

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MURRIE L DUCKINGS

Claimant

APPEAL NO. 09A-UI-19561-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC

Employer

Original Claim: 10/25/09

Claimant: Appellant (1)

Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Murrie L. Duckings (claimant) appealed a representative's November 20, 2009 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 10, 2010. The claimant participated in the hearing. The employer's representative received the hearing notice and responded by calling the Appeals Section on February 4, 2010. The representative indicated that Elena Reader would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, Ms. Reader was not available; therefore, the employer did not participate in the hearing. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the claimant, 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 are there legal grounds 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?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last known address of record on November 20, 2009. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by November 30, 2009. The appeal was not filed until it was hand-delivered to a local Agency office on December 28, 2009, which is after the date noticed on the disqualification decision. The reason for the delay was that the claimant's adult daughter who lives in the same residence had gotten the mail including the representative's decision and

had set the mail aside so that the decision became misplaced, and the claimant did not see the decision.

After a prior period of employment with the employer, the claimant most recently started working for the employer on or about January 15, 2008. He worked full-time on the second shift with a wizard knife in the employer's Waterloo, Iowa, pork processing facility. His last day of work was on or about May 13, 2009.

On or about May 14 the claimant was scheduled to report for work at 3:00 p.m. At about 2:00 p.m. he received a call that his nephew living in Minneapolis had been shot. He then called the employer and left a message that he was going to be absent, as he was going to go to Minneapolis to see his nephew. However, before leaving, he made a trip to the employer's offices at about 2:45 p.m. to pick up his paycheck. When he arrived back home, his ride to Minneapolis had already left, so he did not go to Minneapolis. The next day he still felt too upset to report for work, so he again called in, knowing that he was close to discharge on attendance points. He left a message for his supervisor to call him. When he did not hear back further, he assumed he was discharged. No one with the employer ever told him he was discharged.

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 the appellant's 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 or other action of the United States Postal Service 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).

A voluntary quit is a termination of employment initiated by the employee – where the employee has taken the action that directly results in the separation; a discharge is a termination of employment initiated by the employer – where the employer has taken the action that directly results in the separation from employment. 871 IAC 24.1(113)(b), (c). A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

The claimant asserts that his separation was not “voluntary,” as he had not desired to end the employment; he argues that it was the employer’s action or inaction in not returning a call to him that led to the separation and therefore the separation should be treated as a discharge for which the employer would bear the burden to establish it was for misconduct. Iowa Code § 96.6-2; 871 IAC 24.26(21). Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from which the employee has separated. The rule further provides that there are some actions by an employee that are construed as being voluntary quit of the employment, such as ceasing to report for work because of a belief the employee has been or will be discharged when the employer has not told the employee he has been discharged. 871 IAC 24.25.

The claimant stopped reporting for work because of a belief he had been or would be discharged, but he had not been told by the employer that he was discharged; therefore, the separation is considered to be a voluntary quit. The claimant then has the burden of proving that the voluntary quit was for a good cause that would not disqualify him. Iowa Code § 96.6-2. The claimant has not satisfied his burden. Benefits are denied.

DECISION:

The representative’s November 20, 2009 decision (reference 01) is affirmed. The claimant voluntarily left his employment without good cause attributable to the employer. As of May 14, 2009, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw