

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICK A CARPER
Claimant

APPEAL NO. 10A-UI-07054-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**FRAUENSHUH HOSPITALITY GROUP OF
MN LLC**
FOURTEEN FOODS, DAIRY QUEEN
Employer

Original Claim: 02/08/09
Claimant: Respondent (2-R)

Section 96.5(1) – Voluntary Quit
Section 96.6-2 – Timeliness of Protest

STATEMENT OF THE CASE:

Frauenshuh Hospitality Group of Minnesota L.L.C./Fourteen Foods filed an appeal from the May 3, 2010, reference 01, decision that allowed benefits and found the employer's protest untimely. After due notice was issued, a hearing was held by telephone conference call on June 30, 2010. Claimant Rick Carper participated. Jeff Wieland, Director of Support Services, represented the employer. Exhibits One, Two, and Three were received into evidence. The parties waived formal notice on the issues of whether there was a voluntary quit for good cause attributable to the employer and whether there was a discharge for misconduct in connection with the employer.

ISSUE:

Whether the employer's protest of the claim for benefits was timely.

Whether Mr. Carper separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

Whether Frauenshuh Hospitality Group of Minnesota L.L.C./Fourteen Foods may be charged for benefits paid to Mr. Carper.

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: On February 16, 2009, Iowa Workforce Development mailed a notice of claim concerning the above claimant to the above employer's address of record. The notice of claim contained a warning that any protest must be postmarked, faxed, or returned by the due date set forth on the notice, which was February 26, 2009. The notice of claim was received at the employer's address of in a timely manner, prior to the deadline for protest. On February 19, 2009, Betty Friedman, the employer's payroll processor, completed the employer's protest information on the notice of claim and faxed the completed document to the Unemployment Insurance Service Center at

Iowa Workforce Development. The employer's fax machine generated a transmission verification report that indicated a successful fax of the one-page document on February 19, 2009 at 5:39 p.m. The transmission report indicates that the fax was directed to 1-515-281-6208, the correct fax number for the Unemployment Insurance Service Center. Workforce Development did not document the protest as being received on February 19, 2009 and did not schedule a fact-finding interview.

The employer next heard about Mr. Carper's claim for benefits when the employer received a quarterly statement of charges that Workforce Development mailed to the employer on May 8, 2009 and followed up with a second faxed protest that Workforce Development received on May 12, 2009.

Until June 12, 2008. Carper Corporation was the owner of the Dairy Queen located on South Story Street in Boone, Iowa. The claimant, Rick Carper, was President of the corporation and held a 1/3 ownership interest. Mr. Carper's father, Robert Carper, was Vice President, and Mr. Carper's mother, Betty, was Secretary. Mr. Carper's parents each held a 1/3 ownership interest in the corporation. The Carpers were the board directors.

Rick Carper was the full-time general manager of the Dairy Queen and was responsible for making the management decisions for the business subject to no one else's direction or control. The corporation reported Mr. Carper's wages to the Unemployment Insurance Services Division-Tax Section and unemployment insurance contributions were paid on his wages. Mr. Carper's mother was also an employee of the Dairy Queen.

Effective June 12, 2008, all restaurant assets were sold to Frauenshuh Hospitality Group of Minnesota, L.L.C./Fourteen Foods. Mr. Carper and his parents made the joint decision to sell the business assets to Fourteen Foods. The decision to sell the business was voluntary and was based on the Carpers' plan to open a new restaurant. The decision to sell the Dairy Queen was not due to an imminent failure of the restaurant.

Included in the asset purchase agreement was a provision that the Carpers, including Rick Carper, would have no further involvement with the restaurant once the sale took effect. There was no agreement between seller and buyer for Fourteen Foods to hire or continue employment of any or all of the restaurant's employees. Fourteen Foods did hire all of the restaurant employees except for Mr. Carper and his mother. Mr. Carper separated from his employment at the Dairy Queen on June 12, 2008. Fourteen Foods continued to operate the Dairy Queen in the same location. Fourteen Foods elected to become, and did indeed become, a successor employer for unemployment insurance purposes.

Mr. Carper established a claim for unemployment insurance benefits that was effective February 8, 2009, approximately eight months after selling the Dairy Queen and separating from his employment there. At the time of the claim, and in the absence of a docketed protest from the employer, Workforce Development allowed benefits under a theory that Mr. Carper had been laid off and set Mr. Carper's weekly benefit amount at \$361.00.

REASONING AND CONCLUSIONS OF LAW:

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.
- 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.

Iowa Code section 96.6-2 provides in pertinent part:

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 weight of the evidence indicates that the employer submitted a timely protest on February 19, 2009, that the protest was received by the Workforce Development Unemployment Insurance Service Center on that day, but that the one-page protest was lost or mishandled by Workforce Development staff. Because the evidence establishes a timely protest, the employer has a right to be heard on the protest and the administrative law judge has jurisdiction to rule on the merits of the protest.

The next issue is whether an employee who is also a corporate officer, director, and equal shareholder, and who has management control of the corporation, can draw unemployment insurance benefits when the corporation sells its business and he is no longer employed.

Services performed by an officer of a corporation are considered covered employment under the unemployment insurance law and employers are required to pay unemployment insurance tax contributions on the wages paid to corporate officers. Iowa Code section 96.19(18)(a)(1). The law makes it clear that a person's status as a corporate officer does not make his wages except from unemployment insurance laws.

Iowa Code section 96.5(1) provides that an individual shall be disqualified for benefits if the individual has left work voluntarily without good cause attributable to the individual's employer. Iowa Code section 96.5(1)(i) states that an individual shall not be disqualified if the individual's employer sells or transfers part of its business to another employer and the individual becomes unemployed due to the failure of the new employer to offer the individual suitable work. Iowa Code section 96.5(1)(i) does not apply here because the sale in this case was not a sale of part of the business.

In 1993, the Iowa Supreme Court was presented with a case wherein the unemployment insurance claimant had been a corporate officer, director, majority shareholder, and had exercised management control of the corporation. See Bartelt v. Employment Appeals Board, 494 N.W.2d 684 (Iowa 1993). Mr. Bartelt had been President, sole shareholder, and had also been an employee of the corporation. Mr. Bartelt became unemployed after he closed the business and filed a voluntary petition for bankruptcy. The corporation's largest supplier and creditor was about to seize most of the company's assets. Involuntary bankruptcy was a "near mathematical certainty" and probably just a few days away. The Iowa Supreme Court's analysis focused on whether the decision to close the business and end the employment had been *voluntary*. The court ruled that the decision to close the business operated by Mr. Bartelt was in fact *involuntary* due to the imminent bankruptcy and pressure. The court concluded that Mr. Bartelt's unemployment was therefore involuntary and awarded benefits to Mr. Bartelt. Bartelt, 494 N.W.2d at 686.

The Bartelt decision is distinguishable from the present case, but nonetheless offers guidance for analyzing this case. The court based its decision to allow benefits to Mr. Bartelt on the court's finding of fact that Mr. Bartelt had no choice but to close the business due to outside forces over which he had no control. The court did not state that the corporate decision to close the business could not be attributed to Mr. Bartelt in his capacity as an employee of the business.

In this case, the Carpers' decision to sell the business was not due to an imminent financial failure of the restaurant or some other outside force. The decision was voluntary and due to purely personal factors. Rick Carper was the principal officer, general manager, and was an equal shareholder of the employer. Mr. Carper shared jointly in the decision to sell the business and entered into the arms-length purchase agreement that included his agreement to separate from his employment. The administrative law judge concludes that Mr. Carper voluntarily separated from the employment for personal reasons, not for good cause attributable to the employer. Accordingly, Mr. Carper is disqualified from receiving unemployment insurance benefits effective February 8, 2009. The employer's account will not be charged for benefits paid to Mr. Carper.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the

claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's May 3, 2010, reference 01, decision is reversed. The employer's protest was timely. The claimant voluntarily quit for personal reasons, not attributable to the employer. Effective June 12, 2008, the claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw