

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL C BUCHANAN
Claimant

APPEAL NO. 09A-EUCU-00478-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DES STAFFING SERVICES INC
Employer

OC: 01/25/09
Claimant: Appellant (1)

Section 96.4-3 - Able to and Available for Work
Section 96.5-1 - Voluntary Quit
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated November 3, 2009, reference 04, that concluded he was working enough hours to be considered employed and was unavailable for work effective September 27, 2009. A telephone hearing was held on January 5, 2010. The parties were properly notified about the hearing. The claimant participated in the hearing. Amy Potraze participated in the hearing on behalf of the employer. The parties agreed that the issue involving the claimant's separation from employment could be decided in this case.

ISSUE:

Was the appeal in this case filed timely?
Was the claimant able to and available for work?
Did the claimant voluntarily quit employment without good cause attributable to the employer?

FINDINGS OF FACT:

The employer is a staffing service that provides workers to client businesses on a temporary or indefinite basis. When the claimant was hired, he signed a statement that he would be considered to have voluntarily quit employment if he did not contact the employer within three working days after the completion of a job assignment and request a new assignment.

The claimant worked on an assignment at CCB Packaging from September 16 to 21, 2009. He worked on the third shift which was from 11:00 p.m. to 7:00 a.m. He left work early before the end of his shift on September 21, because he became sick to his stomach and vomited at work. The claimant's job involved packaging dog biscuits, and he thought the work environment caused his illness.

The next day, the claimant contacted the employer. He told the DES employee that he was not going back to CCB because of the work environment and asked for a different job assignment. The DES employee told the claimant that the CCB job was the only available work at that time.

The claimant did not return to work even though work was available each day at CCB after September 21.

The claimant contacted the employer again on September 28 and 29. The employer did not have any work other than at CCB available.

An unemployment insurance decision was mailed to the claimant's last-known address of record on November 3, 2009. The decision concluded he was working enough hours to be considered employed and was unavailable for work effective September 27, 2009. The decision stated it was final unless a written appeal was postmarked or received by the Appeals Section by November 13, 2009.

The claimant received the decision within the ten-day period for appealing the decision. He filed a written appeal on November 24, 2009, which is after the time period for appealing had expired. The claimant delayed in filing his appeal because he did not notice the deadline for appealing and he waited until he had exhausted his available money and became desperate.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant filed a timely appeal.

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 Iowa Supreme Court has ruled that appeals from unemployment insurance decisions must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979); Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979). In this case, the claimant's appeal was filed after the deadline for appealing expired.

The next question is whether the claimant had a reasonable opportunity to file 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). There is no evidence that the claimant did not have an opportunity to file his appeal on time.

The failure to file a timely appeal was not due to any Agency error or misinformation or delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) would excuse the delay in filing an appeal. Since the appeal was not filed timely, the decision dated November 3, 2009, is final.

The problem in this case is that availability disqualifications are always subject to modification if a party can show circumstances have changed so that the disqualification can be removed.

The appeal, therefore, can be considered as a request to remove the disqualification as of the time the appeal was filed.

This ends up being tricky because the decision itself is nonsensical. The decision concluded the claimant “was working enough hours to be considered employed” when in fact the claimant was not working at all as of September 27. The only way to resolve this issue is to decide if the claimant was in fact unavailable for work as of September 27 and whether the circumstances changed as of November 24, 2009, so that the disqualification can be lifted. I conclude that as of September 27 the employer still had eight-hour shifts available working at CCB Packaging available, but the claimant was unwilling to return to work there because he believed the work environment was making him sick. The claimant, however, has not provided any medical documentation to support his belief that working conditions were detrimental. I conclude the claimant was unavailable for work with the employer and this has not changed. Additionally since the claimant left on-going employment with the employer that was providing him with eight hours of work per day by declining to go back to work for CCB Packaging, he would be considered to have voluntarily quit employment without good cause attributable to the employer under Iowa Code section 96-5-1. The claimant has not shown by competent evidence that working conditions were intolerable or a health hazard.

The claimant argued that the job with the employer should not prevent him from getting emergency unemployment compensation based on a different employer. The law, however, requires a claimant be unemployed through no fault of his own and any employment that a claimant has while filing for benefits must be evaluated to decide if the claimant remains eligible for benefits.

DECISION:

The unemployment insurance decision dated November 3, 2009, reference 04, is affirmed. The appeal in this case was not timely, and the unemployment insurance decision disqualifying the claimant from receiving benefits remains in effect. He is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he shows he is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs