

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

TONI D BAKER
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DES MOINES IA 50317

K MART CORP
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-03814-RT
OC: 10/30/05 R: 02
Claimant: Respondent (2)

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 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits
Section 96.6-2 – Initial Determination (Timeliness of Protest)

STATEMENT OF THE CASE:

The employer, K Mart Corporation, filed a timely appeal from an unemployment insurance decision dated March 24, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Toni D. Baker, because the employer's protest was not timely. After due notice was issued, a telephone hearing was held on April 24, 2006, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. Janice Gray, Human Resources Manager, and Terry Dencklau, Sales Coach, participated in the hearing for the employer. Stephanie Mirise was available to testify for the

employer but not called because her testimony would have been repetitive and in addition to the written statements she provided and unnecessary. 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.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant filed a claim for unemployment insurance benefits effective October 30, 2005. A notice of the claimant's claim was sent to the employer on November 2, 2005. The deadline for a protest, if any, was November 14, 2005. According to the written statement of Stephanie Mirise, which is the first page of Department Exhibit One, the employer timely protested the claim. This is confirmed by a copy of the protest letter which is the third page of Department Exhibit One dated November 14, 2005. However, that protest was apparently never received by Iowa Workforce Development and no decision was issued because Iowa Workforce Development believed that the employer had not protested the claim. The quarterly Statement of Charges was sent to the employer on or about February 8 or 9, 2006. The employer received this quarterly Statement of Charges and appealed the same by letter dated March 9, 2006 as shown at the second page of Department Exhibit One.

Because the administrative law judge hereinafter concludes that the employer's protest was not late and, even if it was, the employer has demonstrated good cause for any delay in the filing of its protest, the administrative law judge further finds: The claimant was employed by the employer, most recently as a part-time checkout replenishment person, from November 12, 2003, until she voluntarily quit effective October 22, 2005. The claimant averaged between 20 and 25 hours per week. The employer has a rule or policy that provides that an employee who is absent for three days in a row without notifying the employer is considered a quit. The claimant was absent for three days in a row without notifying the employer and in fact the claimant never returned to work and therefore was treated as a voluntary quit effective October 22, 2005. The claimant was having personal problems and babysitting problems and had informed the employer that she had difficulty coming to work. The claimant stopped showing up for work and has never returned to the employer and offered to go back to work. There is no evidence that the claimant had other employment after the employer herein. The claimant was self-employed as a beautician and therefore was only working part-time hours for the employer herein. Pursuant to her claim for unemployment insurance benefits filed effective October 30, 2005, the claimant has received unemployment insurance benefits in the amount of \$575.00 as follows: \$115.00 per week for five weeks from the benefit week ending November 5, 2005 to the benefit week ending December 3, 2005. The claimant is not otherwise monetarily eligible to receive unemployment insurance benefits based on wages from other employers when the wages from this employer are excluded.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely protest of the claimant's claim or, if not, whether the employer established good cause for such failure. The administrative law judge concludes that the employer's protest was timely and, in the alternative, the employer has demonstrated good cause for any delay in the filing of its protest. Consequently, the employer's protest 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.
3. Whether the claimant is overpaid unemployment insurance benefits. She is.

Iowa Code section 96.6-2 provides in pertinent part:

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.

871 IAC 24.35(1) & (2) provide:

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

a. If transmitted via the United States postal service or its successor, 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 or its successor, on the date it is received by the department.

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

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 department 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 department 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 department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

Iowa Code section 96.7-2-a(6) provides:

2. Contribution rates based on benefit experience.

a. (6) Within forty days after the close of each calendar quarter, the department shall notify each employer of the amount of benefits charged to the employer's account during that quarter. The notification shall show the name of each individual to whom benefits were paid, the individual's social security number, and the amount of benefits paid to the individual. An employer which has not been notified as provided in section 96.6, subsection 2, of the allowance of benefits to an individual, may within thirty days after the date of mailing of the notification appeal to the department for a hearing to determine the eligibility of the individual to receive benefits. The appeal shall be referred to an administrative law judge for hearing and the employer and the individual shall receive notice of the time and place of the hearing.

The administrative law judge concludes that the employer has the burden to prove that its protest was timely or that it had good cause for delay in the filing of its protest. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that its protest was timely or, in the alternative, that the employer had good cause for delay in the filing of its protest. According to the statement by Stephanie Mirise at Department Exhibit One, the employer received the notice of claim and timely protested the notice. This is confirmed by the letter of protest dated November 14, 2005 also at Department Exhibit One. The notice of claim was sent on November 2, 2005 and indicated that a protest was due by November 14, 2005. It appears that the employer's protest was timely. However, apparently, Iowa Workforce Development never received the employer's protest and therefore no decision was issued in this matter. The employer did not know about the benefits paid to the claimant until the quarterly Statement of Charges was sent on or about February 8 or 9, 2006. The quarterly Statement of Charges must be sent within 40 days after the close of each calendar quarter. For the fourth quarter of 2005, the quarterly Statement of Charges must have been sent by February 9, 2006. An employer has 30 days after the date of mailing to appeal the quarterly Statement of Charges. The deadline, therefore, for an appeal of the quarterly Statement of Charges would have been on or about March 10, 2006. The employer appealed the quarterly Statement of Charges by letter dated March 9, 2006 also as shown at Department's Exhibit One. It appears that the employer timely appealed the quarterly Statement of Charges even if its protest had been late. Iowa Workforce Development treated the appeal of the quarterly Statement of Charges as a protest and initially determined that the protest was late. However, the administrative law judge, based upon the circumstances here, concludes that the employer's protest was timely and, in the alternative, the employer has demonstrated good cause for delay in the filing of its protest. Any delays here were either as a result of errors or other acts by Iowa Workforce Development or delays or other acts by the U. S. Postal Service. Therefore, the administrative law judge concludes that the employer's protest should be accepted and that he has jurisdiction to reach the remaining issues.

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) (17) (19) (20) & (23) provide:

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.
- (17) The claimant left because of lack of child care.
- (19) The claimant left to enter self-employment.
- (20) The claimant left for compelling personal reasons; however, the period of absence exceeded ten working days.
- (23) The claimant left voluntarily due to family responsibilities or serious family needs.

The employer's witness, Janice Gray, Human Resources Manager, credibly testified that the claimant was treated as a voluntary quit effective October 22, 2005 when she was absent for three days in a row as a no-call/no-show in violation of the employer's rule which provides that three consecutive absences without notifying the employer is considered a voluntary quit. In fact, the claimant never returned to the employer and offered to go back to work. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily effective October 22, 2005. The issue then becomes whether the claimant left her employment without good cause attributable to the employer. The administrative law judge concludes that the claimant has the burden to prove that she has left her 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 her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The claimant did not participate in the hearing and provide reasons attributable to the employer for her quit. The employer's witnesses credibly testified that the claimant simply stopped showing up for work and this is not good cause attributable to the employer. The employer's witnesses also credibly testified that the claimant had personal problems and babysitting problems but leaving work voluntarily because of a lack of childcare or for compelling personal reasons when the period of absence exceeds ten working days as it does here or because of family responsibilities or serious family needs is not good cause attributable to the employer. There is also evidence that the claimant was self-employed but leaving work voluntarily for self-employment is not good cause attributable to the employer. There is no evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental or that she was subjected to a substantial change in her contract of hire. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily effective October 22, 2005 without good cause attributable to the employer and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, she requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$575.00 since separating from the employer herein on or about October 22, 2005 and filing for such benefits effective October 30, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with provisions of Iowa law.

DECISION:

The representative's decision of March 24, 2006, reference 01, is reversed. The claimant, Toni D. Baker, is not entitled to receive unemployment insurance benefits, until, or unless, she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer. The employer's protest was timely and, in the alternative, the employer has demonstrated good cause for delay in the filing of its protest and the employer's protest should be accepted. The claimant has been overpaid unemployment insurance benefits in the amount of \$575.00.

cs/tjc