IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOHNNA V BONTA Claimant **A1 CABINET & GRANITE LLC** Employer	**APPEAL 20A-UI-08386-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/22/20** **Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quitting – Layoff Due to Lack of Work
Iowa Admin. Code r. 871-24.1(113) – Definitions – Separations
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant/appellant, Johnna V. Bonta, filed an appeal from the June 29, 2020 (reference 02) Iowa Workforce Development ("IWD") unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 27, 2020. The claimant participated. The employer participated through Wen ("Sammy") Lin, owner/manager.

The administrative law judge took official notice of the administrative records. Department Exhibit D-1 was admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?
Has the claimant been overpaid any unemployment insurance benefits?
Is the claimant eligible for Federal Pandemic Unemployment Compensation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed since 2015, and most recently performed work as a part-time office manager, working approximately 25 hours per week. Her last day of work was March 12, 2020.

The claimant went on a scheduled spring break March 15-21, 2020, and upon return, her employer told her she needed to stay home and quarantine due to her travel. On April 4, 2020, the claimant text messaged Mr. Lin: "When do you want me to return to work". He responded:

Office day still closed. Please let me know what your plan?" She replied, "I can come to work anytime just let me know." (Claimant Exhibit 1)

Mr. Lin stated he had work available to the claimant and that while the office was closed to the public to enter, the claimant could have still come to work, but she would have been given only half of her hours. The claimant interpreted Mr. Lin's message to mean the office was closed and work was not available, because he did not respond to her message.

In early May, the claimant learned that her friend had returned to work for the employer. When she inquired, she was told to wait until the business reopens because there was not work available. The claimant did not intend to quit and was waiting for Mr. Lin to tell her she could return. The claimant learned Mr. Lin had interpreted the claimant to quit the employment by way of his notice of claim protest, in which he indicated she had quit by not coming back to work.

An initial unemployment insurance decision (Reference 02) resulting in a denial of benefits was mailed to the claimant's last known address of record on June 29, 2020. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by July 9, 2020. She received the decision within the appeal period. She filed an appeal on July 8, 2020 online and received a confirmation message that her email had been received. When she had not received any additional information after one week, she followed up with IWD and learned the initial appeal had not been received. She resubmitted it on July 16, 2020 using the online form (Department Exhibit 1).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant's appeal is timely.

Iowa Code section 96.6(2) provides, in pertinent part:

> Filing – determination – appeal.
> 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.

Iowa Admin. Code r. 871-24.35(2) provides:

> Date of submission and extension of time for payments and notices.
> (2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
b. The division shall designate personnel who are to decide whether an extension of time shall be granted.
c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

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).

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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

In this case, the claimant made a good faith attempt to submit her appeal in a timely fashion within the prescribed appeal period and reasonably believed it had been received. Upon notification that it had not been received, she immediately resubmitted the appeal. The administrative law judge concludes that her appeal should be considered timely filed.

For the reasons that follow, the administrative law judge concludes the claimant separated for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

Disqualification under the employment security law: An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa code 96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer" Iowa Code 96.5(1) or (2) is discharged for work –connected misconduct, Iowa Code 96.5(2) a, or (3) fails to accept suitable work without good cause, Iowa Code 96.5(3).

The first two disqualifications are premised on the occurrence of a separation of employment. To be disqualified based on the nature of the separation, the claimant must either have been fired for misconduct or have quit but not for good cause attributable to the employer. Generally,

the employer bears the burden of proving disqualification of the claimant. Iowa Code 96.6(2). Where a claimant has quit, however, the claimant has "the burden of proving that a voluntary quit was for good cause attributable to the employer pursuant to Iowa Code section 96.5(1). Since the employer has the burden of proving disqualification, and the claimant only has the burden of proving the justification for a quit, the employer also has the burden of providing that a particular separation was a quit. The Iowa Supreme Court has thus been explicitly, "the employer has the burden of proving that a claimant's department from employment was voluntary." *Irving v. Employment Appeal Board*, 883, NW 2d 179, 210 (Iowa 2016).

Quit not shown: 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.

A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). Generally, a quit is defined to be a "termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." Furthermore, voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The employer has the burden of providing that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Only the claimant participated in the hearing. The employer did not respond to the notice of hearing, request a postponement or submit written documentation or any information to refute the claimant's testimony. Assessing the credibility of the claimant and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the evidence does not support that the claimant was discharged for a disqualifying separation, but rather, mutual mistake on behalf of both parties.

At the hearing, the claimant denied tendering the resignation or telling anyone with the employer that she was done working. The claimant repeatedly asked the claimant when she could return to work. In at least one instance, when she asked, the response was "the office is closed" which she interpreted to mean the office was closed and there was no work for her. The claimant continued to make contact with the employer, waiting to come back to work, after the employer's communication had been that the office was closed and later that business was slow. For these reasons, the administrative law judge cannot conclude the claimant displayed an intent to quit

the employment. Further, she displayed an intent to remain employed inasmuch when he was asking the employer return to work.

The undisputed evidence in this case is that the employer did not tell the claimant claimant was fired either. Rather, the employer said that while the office was closed to the public, it expected the claimant to come into work. This was not clear from the text communications or testimony presented at the hearing. It is unclear from the evidence presented why the employer viewed the claimant's refusal to come into work as a quit, when she maintained contact with Mr. Lin.
In the absence of the employer not telling the claimant she was fired, and the claimant not intending or telling the employer she quit, the separation appears to be one of a mutual mistake.

Mutual Mistake in this Case is not Disqualifying: At issue is a case of mutual mistake: the employer thought the claimant had quit and the claimant believed she had been terminated. However, when considered the rules of separation include "all terminations of employment" which are "generally classifiable as layoffs, quits, discharges, or other separations" 871 IAC 24.1 The administrative law judge concludes that a separation by mistake does not fall squarely into the definition of a quit or discharge, and therefore the claimant cannot be disqualified by the separation under the circumstances of this case. Unlike the case of *La Grange v. IDJS* (*LaGrange v. Iowa Department of Job Service*), (Unpublished Iowa Appeals 1984).), where a claimant "unreasonably assumed" he had been fired, but has not been, this can be a disqualifying quit. However, the case at hand does not fall into this category. The employer has failed to prove the claimant unreasonably assumed she was fired, and the claimant credibly denied quitting. Further, the employer failed to show the claimant quit and failed to prove that the claimant was discharged for reasons that constitute misconduct. Therefore, benefits must be allowed.

DECISION:

The unemployment insurance decision dated June 29, 2020, (reference 02) is REVERSED. The appeal was timely. The claimant was not separated from employment in a manner that would disqualify the claimant from benefits. The claimant is allowed benefits provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge
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September 9, 2020
Decision Dated and Mailed

jlb/sam