IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

HEATHER J URIAS
1718 DOLORES #9
KNOXVILLE IA 50138

PRIMO DEVELOPMENT LIMITED
D/B/A GODFATHER'S PIZZA
PO BOX 2800
SPIRIT LAKE IA 51360-2800

Appeal Number: 05A-UI-07421-RT
OC: 06-19-05 R: 02
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits
Section 96.6-2 – Initial Determination (Timeliness of Appeal)

STATEMENT OF THE CASE:

The employer, Primo Development Limited, doing business as Godfather's Pizza, filed an appeal from an unemployment insurance decision dated July 8, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Heather J. Urias. After due notice was issued, a telephone hearing was held on August 4, 2005, with the claimant participating. Lori Townsend, Manager of the employer's restaurant in Knoxville, Iowa, and Katrina Miller, Assistant Manager of the same store, participated in the hearing for the employer. Department

Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit One, the administrative law judge finds: An unemployment insurance decision dated July 8, 2005, reference 01, determined that the claimant was eligible to receive unemployment insurance benefits. That decision was sent to the employer at the same address as shown on the employer's appeal. That decision indicated that an appeal had to be postmarked or otherwise received by the Appeals Section by July 18, 2005. However, the employer's appeal was not faxed to the Appeals Section until July 20, 2005, as shown at Department Exhibit One. The employer's appeal letter is dated July 20, 2005. The appeal was received by the Appeals Section on July 20, 2005. The appeal is two days late. The appeal was two days late because the employer had not received the decision. The employer's appeal, which is Department Exhibit One, states that the employer had not received the decision. This is confirmed by a fax from Iowa Workforce Development on July 20, 2005, forwarding to the employer a copy of the decision, which is attached to Department Exhibit One.

Because the administrative law judge hereinafter concludes that the employer's appeal was late but that the employer has demonstrated good cause for the delay in the filing of its appeal, the administrative law judge further finds: The claimant was employed by the employer as a part-time supervisor and delivery driver from July 31, 2003, until she separated from her employment on June 19, 2005. The claimant averaged 30 hours per week. Lori Townsend, Manager of the employer's restaurant in Knoxville, Iowa, where the claimant was employed and the employer's witness at the hearing, scheduled a mandatory meeting for all employees at 3:00 p.m. on June 19, 2005. She posted a note one week in advance of the meeting and indicated that it was mandatory and if employees did not show up for the meeting, they did not have a job. The claimant did not show up for the meeting. The claimant called the employer three times on June 19, 2005. On the first two occasions she spoke to Ms. Townsend. The claimant stated that she was waiting for her father to return because she wanted to spend time with him since it was Father's Day. The claimant did not say specifically whether she would or would not be coming to the meeting. Ms. Townsend informed the claimant that the meeting was mandatory and that if she did not come to the meeting, she would not have a job. Ms. Townsend told the claimant that the meeting would only be 15 or 20 minutes. The employer's store is in Knoxville, Iowa; the claimant lives in Knoxville, Iowa; and the claimant's father lives in Knoxville, Iowa. On the third and last occasion when the claimant called the employer, she spoke to Katrina Miller, Assistant Manager and one of the employer's witnesses, and told her that she was not going to make the meeting. Ms. Miller told the claimant that if she did not come to the meeting, she would not have a job. The claimant then told Ms. Miller that she was choosing to spend the day with her father and so she would not have a job. Neither Ms. Miller nor Ms. Townsend ever told the claimant that she was fired or discharged. The claimant was scheduled to work at 5:00 p.m. on June 19, 2005 but she did not show up for that shift nor did the claimant ever return to work. The claimant could have seen her father after the meeting on June 19, 2005, or on the previous day, Saturday, June 18, 2005. The claimant's father was not available earlier on June 19, 2005 because he was in Chariton, Iowa, but he was not working at that time. The claimant missed the May mandatory meeting because she was sleeping and received a verbal warning. Pursuant to her claim for unemployment insurance benefits filed effective June 19, 2005, the claimant has received unemployment insurance

benefits in the amount of $708.00 as follows: $118.00 per week for six weeks from benefit week ending June 25, 2005 to benefit week ending July 30, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely appeal of the decision dated July 8, 2005, reference 01, or, if not, whether the employer demonstrated good cause for such failure. The administrative law judge concludes that the employer's appeal was not timely but the employer has demonstrated good cause for the delay in the filing of its appeal and the appeal should, therefore, be accepted and the administrative law judge has jurisdiction to reach the remaining issues.

2. Whether the claimant's separation from employment was a disqualifying event. It was.

3. Whether the claimant is overpaid unemployment insurance benefits. She is.

Iowa Code section 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. 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. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". 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. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

871 IAC 24.35(1) provides:

> (1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:
>
> a. If transmitted via the United States postal service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
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> b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

871 IAC 24.35(2) provides:

> (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 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.
>
> 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 department 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 department error or misinformation or delay or other action of the United States postal service or its successor, the department 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).

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 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. 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 employer has the burden to prove that its appeal was timely or that it had good cause for the delay in the filing of its appeal. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that although its appeal was not timely, the employer had good cause for the delay in the filing of its appeal. As shown at Department Exhibit One and as set out in the findings of fact, the employer's appeal was two days late. The reason for the delay in the filing of the appeal was that the employer did not get or receive the decision. The decision was sent to the employer on July 8, 2005, at the address shown on the employer's appeal, but it was never received by the employer. The employer so states in its appeal letter and this is confirmed by a fax from Iowa Workforce Development at Department Exhibit One indicating that Iowa Workforce Development is faxing a copy of the decision from which the employer seeks to appeal. Accordingly, the administrative law judge concludes that the delay in the filing of the employer's appeal was because of a delay or other action by the U. S. Postal Service and this is good cause for the delay in the filing of its appeal. Therefore, the administrative law judge concludes that although the employer's appeal is not timely, the employer has demonstrated good cause for the delay in the filing of its appeal and, as a consequence, the employer's appeal should be accepted and the administrative law judge has jurisdiction to reach the remaining issues.

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.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The next issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when she failed and refused to attend a mandatory meeting on June 19, 2005 at 3:00 p.m. and then later at 5:00 p.m. failed to come to her regularly scheduled shift and then never returned to work thereafter. The claimant maintains that she was discharged. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant left her employment voluntarily. Both of the employer's witnesses credibly testified that the claimant was never told that she was fired or discharged. The claimant was told that she needed to come to a 3:00 p.m. and that if she did, she did not have a job. The claimant stated in a telephone conversation with Katrina Miller, Assistant Manager and one of the employer's witnesses, at approximately 3:00 p.m. on June 19, 2005, that she was not coming to the meeting. Ms. Miller told the claimant that if she did not, she might not have a job. The claimant said then that she was choosing to spend the day with her father and so she would not have a job. The administrative law judge concludes that this was a conscious decision by the claimant to voluntarily quit. The claimant testified that she heard in the background Lori Townsend, Manager and the employer's other witness, say that Ms. Miller should tell the claimant that she was done. However, both of the employer's witnesses deny that Ms. Townsend said this. The administrative law judge must conclude that Ms. Townsend did not make such a statement. The claimant testified that the mandatory meeting was on Father's Day and she wanted to spend time with her father. However, her father was gone all morning and most of the afternoon in Chariton, Iowa, but he was not working. The evidence also establishes that the claimant could have spent some time with her father after the mandatory meeting, which was only going to take between 15 and 20 minutes. The administrative law judge notes that the employer's location is in Knoxville, Iowa, where both the claimant and her father also live. The claimant could have visited with her father on the previous day, Saturday, June 18, 2005, but her father chose to spend it with his friends and go to the races while the claimant took her brother and sister to Adventureland. If the claimant really wanted to see her father for Father's

Day and her father wished to do so as well, the claimant could have spent Saturday, June 18, 2005, with her father and even most of the day on June 19, 2005. The administrative law judge concludes that the claimant knew she was quitting when she failed to attend the mandatory meeting. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily on June 19, 2005. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. There is not a preponderance of the evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental, or that she was subjected to a substantial change in her contract of hire. The claimant simply quit because she did not want to attend the mandatory meeting, but this is not good cause attributable to the employer. The administrative law judge notes the mandatory meeting had been scheduled one week in advance, that it was a mandatory meeting, and that it was only going to last between 15 and 20 minutes. The administrative law judge also notes that the claimant had missed the May mandatory meeting because she was sleeping and she received a verbal warning for this. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct and would still be disqualified to receive unemployment insurance benefits. The claimant missed a mandatory meeting in May because she was sleeping. This absence was not for reasonable cause or personal illness and not properly reported. The claimant then missed the June meeting on June 19, 2005, because she purportedly wanted to spend time with her father but, as noted above, the claimant's justification is not credible or genuine. This was not for a personal illness or other reasonable cause. The claimant deliberately and consciously missed the June 19, 2005, meeting and had missed the prior meeting. The administrative law judge would conclude that the claimant's actions in deliberately missing these two meetings were disqualifying misconduct and also excessive unexcused absenteeism when the claimant's absence from the shift she was scheduled to work at 5:00 p.m. on June 19, 2005 is considered. Accordingly, the administrative law judge would conclude, if the claimant's separation were determined to be a discharge, that the claimant was discharged for disqualifying misconduct and she would still be disqualified to receive unemployment insurance benefits.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $708.00 since separating from the employer herein on or about June 19, 2005, and filing for such benefits effective June 19, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of July 8, 2005, reference 01, is reversed. The claimant, Heather J. Urias, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer. She has been paid unemployment insurance benefits in the amount of $708.00. Although the employer's appeal is not timely, the employer has demonstrated good cause for the delay in the filing of its appeal and the appeal is, therefore, accepted.

pjs/kjw