

**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**

**SHELLEY R CHRISTIAN
306 WATER ST
WEBSTER CITY IA 50595**

**R & D CK INC
COUNTRY KITCHEN
PO BOX 763
AMES IA 50010**

**Appeal Number: 04A-UI-07798-BT
OC: 02/01/04 R: 01
Claimant: Respondent (4)**

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 96.6-2 - Timeliness of Protest
Section 96.5-1-a – Voluntary Leaving – Other Employment

STATEMENT OF THE CASE:

Country Kitchen (employer) appealed an unemployment insurance decision dated July 12, 2004, reference 01, which held it failed to file a timely protest regarding the claimant's separation of employment on November 30, 2003, and no disqualification of unemployment insurance benefits was imposed. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 10, 2004. The claimant did not provide a telephone number at which she could be contacted, and therefore, did not participate. The employer participated through owner Diane Vasquez.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The notice of claim was mailed to the employer's last known address of record on February 5, 2004. The employer received the notice of claim. The notice contained a warning that a protest must be postmarked or received by the Agency by July 22, 2004. The records indicate the protest was filed on July 8, 2004, which is after the date on the notice of claim. The employer filed a protest by fax after receiving the notice of claim but never heard any more after that until receipt of the quarterly statement of charges, which is why the subsequent protest was filed on July 8, 2004.

The claimant was employed with Country Kitchen until November 30, 2004 when she quit to accept employment with Curves. Continued work was available.

REASONING AND CONCLUSIONS OF LAW:

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.

The ten calendar days for protesting a claim begins running on the mailing date. The date stated on the notice of claim is presumptive of the actual date mailed. 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), protests 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 protest was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file protests within the time allotted by statute, and that the administrative law judge has no authority to consider the merits of a protest if it is not timely 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 employer was deprived of a reasonable opportunity to file its 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 had a reasonable opportunity to file a timely protest within ten days after the mailing of the notice of claim and did file a protest within the time frame, even though Iowa Workforce Development has no record of this document. Furthermore, the employer filed a protest in a timely manner after receipt of the quarterly statement of charges.

The administrative law judge concludes that failure to file a timely protest within the time prescribed by the Iowa Employment Security Law was due to Agency error or action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the protest was timely filed pursuant to Iowa Code Section 96.6-2, and the administrative law judge can proceed to make a determination with respect to the nature of the protest. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

The next issue is whether the reasons for the claimant's separation from employment qualify her to receive unemployment insurance benefits. For the reasons that follow, the administrative law judge concludes the claimant voluntarily left her employment to accept employment elsewhere.

Iowa Code Section 96.5-1-a 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. But the individual shall not be disqualified if the department finds that:

a. The individual left employment in good faith for the sole purpose of accepting other or better employment, which the individual did accept, and the individual performed services in the new employment. Benefits relating to wage credits earned with the employer that the individual has left shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Even though the separation was without good cause attributable to the employer and would, standing alone, disqualify the claimant from receiving benefits, the claimant did leave in order to accept other employment and did perform services for the subsequent employer. Accordingly, benefits are allowed and the employer's account shall not be charged.

DECISION:

The unemployment insurance decision dated July 12, 2004, reference 01, is modified in favor of the appellant. The claimant voluntarily left her employment in order to accept other employment. Benefits are allowed, provided the claimant is otherwise eligible. The employer's account shall not be charged.

sdb/kjf