

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LONNY L KING
Claimant

APPEAL NO. 08A-UI-04425-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DILLARD'S INC
Employer

**OC: 04/06/08 R: 01
Claimant: Respondent (1)**

Section 96.6-2 – Timeliness of Protest

STATEMENT OF THE CASE:

Dillard's Inc. (employer) appealed a representative's April 30, 2008 decision (reference 05) that concluded Lonny L. King (claimant) was qualified to receive unemployment insurance benefits and the employer's account might be charged because the employer's protest was not timely filed. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 20, 2008. The claimant participated in the hearing. Mary Harper appeared on the employer's behalf. 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 affirming the representative's decision and allowing the claimant benefits.

ISSUE:

Should the employer's protest be treated as timely?

FINDINGS OF FACT:

The claimant established a claim for unemployment insurance benefits effective April 6, 2008. A notice of claim was mailed to the employer's last known address of record on April 9, 2008. The employer received the notice on April 15, 2008. The notice contained a warning that a protest must be postmarked or received by the Agency by April 21, 2008. The protest was not filed until it was successfully faxed on April 23, 2008, which is after the date noticed on the notice of claim.

The employer's unemployment manager signed the employer's protest on April 21. The protest form was then given to her assistant, Ms. Harper, who placed the protest with some other protests into the employer's fax machine, still on April 21 at approximately 3:35 p.m. The fax was not transmitted; an error message was generated showing that the fax attempt was "terminated by system." The fax system was not checked yet on April 21 to ensure that the fax had been transmitted, or if there was a problem with the fax system, to allow time for the protest to have been mailed and postmarked that date. Ms. Harper did not discover that the protest had not been faxed until the morning of April 22. She attempted to fax the protest again at that time, but again the fax was not transmitted; an error message was generated showing that the

fax attempt was “fail.” She did not verify the status of the fax that day, but on April 23 discovered that the fax had not transmitted. On April 23 she again attempted to fax the protest, and this attempt was successful, but was two days past the deadline.

REASONING AND CONCLUSIONS OF LAW:

The law provides that all interested parties shall be promptly notified about an individual filing a claim. The parties have ten days from the date of mailing the notice of claim to protest payment of benefits to the claimant. Iowa Code § 96.6-2. Another portion of Iowa Code § 96.6-2 dealing with timeliness of an appeal from a representative’s decision states an appeal must be filed within ten days after notification of that decision was mailed. In addressing an issue of timeliness of an appeal under that portion of this Code section, the Iowa court has held that this statute clearly limits the time to do so, and compliance with the appeal notice provision is mandatory and jurisdictional. Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979).

The administrative law judge considers the reasoning and holding of the Beardslee court controlling on the portion of Iowa Code § 96.6-2 that deals with the time limit to file a protest after the notice of claim has been mailed to the employer. Compliance with the protest provisions is jurisdictional unless the facts of a case show that the notice was invalid. Beardslee, 276 N.W.2d 373, 377 (Iowa 1979); see also In re Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982). Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), protests are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). The question in this case thus becomes whether the employer was deprived of a reasonable opportunity to assert a protest 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 employer did have a reasonable opportunity to file a timely protest.

871 IAC 24.35(2) provides in pertinent part:

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 department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

The employer has not shown that the delay for not complying with the jurisdictional time limit was due to department error or misinformation or delay or other action of the United States Postal Service. The placing of the completed protest into the employer’s outgoing fax machine is not comparable to placing a completed protest into the custody of the United States Postal Service; the employer’s fax machine remains within the employer’s control, and the employer could have ensured that the machine successfully transmitted the protest on the due date but chose not to. Since the employer filed the protest late without any legal excuse, the employer did not file a timely protest. Since the administrative law judge concludes that the protest was not timely filed pursuant to Iowa Code § 96.6-2, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the protest and the reasons for the claimant’s separation from employment, regardless of the merits of the employer’s protest. See Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979) and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

DECISION:

The April 30, 2008 (reference 05) decision is affirmed. The protest in this case was not timely, and the decision of the representative remains in effect. Benefits are allowed, provided the claimant is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw