

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLEY I BALLEW
Claimant

APPEAL NO. 08A-UI-08992-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEHRENBURG INC
Employer

OC: 08/03/08 R: 03
Claimant: Respondent (5-R)

871 IAC 24.1(113)(b) - Layoff

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 26, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 21, 2008. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. General Manager Anna Wilcox represented the employer and presented additional testimony through Floor Manager John Kidd and Associate Manager Stephen Melson. Exhibits One through Eight were received into evidence.

ISSUE:

Whether Ms. Ballew voluntarily quit, was discharged or was laid off from her employment. The administrative law judge concludes that Ms. Ballew was laid off.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kimberley Ballew commenced her part-time employment with Wehrenberg, Inc., on October 1, 2007 and worked as a host at the employer's movie theater. On May 23, 2008, Ms. Ballew requested a leave of absence. Floor Manager John Kidd approved the request for a leave of absence. Mr. Kidd told Ms. Ballew to contact him when she was ready to be placed back on the weekly work schedule. Within a couple months, Ms. Ballew contacted the employer and requested to be placed back on the weekly work schedule. General Manager Anna Wilcox notified Ms. Wilcox that she would not be allowed to return to the employment and that the employer had already processed paperwork terminating her employment. The employer cannot say when exactly the further contact between Ms. Ballew and the employer occurred. The employer has a policy that limits a leave of absence to three months. If an employee fails to return within three months, the employer deems the employment terminated. The employer terminated the employment before Ms. Ballew's leave reached the three-month limit. In making the decision not to allow Ms. Ballew to return to the employment, the employer considered Ms. Ballew's prior attendance.

Ms. Ballew established a claim for unemployment insurance benefits that was effective August 3, 2008.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is 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.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

The evidence in the record fails to establish a voluntary quit. The evidence fails to establish that Ms. Ballew ever evidenced an intention to sever the employment relationship. Instead, the evidence indicates that Ms. Ballew went through the appropriate steps to request a leave of absence, an indication that she planned to return to the employment. The evidence indicates that Ms. Ballew's conduct at the end of the leave further indicated that she did not intend to sever the employment relationship.

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. 871 IAC 24.22(2)(j). If at the end of a period of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits. 871 IAC 24.22(2)(j)(1).

The evidence indicates that the employer initiated the separation from the employment. The employer had agreed to and approved a leave of absence not to exceed three months. The employer then changed its mind and decided to end the employment during the leave, without immediately notifying Ms. Ballew that it had made that decision. Ms. Ballew's leave of absence did not reach the employer's three-month time limit for leaves. The evidence fails to establish that the employer told Ms. Ballew to check in weekly while she was on leave. When Ms. Ballew contacted the employer and requested to be returned to the schedule, the employer told her that it did not have work for her.

Pursuant to Workforce Development rule 871 IAC 24.22(2)(j), the administrative law judge concludes that the employer laid Ms. Ballew off by failing to employ her at the end of an approved leave of absence. Ms. Ballew is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The evidence in the record and Ms. Ballew's failure to participate in the hearing, raises the question of whether Ms. Ballew has been available for work since she established her claim for unemployment insurance benefits. This matter will be remanded to the Claims Division for determination of Ms. Ballew's availability for work.

DECISION:

The Agency representative's September 26, 2008, reference 01, decision is modified as follows. The employer laid off the claimant by failing to reemploy the claimant at the end of an approved leave of absence. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Claims Division for determination of the claimant's availability for work since she established her claim.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs