant had called her local Agency office a few days after receiving the January 21

decision, and had been advised that there was nothing she could do, so she did not appeal at that time, but did appeal upon receiving the overpayment decision.

The claimant was hired to work part time approximately 30 hours per week as a cook at the employer's Jewell, Iowa store. Her first and last day was on or about September 6, 2008; she was paid about \$68.00 for that work, paid to her in the third quarter of 2008. She went to the hospital the next day and never returned to work with the employer as she assumed she was discharged. While the employer had covered the claimant's shifts, the employer never informed her that she could not return to work.

The claimant filed a new claim for unemployment insurance benefits with an effective date of November 9, 2008. Her base period was established as being from the third quarter of 2007 through the second quarter of 2008. The claimant's highest quarter of earnings during her base period was the fourth quarter of 2007, which did not include any wages from the employer.

Two of claimant's employers prior to this employer were Doc's Stop, Inc. and W & G Marketing Company, Inc. There were two other decisions issued on January 22, 2009, the first issued as reference 02 which concluded that the claimant had a disqualifying separation from Doc's Stop, Inc. on June 1, 2008, and the other issued as reference 03 which concluded that the claimant had a disqualifying separation from W & G Marketing Company, Inc. on April 11, 2008; neither of these decisions have been reversed, nor has there been a requalification by earning ten times the weekly benefit after those separations. If the claimant wishes to further pursue the matter, she should file appeals to those decisions; if her reasons for not appealing those decisions by their deadlines is the same for her reason for delaying on filing the appeal in this case, she should set that explanation out in her appeal of those decisions.

The claimant has been unable to work since her day of work with the employer as she has a serious illness which leaves her too weak.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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 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). The record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

Generally, if the claimant voluntarily quit her employment, she is not eligible for unemployment insurance benefits unless it was for good cause attributable to the employer. Iowa Code § 96.5-1. Failing to return to work because of a belief an employee will be fired, when she has not been told she could not return, is deemed a voluntary quit. 871 IAC 871 IAC 24.25(33). However, there is an exception for some part time employment.

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.

The claimant voluntarily quit employment without good cause attributable to the employer. The job, however, was part time, and the claimant has sufficient wages from other employers to qualify to receive unemployment insurance benefits. The employer's account will not be subject to charge for any benefits paid to the claimant. Benefits would be allowed if the claimant were otherwise eligible. However, she is currently not otherwise eligible due to the standing of the other disqualification decisions.

Further, with respect to any week in which unemployment insurance benefits are sought, In order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. Unemployment insurance benefits are not intended to substitute for health or disability benefits. White v. Employment Appeal Board, 487 N.W.2d

342 (Iowa 1992). The claimant has not been physically able and available for work, and is not eligible for unemployment insurance benefits.

DECISION:

The unemployment insurance decision dated January 21, 2009 (reference 07), is affirmed as modified with no effect on the parties. The appeal is treated as timely. The claimant is not disqualified due to this separation and the employer's account is not subject to charge because the claimant voluntarily quit part-time employment without good cause attributable to the employer. However, there are other disqualification decisions which still render the claimant ineligible. Additionally, the claimant has not been able to work and available for work since the effective date of her claim November 9, 2008.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs