

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PATRICIA ALLEN

Claimant

ADVANCE STORES COMPANY INC

Employer

APPEAL 21A-UI-06010-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/22/20

Claimant: Appellant (1)

Iowa Admin. Code r. 871-24.23(26) – Able & Available – Availability Disqualifications
Iowa Code § 96.19(38) – Total and Partial Unemployment
Iowa Code § 96.7(2)a(2) – Same Base Period Employment
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Code § 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

Patricia Allen (claimant) appealed an Iowa Workforce Development May 18, 2020, decision (reference 01) that denied benefits based on her continued employment with Advance Stores Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 25, 2021. The claimant participated personally. The employer was represented by Jackie Boudreaux, Hearings Representative, and participated by Mike Schmitt, District Manager.

Exhibit D-1 was received into evidence. The administrative law judge took official notice of the administrative file. 21A-UI-06010.S1 and 21A-UI-06011.S1 were heard at the same time.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, whether the claimant is eligible for total or partial unemployment benefits, still employed at the same hours and wages, whether the claimant is able and available for work and/or whether the employer's account is subject to charge.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on February 27, 2013, as a full-time retail parts manager. She worked forty hours per week and the employer paid her \$15.25 per hour. It did not issue her any written warnings.

At some point, the employer reduced her hours to thirty-two or thirty-five hours per week, based on business needs. The claimant filed for unemployment insurance benefits with an effective date of March 22, 2020. Her weekly benefit amount (WBA) was determined to be \$391.00. The claimant received no benefits as of March 22, 2020.

A disqualification decision was mailed to the parties' last known address of record on May 18, 2020. The claimant received the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 28, 2021. The appeal was filed on February 22, 2021, which is after the date noticed on the decision. The claimant decided not to file an appeal to the decision after a manager told her that working thirty-two hours per week was considered full-time.

On December 7, 10, and 14, 2020, unknown workers complained about the claimant to the employer. The claimant requested and was granted vacation from December 24, 2020, through January 4, 2021. On January 5, 2021, the district manager told the claimant some statements the unknown co-workers were saying about her. This was the first the claimant had heard the statements. The claimant told the employer the statements were untrue. The district manager had never heard the claimant make the statements. On January 6, 2021, the employer terminated the claimant for statements that unknown co-workers heard. It did not terminate the claimant for weeks after the complaints because it was investigating.

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, subsections 10 and 11, 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 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).

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. She chose not to file an appeal to the decision.

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). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 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).

In the alternative, the claimant was not eligible for unemployment insurance benefits from March 22, 2020, through January 2, 2021.

Iowa Code section 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Iowa Code section 96.4(3) provides:

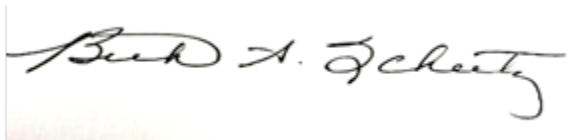
An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The claimant was at all times employed and earning wages from the employer between March 22, 2020, through January 2, 2021. She cannot be considered totally or temporarily unemployed. The issue becomes whether she was partially unemployment insurance benefits. For a worker to be partially unemployed, she must be earning less than her WBA plus \$15.00. The claimant's WBA was \$391.00. \$391.00 plus \$15.00 is \$406.00. Each week the claimant earned at least \$488.00 (\$15.25 times thirty-two hours). This was greater than \$406.00. The claimant was not partially unemployed. She was not monetarily eligible for unemployment insurance benefits. Benefits are denied between March 22, 2020, through January 2, 2021.

DECISION:

The May 18, 2020, reference 01, decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. The claimant is not able to work and available for work between March 22, 2020, through January 2, 2021.



Beth A. Scheetz
Administrative Law Judge

June 4, 2021
Decision Dated and Mailed

bas/kmj