IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

FRANK CARMENATE
1508 E 12TH ST #2
DES MOINES IA 50316-2212

WELLS FARGO FINANCIAL RETAIL CREDIT INC
C/O TALX EMPLOYER SERVICES
PO BOX 1160
COLUMBUS OH 43216-1160

Appeal Number: 06A-UI-05438-RT
OC: 02-26-06 R: 02
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-1-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.6-2 – Initial Determination (Timeliness of Appeal)

STATEMENT OF THE CASE:

The claimant, Frank Carmenate, filed an appeal from an unemployment insurance decision dated March 30, 2006, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on June 12, 2006, with the claimant participating. Kelly Uelmen, Customer Services Department Manager, and Jed Spera, Supervisor of Customer Services, participated in the hearing for the employer, Wells Fargo Financial Retail Credit, Inc. Department Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department

unemployment insurance records for the claimant. When the administrative law judge called the claimant at 2:01 p.m. at the number he had provided for the hearing, the person who answered informed the administrative law judge that the claimant was in the hospital ill. The administrative law judge had determined to reschedule the hearing when the claimant called at 2:12 p.m. and indicated that he was in the hospital because his wife was having a baby but that he wanted to proceed with the hearing. The hearing proceeded and the claimant participated in the hearing. This appeal was consolidated with appeal number 06A-UI-05439-RT for the purposes of the hearing with the consent of the parties.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit One, the administrative law judge finds: An unemployment insurance decision dated March 30, 2006, reference 01, determined that the claimant was not eligible to receive unemployment insurance benefits because records indicate he voluntarily left his employment on February 28, 2006 by failing to report to work for three days in a row and not notifying the employer of the reason and the claimant's quitting was, therefore, not caused by the employer. That decision was sent to the claimant on March 30, 2006. That decision was received by the claimant. That decision indicated that an appeal had to be postmarked or otherwise received by the Appeals Section by April 10, 2006. The decision actually read April 9, 2006 but since that was a Sunday the appeal would be due the next business or working day. The claimant sent in an appeal to the Appeals Section two days after he had received the decision from which he seeks to appeal and before April 10, 2006. However, that appeal apparently was never received by the Appeals Section. The claimant then filed a second appeal as shown at Department Exhibit One when he left the same with the customer service department on May 23, 2006. This appeal was over one month late.

Because the administrative law judge hereinafter concludes that the claimant's appeal was not late or in the alternative, if late, the claimant has demonstrated good cause for the delay in the filing of his appeal, the administrative law judge further finds: The claimant was employed by the employer as a full-time customer service representative from February 21, 2005 until he was separated from his employment on February 23, 2006. The claimant was on a leave of absence to go out of the country to Mexico because the grandparent of his girlfriend was sick and then passed away. The claimant was supposed to return on February 24 or 25, 2006, however, the claimant did not return to the employer until February 28, 2006 and then not at the start of the day ready to work on that day. The claimant never informed the employer that he was not going to return at the end of his leave of absence on February 24 or 25, 2006. In fact, on February 22 or 23, 2006, the claimant left a voicemail message with the employer indicating that he was returning to the United States. Although the claimant knew that the employer would wonder why the claimant had not returned to work when expected, he did not call or notify the employer. The claimant could have used an 800 number to call the employer but he did not think to do so. The employer has a policy that requires that an employee notify the employer if the employee is going to be absent and if the employee is absent for three consecutive days without notifying the employer, the employee is considered to have abandoned his job and to have quit his job. This policy is in the handbook as well as an attendance policy and the claimant received copies of both and signed an acknowledgement of both.

The claimant had an attendance problem prior to his leave of absence. The claimant had six tardies either coming to work or returning late from lunch. The claimant received two written warnings for his attendance; one on August 10, 2005 and another on November 9, 2005 and also two or three informal oral warnings. The claimant also had absences for which he took

unscheduled paid leave when he was sick or had family issues. The claimant would also leave work early occasionally.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant filed a timely appeal of a decision dated March 30, 2006, reference 01, or, if not, whether the claimant demonstrated good cause for such failure. The administrative law judge concludes that the claimant's appeal was timely and in the alternative, the claimant has demonstrated good cause for a delay in the filing of any appeal and, therefore, the claimant's appeal should be accepted and the administrative law judge has jurisdiction to reach the remaining issues.

2. Whether the claimant's separation from employment was a disqualifying event. It was.

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, subsection 10, 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.

871 IAC 24.35(1) provides:

> (1) Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

a. If transmitted via the United States postal service, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

b. If transmitted by any means other than the United States postal service on the date it is received by the division.

871 IAC 24.35(2) provides:

(2) 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 division that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The division shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the division after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service or its successor, the division shall issue an appealable decision to the interested party.

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 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).

(2) The record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that the claimant has the burden to prove that his appeal was timely or that he had good cause for the delay in the filing of his appeal. The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that his appeal was timely or, in the alternative, he has demonstrated good cause for the delay in the filing of his appeal. The claimant testified, and there is no evidence to the contrary, that he actually filed an appeal before the appeal deadline of April 10, 2006. However, apparently this appeal was never received by the Appeals Section. The claimant then appealed the decision a second time on May 23, 2006 as shown at Department Exhibit One. This appeal was over one month late. The administrative law judge concludes that in the absence of any evidence to the contrary, the claimant timely appealed the decision but his appeal was never received by workforce development. The administrative law judge further concludes that although the claimant's second appeal was not timely, the claimant has demonstrated good cause for the delay in the filing of his appeal. Assuming that the claimant's second appeal was not timely, the claimant was justified in the delay in filing his appeal because he had attempted to appeal in a timely fashion but it had not been received by the Appeals Section. Accordingly, the delay in the filing of the appeal was due to error or misinformation on the part of Iowa Workforce Development. Therefore, the administrative law judge concludes that the claimant's appeal was timely or, in the alternative, the claimant has demonstrated good cause for the delay in the filing of his appeal and, therefore, the administrative law judge concludes that the claimant's appeal should be accepted. The administrative law judge further concludes that he has jurisdiction to reach the remaining issue.

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(4) provides:

> Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

871 IAC 24.22(2)j(1)(2)(3) provides:

> Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.
>
> (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.
>
> (2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.
>
> (3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

The first issue to be resolved is the character of the separation. The claimant maintains that he was discharged when he returned to work on or about February 28, 2006 and was informed that he had abandoned his job and been treated as a voluntary quit. The employer maintains that the claimant voluntarily left his employment when he failed to return from a leave of absence on February 24 or 25, 2006. The administrative law judge concludes that the claimant left his employment voluntarily effective February 23, 2006 when he failed to return from a leave of absence. When an employee fails to return at the end of a leave of absence and subsequently becomes unemployed, the employee is considered as having voluntarily quit and, therefore, is ineligible for unemployment insurance benefits. The evidence establishes that the claimant was on a leave of absence to end on February 24 or 25, 2006 but he did not return to work until February 28, 2006 and when he returned to work on February 28, 2006, he did not return at the start of the day and was not ready to work on that day. The evidence also establishes that the claimant did not inform the employer that he was not going to return from his leave of absence promptly. Accordingly, the administrative law judge concludes that the claimant failed to return at the end of a leave of absence and, therefore, is considered to have voluntarily quit. Further, the employer has a policy that provides that an employee who is absent for three consecutive days without notifying the employer is considered to have abandoned his job and to be a voluntary quit. This policy is applicable here. The claimant was absent on either February 24 or 25 and 27 and 28, 2006, which is three consecutive days and he did not notify the employer. In fact, the claimant called and left a voicemail for the employer on February 22 or 23, 2006 that he was returning to the United States. Since the claimant was absent for three working days without notifying the employer, in violation of the employer's rule, the administrative law judge again concludes that the claimant left his employment voluntarily. In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant left his employment voluntarily effective February 23, 2006.

The issue then becomes whether the claimant left his employment without good cause attributable to the employer. The administrative law judge concludes that the claimant has the

burden to prove that he has left his employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6(2). The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The claimant testified that he was delayed in returning from a leave of absence but did not notify the employer. This is not good cause attributable to the employer. There is even evidence that the claimant could have used the employer's 800 number to call the employer but the claimant did not think to do so. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily effective February 23, 2006, without good cause attributable to the employer and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism and would still be disqualified to receive unemployment insurance benefits. See 871 IAC 24.32(7). The evidence establishes that the claimant had at least six tardies when he was either late from lunch or late getting to work at least on some occasions because he had no car. The claimant also took unscheduled paid leave for family issues or when he left work early. In addition, the claimant had the absences noted above following the due date of his return from a leave of absence and these were not properly reported to the employer. The evidence establishes that the claimant could have used an 800 number for the claimant to call the employer but he did not think to do so. The evidence also establishes that the claimant left a voicemail for the employer indicating that he was returning to the United States on February 22 or 23, 2006. If the claimant was able to leave this voicemail, the administrative law judge does not understand why the claimant was not able to notify the employer that he was not going to be able to return as expected. Accordingly, the administrative law judge concludes that the claimant's tardies and absences as noted were not for reasonable cause and/or not properly reported and are excessive unexcused absenteeism. Therefore, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism, and he would still be disqualified to receive unemployment insurance benefits.

DECISION:

The representative's decision of March 30, 2006, reference 01, is affirmed. The claimant, Frank Carmenate, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he left his employment voluntarily without good cause attributable to the employer. The claimant's appeal is timely or, in the alternative, the claimant has demonstrated good cause for the delay in the filing of his appeal and his appeal should, therefore, be accepted.

pjs/pjs