IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ZAHRA A ABURAS
Claimant

SDH EDUCATION WEST LLC
Employer

APPEAL NO. 10A-UI-02185-DT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 12/21/08
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Zahra A. Aburas (claimant) appealed a representative's January 29, 2010 decision (OC 12/21/08 – reference 01) which concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from SDH Education West, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 2, 2010. This appeal was consolidated for hearing with three related appeals, 10A-UI-02186-DT, 10A-UI-02187-DT, and 10A-UI-02188-DT. The claimant participated in the hearing and was represented by Katie Naset, attorney at law. Judy Jesson appeared on the employer's behalf. 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.

ISSUES:

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

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

This representative's decision in this case was issued under an original claim year the claimant had first established effective December 21, 2008. The decision was mailed to the claimant's last known address of record on January 29, 2010. The claimant received the decision on February 1, 2010. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 8, 2010, a Monday.

On February 1, two other representative's decisions were issued and mailed to the claimant. One was OC 12/20/09 – reference 01, issued under a second claim year the claimant had established effective December 20, 2009, which concluded that the previously issued decision regarding the separation from employment between the parties was still in effect for the new

claim year; this decision is the subject of 10A-UI-02187-DT. The other decision issued on February 1 was OC 12/21/08 – reference 02, which concluded that as a result of the initial decision concluding that the claimant's separation from the employer had been disqualifying, the claimant had been overpaid unemployment insurance benefits for the period of September 20 through December 26, 2009; this decision is the subject of 10A-UI-02186-DT. Finally, on February 2, an additional representative's decision was issued and mailed to the claimant – OC 12/20/09 – reference 04. This decision concluded that as a result of the decision concluding that the claimant's separation from employment had been disqualifying, the claimant had been overpaid unemployment insurance benefits in her second benefit year for the period of December 20, 2009 through January 16, 2010.

The claimant did not file her appeal until it was hand delivered to a local Agency office on February 9, 2010, which is after the date noticed on the initial disqualification decision. The claimant was sufficiently able to read the representative's decision, and understood from that decision that she was disqualified from unemployment insurance benefits and that there was an opportunity to appeal. While the subsequent three decisions were issued as a result of the initial disqualification decision, none of those decisions modified or amended the January 29 decision, and did not extend the deadline for appealing the decision. The claimant did not have an explanation as to why she waited until February 9 to make her appeal.

The claimant started working for the employer on April 7, 2006. She worked full-time as a food preparer at the employer's Des Moines, Iowa, food service at Drake University. The claimant's last day of work was August 12, 2009, a day of training for the fall semester. Prior to August 12, the claimant had exhausted all but 12 days of her annual FMLA (Family Medical Leave) allowance. On August 17 the claimant reported to the employer that she wished to take a leave until October 15 to go to Egypt to be with her mother, who had a hip replacement surgery. Ms. Jesson, the manager of the food service, advised the claimant she only had 12 days of leave left, so that if the claimant was gone for longer than that, the employer could not hold her position for her, so at best she would only be able to reapply for her job. The claimant indicated that she was going to pursue the time off into October.

The employer calculated the claimant's additional 12 days of leave as starting on August 17 and expiring on August 29. It is not clear whether the claimant would have had any scheduled work duties between August 17 and August 23, but at the least the regular work schedule would have gone into effect by August 24, 2009 with the start of classes. Twelve days from August 24 would have taken the claimant through September 4.

The claimant did not go to Egypt. She had needed to procure a loan in order to finance the trip, and she ultimately did not get the loan. She learned this on September 10. On September 11 she contacted Ms. Jesson and indicated she wanted to get her job back. Ms. Jesson advised the claimant that her prior position had been filed, but that she could reapply for any future openings, which the claimant did.

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 the appellant's 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 affirm the representative's decision on the merits. A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. A voluntary quit is a termination of employment initiated by the employee – where the employee has instigated the action which directly results in the separation; a discharge is a termination of employment initiated by the employer – where the employer has instigated the action which directly results in the separation from employment. 871 IAC 24.1(113)(b), (c). A mutually agreed-upon leave of absence is deemed a period of voluntary unemployment. 871 IAC 24.22(2)j. However, if at the end of the leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits; and, conversely, if at the end of the leave of absence the employee fails to return and subsequently becomes unemployed, the employee is considered as having voluntarily quit and therefore is ineligible for benefits. Id.

Here, the claimant failed to return at the end of the leave of absence. Even calculated from the start of regular work duties on August 24, the claimant's allowable 12 days of leave would have expired on September 4, but she did not seek to return to work until another week later. She is

therefore deemed to have voluntarily quit the employment. The claimant therefore has the burden of proving that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. Rule 871 IAC 24.25(20) indicates that a "quit" of ten or less days can be for a non-disqualifying good cause, but only if the reason for the absence was "compelling." The claimant has not established that her absence was for a "compelling" reason; she did not in fact go to Egypt and was not attending to her mother's needs during that time, but rather simply spent the time in preparation for the potential trip and in making the application for the loan. Neither has the claimant established that the "necessary and sole reason" for her absence was because she was "taking care of a member of the claimant's immediate family who was ill or injured," at the least because she was not in fact attending to her mother during her absence. 871 IAC 24.26(8). At best, the claimant's extended absence from work was "due to family responsibilities or serious family needs," but while that is a good personal reason, it is a disqualifying reason. 871 IAC 24.25(23). The claimant has not satisfied her burden. Benefits are denied.

DECISION:

The representative's January 29, 2010 decision (OC 12/21/08 – 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. In the alternative, treating the appeal as timely, the claimant voluntarily left her employment without good cause attributable to the employer. As of September 4, 2009, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw