IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

STEVEN J ENDRES Claimant **MENARD INC** Employer	**APPEAL 14A-UI-11470-H2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/14/14** **Claimant: Appellant (1)**

Iowa Code § 96.5(1) – Voluntary Leaving
Iowa Code § 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 30, 2014 (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 25, 2014. Claimant participated along with his fiancé Florence Nuez. Employer participated through Dale Dickman, General Manager and was represented by Gary Roehm, Attorney at Law. Department's Exhibit D-1 was entered and received into the record. Claimant's Exhibit A was entered and received into the record. Employer's Exhibits A and B were entered and received into the record.

ISSUES:

Did the claimant file a timely appeal?

Did the claimant voluntarily quit his employment without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a second assistant manager at the Spencer, Iowa store beginning on April 5, 2013 through August 25, 2014 when he voluntarily quit.

The claimant filed a claim for benefits in Iowa with an effective date of September 28, 2014. At that time he listed the address where mail could be sent to reach him as 110 4th Street SE in Spencer, Iowa. The claimant was not living in Spencer, Iowa at the time but in Chicago, Illinois. He alleges that an Illinois unemployment employee told him he had to list an Iowa address since he was filing for benefits in Iowa. Such a statement is not true and is not believable as the Agency would need an accurate address at which to contact the claimant. The claimant did not contact any IWD employee to find out if he needed to provide his accurate address. The claimant did not provide IWD with his correct address until October 8, 2014. A decision denying the claimant benefits was mailed to the address he provided he could be contacted at in Spencer, Iowa on September 30, 2014. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by October 10, 2014. The appeal was not filed until November 5, 2014 which is after the date noticed on the disqualification decision.

The claimant asked for a transfer from the Spencer, Iowa store to the Rockford, Illinois store. His request was granted. Prior to even leaving Spencer the claimant had been given his schedule for work at the new store. He was to begin work at 9:00 a.m. on Monday, August 25. The claimant was responsible for showing up for his scheduled work shifts and had received the employer's written attendance policy which put him on notice that three days of a no-call/no-show would be considered a voluntary quit.

The claimant alleges that he called the Rockford store on Sunday night August 24 and whoever answered the telephone was unable to tell him his work scheduled for the next day. That person, whose name the claimant did not obtain, never told the claimant he was not an employee nor did they tell him not to show up for work. The claimant simply assumed that because the person who answered the telephone on a Sunday night could not give him his work schedule he was no longer employed. The claimant had already been given his work schedule and had only to show up at the store the next day to learn that he had not been discharged but was in fact still an employee. The claimant did not contact anyone at the store in human resources or the general manager to inquire about his status. Had he taken that reasonable step, he would have discovered he still had employment.

The claimant arrived in Rockford to find the apartment he had rented, was no longer available for him. He left the city because he had no place to live, not because his job was not available for him.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's appeal is untimely.

Iowa Code § 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.

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). 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 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 event that the Employment Appeal Board or any other reviewing authority should find the claimant's appeal timely for the reasons that follow, the administrative law judge concludes the claimant was not discharged but voluntarily left the employment without good cause attributable to the employer.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.25(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:
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> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2) (amended 1998). Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. Since claimant did not follow up with management personnel or the owner, and his assumption of having been fired was erroneous, claimant's failure to continue reporting to work was an abandonment of his job.

Additionally, since the employer had provided the claimant with a work schedule, his failure to report to work or to call to report his absence as required by the written policy is considered job abandonment. Benefits are denied.

DECISION:

The September 30, 2014 (reference 02) decision is affirmed. The appeal in this case was not timely and the decision of the representative remains in effect. In the alternative, the administrative law judge concludes the claimant voluntarily left employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

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