

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

MELISSA A MIMS
2235 LINCOLN ST
CEDAR FALLS IA 50613

WAL-MART STORES INC
c/o FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166

Appeal Number: 05A-UI-03145-JTT
OC: 02/27/05 R: 03
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 Quit

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the March 17, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 13, 2005. Melissa Mims did not respond to the notice of the hearing, did not provide a telephone number at which she could be reached for the purpose of participating in the hearing, and did not participate. Andrew Fosselman, Co-Manager, represented Wal-Mart and presented additional testimony through John Klockslem, Assistant Manager. Exhibits One through Five were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Melissa Mims was employed by Wal-Mart as a full-time deli sales associate from May 1, 2004 until February 26, 2005, when she voluntarily quit the employment.

Ms. Mims' quit was prompted by events surrounding a request she made for time off. Ms. Mims serves in the Iowa National Guard and did so during the entire length of her employment with Wal-Mart. The Wal-Mart management team was aware of Ms. Mims' service obligation to the Guard and Ms. Mims' immediate supervisor, Assistant Manager John Klocksium, accommodated Ms. Mims' need for time off for Guard service if the information was made available to Mr. Klocksium prior to the posting of the work schedule. The work schedule is posted three weeks in advance. Ms. Mims had provided Mr. Klocksium information regarding all of her scheduled Guard activities for 2005 and Mr. Klocksium scheduled Ms. Mims accordingly.

On or about February 11, 2005, Ms. Mims received an e-mail from Sergeant Robin Page of the Iowa National Guard that indicated Sgt. Page needed Ms. Mims' assistance for Guard activities during the weekend of February 26-27. Ms. Mims provided a copy of the e-mail to Mr. Klocksium. On or about February 11, Ms. Mims made a request to Mr. Klocksium for time off so she could participate in her "special detail" weekend duties. Mr. Klocksium indicated to Ms. Mims that since the schedule was already posted, she would need to find someone to replace her on the schedule if she wanted the time off. Wal-Mart's written policy requires employees to make time off requests at least two weeks in advance. Ms. Mims complied with this written policy. The particular Wal-Mart store had an apparently unwritten policy and practice that if the schedule had been posted, employees had to find a replacement or appear for the shift.

Approximately a week later, Mr. Klocksium inquired of Ms. Mims whether she had located a replacement, but did not press the matter. He does not appear to have received an update from Ms. Mims at that time.

On February 25, the day before the period of requested time off, Mr. Klocksium inquired of Ms. Mims whether she had found a replacement. Ms. Mims indicated she had not. Mr. Klocksium commented that he guessed he was "SOL" for Ms. Mims' weekend hours and Ms. Mims responded that he was.

After this conversation, Mr. Klocksium contacted Sgt. Page by telephone. Mr. Klocksium had been trying to contact Sgt. Page for a couple days to discuss Ms. Mims' request for time off for Guard duty. Mr. Klocksium had never previously been in contact with the Guard regarding a request for time off submitted by Ms. Mims. Mr. Klocksium used the telephone number for Sgt. Page that appeared on the e-mail Ms. Mims had provided. Ms. Mims had not asked Mr. Klocksium to contact Sgt. Page, had no knowledge that Mr. Klocksium intended to contact Sgt. Page, and was not present when Mr. Klocksium contacted Sgt. Page. Mr. Klocksium decided to contact Sgt. Page because he was suspicious of the request for time off. Ms. Mims was frequently absent from work on the first or second weekend of the month. Mr. Klocksium was aware that Ms. Mims had her monthly weekend Guard duty on the first weekend of the month, but believed she was absent on other weekends without a legitimate basis. Mr. Klocksium was also suspicious of the request for time off for Guard duty because Ms. Mims had advised him that she would be unable to provide "orders" regarding the weekend duty until the Monday afterwards. The e-mail from Sgt. Page to Ms. Mims, a copy of which Ms. Mims had provided to Mr. Klocksium, included the statement, "Please let me know if this is a workable plan," suggesting that the weekend duty on February 26-27 was not mandatory. Mr. Klocksium may or may not have considered this when he contacted Sgt. Page.

During the course of Mr. Klocksien's conversation with Sgt. Page, Sgt. Page advised that Ms. Mims had been taken off the weekend duty for February 26-27, because "it wasn't going to work out for her." Sgt. Page assumed that Ms. Mims was with Mr. Klocksien as he was making the phone call and asked to speak with Ms. Mims. Mr. Klocksien advised that Ms. Mims was working in another part of the store. Sgt. Page asked Mr. Klocksien to advise Ms. Mims that she had been taken off the weekend duty.

After the conversation with Sgt. Page, Mr. Klocksien returned to the deli and advised Ms. Mims had he had spoken with Sgt. Page and that Ms. Mims would not be on the weekend "special detail." Ms. Mims was upset by the situation and advised that she was in fact on the weekend detail. Mr. Klocksien advised that if Ms. Mims did not believe him, the two of them could call Sgt. Page together to confirm the information.

On February 26, Ms. Mims reported to work as scheduled. Another deli sales associate advised Mr. Klocksien that Ms. Mims was still upset about the situation. When Mr. Klocksien walked to the office area, Ms. Mims was in the hallway outside Co-Manager Andrew Fosselman's office, waiting to speak with him about the situation. Mr. Fosselman was in the middle of the conference call and indicated through Mr. Klocksien that he would speak with Ms. Mims after the conference call concluded. Mr. Klocksien provided this information and directed Ms. Mims to return to her work area.

Approximately 30-45 minutes later, Mr. Fosselman met with Ms. Mims. At that time, Ms. Mims provided the details of the missed Guard activities and further advised that the inability to attend those activities had cost her \$500.00 in pay and a promotion. Ms. Mims further indicated that she believed Mr. Klocksien had spoiled the opportunity for her. Mr. Fosselman indicated that the only way he would be able to explore whether Mr. Klocksien had interfered with Ms. Mims' Guard duties would be to contact Sgt. Page. Ms. Mims went on to request every weekend off so that she could be available should the weekend "special detail" opportunity arise again. Mr. Fosselman indicated that Ms. Mims would need to provide documentation from the Guard to support the need for the time off. Ms. Mims then advised that she was quitting and provided Mr. Fosselman with her nametag and employee discount card.

Ms. Mims subsequently returned to Wal-Mart and asked Mr. Klocksien if she could have her job back. At that time, Ms. Mims advised she had been mistaken regarding her obligation to appear for Guard duty on February 26-27 and someone in her Guard company had in fact removed her from the weekend "special detail." Ms. Mims was not rehired.

Ms. Mims established a claim for benefits that was effective February 27, 2005, and has received benefits in the total amount of \$440.00.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the Ms. Mims' voluntary quit was for good cause attributable to the employer.

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.

Because Ms. Mims quit the employment, she has the burden of proof in this matter. See Iowa Code section 96.6(2). Unfortunately, Ms. Mims chose not to participate in the hearing and, thereby, denied the administrative law judge the opportunity to hear testimony from her. In the absence of testimony from Ms. Mims, the evidence presented by the employer is uncontested and the only evidence upon which the administrative law judge's decision may be based.

Quits due to intolerable or detrimental conditions are considered to be for good cause attributable to the employer. See 871 IAC 24.26(2), and 871 IAC 24.26(4). However, before a quit prompted by such conditions will be considered for good cause attributable to the employer, the claimant must show that before she resigned (1) the employer was aware of the intolerable or detrimental conditions, (2) the employer was aware that she might quit if the conditions were not addressed, and (3) the employer had a reasonable opportunity to address the claimant's legitimate concerns. See Suluki v. Employment Appeal Board, 503 N.W.2d 402 (Iowa 1993); Cobb v. Employment Appeal Board, 506 N.W.2d 445 (Iowa 1993); and Swanson v. Employment Appeal Board, 554 N.W.2d 294 (Iowa 1996).

The evidence in the record establishes that Wal-Mart was well aware of Ms. Mims' Guard obligations. Wal-Mart was also aware no later than February 25 that Ms. Mims believed Wal-Mart had interfered with her ability to meet her Guard obligations and had gone beyond that to interfere with her relationship with the Guard. Wal-Mart was aware two weeks prior to the requested period of time off that Ms. Mims had been instructed to appear for duty during the weekend of February 26-27. Wal-Mart had the opportunity at any point during the two weeks prior to February 26-27 to accommodate the request for time off and chose not to do that. Instead, Wal-Mart placed the burden on Ms. Mims to locate someone to cover her shifts. The evidence in the record does not indicate whether Ms. Mims took any steps to get a co-worker to cover her shifts or any measure of the difficulty Ms. Mims might have encountered in trying to do that. Based on the evidence in the record, the administrative law judge is not able to conclude that the circumstances faced by Ms. Mims rose to the level of being intolerable or detrimental to her.

An equally important test is whether a reasonable person in the claimant's position would have quit under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993). This is a much closer issue. However, in light of the evidence in the record and the claimant's burden of proof, the administrative law judge cannot conclude that a reasonable person would have quit under the circumstances.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Mims' voluntary quit was not for good cause attributable to the employer. Accordingly, a disqualification for benefits will enter.

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.

Ms. Mims has been overpaid benefits in the amount of \$440.00 and will have to repay this amount.

DECISION:

The Agency representative's March 17, 2005, reference 01, decision dated is reversed. The claimant voluntarily quit her employment without good cause attributable to the employer. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits of \$440.00. The claimant will have to repay that amount.

jt/pjs