

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICOLE M STRAIN
Claimant

APPEAL NO. 07A-UI-05337-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 03/04/07 R: 03
Claimant: Appellant (1)**

Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Nichole M. Strain (claimant) appealed a representative's May 9, 2007 decision (reference 03) that concluded she was disqualified for reasons constituting gross misconduct under Iowa Code § 96.5-2-b, c in connection with her employment with Wal-Mart Stores, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 11, 2007. This appeal was consolidated for hearing with one related appeal, 07A-UI-05338-DT. The claimant participated in the hearing. Joann Heath appeared on the employer's behalf. One other witness, Timothy Timmer, was available on behalf of the employer but did not testify. 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.

ISSUE:

Was the claimant's appeal timely or are there legal grounds under which it can be treated as timely?

FINDINGS OF FACT:

On April 24, 2007, under 07A-UI-03638-S2T, an appeal hearing was held on the employer's appeal of a representative's March 26, 2007 (reference 01) decision regarding the underlying separation from employment. On the same date, April 24, 2007, that administrative law judge issued a decision in that case concluding the separation was a discharge for misconduct; the decision further remanded a question back to the Agency Claims Section to make an inquiry and determination as to whether the discharge was for reasons constituting "gross misconduct" as defined by Iowa Code § 96.5-2-b, c. The claimant filed an appeal of the administrative law judge's decision with the Employment Appeal Board on May 7, 2007; as of the date of the hearing in the current matter, no further determination had been made by the Board on the claimant's appeal.

Following the remand instructions in the administrative law judge's April 24 decision, on or about May 9 the Claims Section issued two additional decisions, a reference 03 decision (the decision

subject to review in this appeal), and a reference 05 decision (an overpayment decision subject to review in the companion appeal 07A-UI-05338-DT).

The representative's decision was mailed to the claimant's last-known address of record. The claimant received the decision on or about May 14, 2007. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 22, 2007, a Tuesday. The appeal was not filed until it was hand-delivered to the claimant's local Agency office on May 24, 2007, which is after the date noticed on the disqualification decision. The claimant had taken no action after receiving the decision to pursue an appeal until contacting the local office on May 24, at which time she was instructed she needed to file an appeal immediately, which she did. She did not pursue action to make an appeal on or by May 22, as she was busy with personal matters.

REASONING AND CONCLUSIONS OF LAW:

If a party fails to make a timely appeal of a representative's decision and there is no legal excuse under which the appeal can be deemed to have been made timely, the decision as to the merits has become final and is not subject to further review.

Iowa Code § 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 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(1) and 871 IAC 24.35(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 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 have a reasonable opportunity to file a timely appeal.

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 administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2) or other factors outside the appellant's control. The administrative law judge further concludes that because the appeal 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 appeal, regardless of whether the merits of the appeal would be valid. See Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

DECISION:

The representative's May 9, 2007 decision (reference 03) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. Benefits are denied.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw