IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BROOKE M HAGEN
Claimant

WAL-MART STORES INC
Employer

APPEAL NO: 11A-UI-07162-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/10/11
Claimant: Appellant (1)

Section 96.5-1 – Voluntary Leaving
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Brooke M. Hagen (claimant) appealed a representative's May 5, 2011 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from 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 22, 2011. The claimant participated in the hearing. Brent Prunty appeared on the employer's behalf and presented testimony from one witness, Jolene Staudt. One other witness, Judy Gudex, 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:

The representative's decision was mailed to the claimant's last-known address of record on May 5, 2011. The claimant confirmed that the address was her new and current address, but asserted that she did not receive the decision until on or about May 14, 2011 because all of her mail was being held by the United States Postal Service. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 15, 2011, a Sunday. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, May 16. The appeal was not filed until it was hand-delivered to a local Agency office on May 27, 2011, which is after the date noticed on the disqualification decision. The claimant asserted that she delayed that long because at some undetermined time after receiving the decision she had been speaking by phone with some unspecified person with the Agency, making inquiries about the appeal procedure, and that she could not afford to drive to the Agency office until May 27; however, the questions she indicated she was asking were already addressed in the

instructions on the representative's decision. She did not provide a clear reason as to why she did not put an appeal into the mail prior to being able to drive to the Agency office on May 27.

The claimant started working for the employer on October 14, 2010. Since about November she worked full time as a deli sales associate in the employer's Indianola, Iowa store on a 2:00 p.m. to 10:00 p.m., Wednesday through Sunday schedule. Her last day of work was March 9, 2011. The employer considered the claimant to have quit by job abandonment as of April 1.

The claimant was a no-call, no-show for scheduled work from March 10 through March 13. On March 17 she came to the employer's office and picked up forms for a leave of absence. Ms. Staudt, the personnel coordinator, discussed with her at that time that the days she had missed were considered unexcused unless she provided medical documentation to cover those days. The claimant was told that she needed to return the paperwork within 15 days. Two of the pages were for her doctor to complete, and two of the pages were for the claimant to complete. The doctor completed the medical papers and returned them on about March 20; however, the claimant did not complete and return her papers.

On March 23 the employer sent the claimant a letter by certified mail indicating that it still needed to receive her leave papers and that she needed to respond to the letter by calling the employer within seven days of receipt of the letter. The claimant signed for receipt of the letter from the United States Postal Service on March 24. She did not contact the employer within seven days, so as of April 1 the employer deemed her to have voluntarily quit by job abandonment. The claimant did not contact the employer until April 27. She then contacted Ms. Staudt and inquired if she still had a job and whether there was a final paycheck waiting for her. She was informed that she no longer had a job with the employer.

On the whole, the administrative law judge found the claimant's testimony to be less credible than the testimony of Ms. Staudt. The claimant's testimony was less precise regarding dates. She also failed to adequately explain how her signature appeared to be on the mail receipt for the March 23 letter which she now asserts she did not receive.

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 that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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(96)(1) and 871 IAC 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 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 then 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).

A party does not have a reasonable opportunity to file a timely appeal if the delay is due to Agency error or misinformation or to delay or other action of the United States postal service. 871 IAC 24.35(2). Failing to read and follow the instructions for filing an appeal is not a reason outside the appellant's control that deprived the appellant from having a reasonable opportunity to file a timely appeal. 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 prescribed time was not due to a legally excusable reason so that it can be treated as timely. The administrative law judge further concludes that because the appeal was not timely, 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, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

However, in the alternative, even if the appeal were to be deemed timely, the administrative law judge would in effect affirm the representative's decision on the merits. If the claimant voluntarily quit her employment, she is not eligible for unemployment insurance benefits unless it was for good cause attributable to the employer. Iowa Code § 96.5-1.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993); Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989). The intent to quit can be inferred in certain circumstances. For example, failing to report to the employer as directed is considered to be a voluntary quit. 871 IAC 24.25(27). The claimant did exhibit the intent to quit and did act to carry it out. The claimant would be disqualified for unemployment insurance benefits unless she voluntarily quit for good cause.

The claimant has the burden of proving that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. The claimant has not satisfied her burden. Even if the merits of the separation are considered, benefits would be denied, although the administrative law judge would treat the separation as a voluntary quit by job abandonment rather than a discharge.

DECISION:

The representative's May 5, 2011 decision (reference 01) 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs