

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

LYNETTE M VIVACQUA
Claimant

HY-VEE INC
Employer

APPEAL NO. 20A-UI-12157-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/14/20
Claimant: Appellant (1)

Iowa Code § 96.6-2 – Timeliness of Appeal
Iowa Code § 96.5-1 – Voluntary Quit
Iowa Code § 96.5-12 – Voluntary Quit Part Time Employment

STATEMENT OF THE CASE:

Claimant filed an appeal from the August 12, 2020, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 30, 2020. The claimant did participate and had representative Jeffrey Vivacqua. The employer did participate through hearing representative Barbara Buss and witness Staci Wahl.

ISSUES:

Whether the appeal is timely?

Whether claimant quit for good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A decision was mailed to the claimant's last known address of record on August 12, 2020. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by August 22, 2020. The appeal was not filed until September 27, 2020, which is after the date noticed on the disqualification decision. Claimant stated that she did receive the decision. She stated that although the decision granted unemployment benefits, that she chose to appeal the decision because the decision indicated that claimant voluntarily quit the employment when claimant argued that she was terminated from her employment.

Claimant stated that she believed she was terminated from her employment, as she was not put on the schedule after she'd missed a number of days from work because of an ear infection. Claimant stated that she did call in to work in advance of each day missed, but the human resources officer was not in and there was no phone mail to leave a message of illness. Claimant stated that on each occasion she then called the front of the store as the employee handbook instructed her to do. Claimant said she left a message on at least one occasion with a Cody Lyman and wasn't sure with whom she left a message on other occasions but was sure that she did so each time she was not at work.

Employer stated that they had no record of claimant calling off any of her missed days, so after three days of no call / no show, claimant was seen as a voluntary quit and taken off the schedule.

REASONING AND CONCLUSIONS OF LAW:

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 ten calendar days for appeal begin 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).

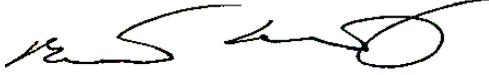
Pursuant to rules Iowa Admin. Code r. 871-26.2(96)(1) and Iowa Admin. Code r. 871-24.35(96)(1), appeals are considered filed when postmarked, if mailed. *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983).

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 have a reasonable opportunity to file a timely appeal.

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 Iowa Admin. Code r. 871-24.35(2). Claimant stated that she wanted to appeal this case because she did not agree that she had voluntarily quit her job. This decision was one that could have been made within 10 days of the receipt of her decision. As she did not make to decision to file an appeal until well outside the 10 days, her appeal is untimely. The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code Section 96.6-2, and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The August 12, 2020, reference 01, decision is affirmed. Claimant in this matter is still eligible for benefits, so long as other eligibility requirements are satisfied. Employer's account will not be charged. The appeal in this case was not timely, and the decision of the representative remains in effect.



Blair A. Bennett
Administrative Law Judge

December 7, 2020
Decision Dated and Mailed

bab/mh