

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

REBECCA APPLGATE

Claimant,

and

WAL-MART STORES INC

Employer.

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HEARING NUMBER: 09B-UI-11877

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Rebecca Applegate (Claimant) was employed by Wal-Mart (Employer) as a full-time assistant manager at the Employer's Blairs Ferry Road location in Cedar Rapids. (Tran at p. 7-8; p. 21-22). The Claimant started the employment in February 2008 and last performed work for the Employer on March 26, 2009. (Tran at p. 7; p. 21-22). The Claimant was on an approved leave of absence under the Family and Medical Leave Act from March 26, 2009 through June 11, 2009. (Tran at p. 7; p. 8-10; p. 22-24; Ex. 1; Ex. 9-11).

On June 13, 2009 the Claimant returned to work. (Tran at p. 12; p. 14; Ex. 9; Ex. 10). She requested and received a personal leave of absence from the Employer. (Tran at p. 10-11; p. 16-17; p. 25; p. 28;

Ex. 5-8). The Claimant intended during this leave to seek, and during the leave did seek, a transfer

within the Employer but at another location. (Tran at p. 10-11; p. 13; p. 15; p. 17; p. 19-20; p. 29-30). The Claimant did not intend to quit when she requested leave. (Tran at p. 11; p. 13; p. 18; p. 19). The request for leave was granted through July 13, 2009. (Tran at p. 19; Ex. 5; Ex. 6). At the end of the leave the Claimant had not secured a transfer. (Tran at p. 12; p. 20). On July 14 the Claimant requested to return to her previous position but was told by the Employer that her position was no longer available. (Tran at p. 12; p. 20-21; p. 29).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(1) states:

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.

Generally a quit is defined to be "a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." 871 IAC 24.1(113)(b). Furthermore, Iowa Administrative Code 871-24.25 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.

Since the Employer had the burden of proving disqualification the Employer had the burden of proving that a quit rather than a discharge has taken place. On the issue of whether a quit is for good cause attributable to the employer the Claimant had the burden of proof by statute. Iowa Code §96.6(2).

"[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." *FDL Foods, Inc. v. Employment Appeal Board*, 460 N.W.2d 885, 887 (Iowa App. 1990), accord *Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992).

Although the Claimant requested a personal leave of absence she did not by that action intend to quit. True, the leave was unprotected. But taking unprotected leave does not, by that reason alone, mean that you are quitting. Asking for leave, even unprotected leave, is not quitting.

In support of this Iowa Administrative Code 871-24.22(2) provides:

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.

We cannot see how this case is anything but an example of an employee who returns “at the end of a period or term of negotiated leave of absences” but whom “the employer fails to reemploy.” 871 IAC 24.22(2)(j)(1). This being the case the rule specifies that “the individual is considered laid off and eligible for benefits.” *Id.* The Claimant did not quit; she asked for leave. As soon as leave was up she asked to return but was told her job was filled. The Claimant is not disqualified from benefits.

We note that during a period of voluntary unemployment, such as personal leave, the Claimant would not be able and available for work. Thus she is not allowed benefits for any time prior to the end of that leave, July 14, 2009.

DECISION:

The administrative law judge’s decision dated September 9, 2009 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits, following July 24, 2009, provided the Claimant is otherwise eligible. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge’s decision in this case is vacated and set aside.

John A. Peno

Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

RRA/fnv

Monique F. Kuester