

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

TERESA A MILLER
PO BOX 14
ATKINS IA 52206-0014

WAL-MART STORES INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-12430-RT
OC: 01-04-04 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 Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated November 9, 2004, reference 04, allowing unemployment insurance benefits to the claimant, Teresa A. Miller. After due notice was issued, a telephone hearing was held on December 15, 2004 with the claimant participating. Jenny Ressler, Personnel Manager, participated in the hearing for the employer. Employer's Exhibits 1 and 2 and Claimant's Exhibit A were 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, including Employer's Exhibits 1 and 2 and Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a full-time cashier from July 6, 2004 until she was separated from her employment on September 10, 2004. The claimant last worked for the employer on September 5, 2004. On September 6, 2004, the claimant was scheduled to work. The claimant was tardy at least one hour because of her children. She came to the employer's parking lot but left and did not go to work. The claimant did not inform the employer that she was not coming to work. On September 7, 2004, the claimant was again scheduled to work but was absent and did not notify the employer. The claimant was not scheduled to work on September 8 and September 9, 2004. On September 10, 2004, the claimant came in merely to get her check but not to work. At that time, she asked Kelly Moore if she had a job and Ms. Moore said no. Ms. Moore did not tell the claimant that she had been fired or discharged. The claimant then signed an exit interview as shown at Employer's Exhibit 1 indicating that she was separated voluntarily because of job abandonment because of three days of unreported absences. The claimant had no valid reason for being absent those days except that she believed that she was going to be discharged.

Two weeks prior, the claimant had missed three days, August 26, 27 and 28, 2004, because her father was in the hospital as shown at Claimant's Exhibit A. At that time, the claimant got a warning for attendance, called a coaching, and was told that further absences or tardies could result in her discharge. Although the claimant was never told that she was discharged or fired or specifically that she would be for the tardy on September 6, 2004, the claimant never returned to work to go back to work. Pursuant to her claim for unemployment insurance benefits filed effective January 4, 2004 and reopened effective October 10, 2004, the claimant has received unemployment insurance benefits in the amount of \$682.70 since separating from the employer on September 10, 2004 and reopening her claim for benefits effective October 10, 2004 as follows: \$143.00 per week for four weeks from the benefit week ending October 16, 2004 to the benefit week ending November 6, 2004 and \$110.70 for benefit week ending November 13, 2004. The claimant exhausted her unemployment insurance benefits at that point. The claimant did receive benefits prior to employment with the employer herein but they are not relevant.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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), (28) 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.

(28) The claimant left after being reprimanded.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when she was absent for three days in a row as a no-call/no-show without notifying the employer. The claimant claims that she was discharged when she was going to be tardy on September 6, 2004. However, even the claimant concedes that no one ever told her officially that she was fired or discharged but she only assumed that she would be and, therefore, rather than just be tardy on September 6, 2004, the claimant never came to work at all thereafter. The administrative law judge, under the evidence here, concludes that the claimant effectively left her employment voluntarily when she was absent for three days in a row without notifying the employer. The administrative law judge believes that the claimant "jumped the gun" in believing that she was discharged and, therefore, did not return to work. There is no evidence that anyone ever told the claimant that she was specifically fired or discharged. When the claimant came in to get her check on September 10, 2004, she was merely told that she did not have a job anymore. At that point, the claimant had been absent for three days in a row and the employer had treated her absences as a quit. The claimant testified that she came in on September 10, 2004 early enough to work but did not work when she found out she did not have a job. This is not really credible to the administrative law judge because the testimony indicates that the claimant was absent for three days including September 10, 2004 without notifying the employer. The claimant came in on September 10, 2004 to get her check. The claimant also signed an exit interview as shown at Employer's Exhibit 1 indicating that it was a voluntary termination due to job abandonment. The claimant signed it. The claimant now testifies that the form was blank. This is not credible. Even assuming that the exit interview was blank, the claimant must have been fully aware of why she was being terminated, namely the three consecutive absences without notifying the employer. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily on September 10, 2004 when she failed to show up for work for three days in a row without notifying the employer. The employer has a policy providing that such absences are a quit and an absence for three days without giving notice to the employer in violation of an employer rule is considered a quit. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily on September 10, 2004.

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 really did not provide evidence of any reasons attributable to the employer for her quit. The evidence establishes that the claimant was given a reprimand for absences two weeks earlier when her father was in the hospital. The administrative law judge has no doubt that the claimant's father was in the hospital as shown at Claimant's Exhibit A. However, the claimant was not discharged. She was merely given a warning called a "coaching." This is in the nature of a reprimand and leaving work voluntarily because of a reprimand is not good cause attributable to the employer. Leaving work voluntarily when one is absent for three days in row is also not good cause attributable to the employer. There is no evidence that the claimant ever expressed any concerns to the employer about her working conditions or that she ever indicated or announced an intention to quit if her concerns were not addressed by the employer. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily 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.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. The claimant had previous absences to those in September 2004 and received a coaching. The claimant was then absent three days on September 6, 7 and 10, 2004 as noted above. The claimant concedes to two of these absences. The claimant concedes to two of these absences. The claimant also concedes that she did not call in to the employer or notify the employer of the reasons. The claimant was going to be tardy one hour because of child matters but chose not to go to work at all. It may well be that the tardy was justified but the administrative law judge concludes here that the claimant's absence was not justified nor were her other absences and, further, none of the absences were properly reported. Therefore, the administrative law judge concludes that these absences were not for reasonable cause and not properly reported and were excessive unexcused absenteeism. Accordingly, even if the claimant should be considered to have been discharged, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism, and would still be 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 \$682.70 since separating from the employer herein on or about September 10, 2004 and reopening her claim for unemployment insurance benefits effective October 10, 2004. 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 the provisions of Iowa law.

DECISION:

The representative's decision of November 9, 2004, reference 04, is reversed. The claimant, Teresa A. Miller, 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. She has been overpaid unemployment insurance benefits in the amount of \$682.70.

tjc/kjf