

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

KRISTY M BRITTAIN
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COUNCIL BLUFFS IA 51501

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

Appeal Number: 06A-UI-03820-RT
OC: 03/05/06 R: 01
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 March 24, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Kristy M. Brittain. After due notice was issued, a telephone hearing was held on April 24, 2006, with the claimant participating. Steven Johnson, General Manager of the Sam's Club in Council Bluffs, Iowa, participated in the hearing for the employer. Terri Bailey, Personnel Training Coordinator, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. Employer's Exhibits One

through Three 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 One through Three, the administrative law judge finds: The claimant was employed by the employer as a full-time bakery packager from October 11, 2005, until she separated from her employment on March 10, 2006. The claimant's last day of work was February 15, 2006. On that day the claimant went on a medical leave of absence from February 16, 2006 to February 25, 2006. The claimant's application for such leave of absence appears at Employer's Exhibit Two. The claimant was on this leave of absence for a knee injury unrelated to her employment. The employer approved the leave of absence. According to the employer's policies as shown at Employer's Exhibit Three, employees are required to return from a leave of absence and, if not, a supervisor must follow up with a letter sent certified mail, return receipt requested, advising the employee that failure to contact management within three days of the receipt of the letter will result in the termination of the employee's employment. If the employee fails to respond within three days of the delivery date, the associate's employment may be terminated and such failure to return would be handled and classified as a voluntary termination. The claimant was to return from the leave of absence on February 25, 2006 but she did not do so. The employer sent the claimant a letter dated March 1, 2006 certified mail, return receipt requested, as shown at Employer's Exhibit One. The claimant received the letter but no date is specified in the receipt which was returned to the employer. The letter provided that if the employer does not hear from the claimant within three days of receiving the letter, the employer will have no choice but to terminate the claimant. The claimant received the letter on or about March 9, 2006 but never contacted the employer. The claimant was able to return to work on February 25, 2006. However the claimant did not do so. On or about February 27, 2006, the claimant went out of town to Georgia because the claimant's mother was in the hospital. While in Georgia the claimant never called the employer. When the claimant returned to Iowa on or about March 9, 2006 she received the letter as shown at Employer's Exhibit One but still did not call the employer. The claimant intended to quit but had no reasons for her quit.

Prior to her leave of absence the claimant had three absences. On February 11, 2006, the claimant was absent for illness and properly reported this absence. On January 31, 2006, the claimant was absent without giving a reason although she properly reported this absence. On October 6, 2005, the claimant was absent without giving a reason although she properly reported this absence. On December 24 and 29, 2005, the claimant was absent for personal illness and properly reported these absences. The claimant received no warning or disciplines for her attendance. Pursuant to her claim for unemployment insurance benefits filed effective March 5, 2006, the claimant has received unemployment insurance benefits in the amount of \$1,197 as follows: \$171.00 per week for seven weeks from the benefit week ending March 11, 2006 to the benefit week ending April 22, 2006.

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) 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. 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.

The first issue to be resolved is the character of the separation. The claimant testified that she quit by simply not calling the employer. The employer's witness, Steven Johnson, General Manager of the employer's Sam's Club in Council Bluffs, Iowa, testified that the claimant was "terminated." The administrative law judge concludes on the evidence here that the claimant actually voluntarily left her employment. The employer has a rule at Employer's Exhibit Three that provides that a failure to return from a leave of absence and then a failure to respond within three days to a letter to that effect sent certified mail, return receipt requested, will be classified as a voluntary termination. The claimant was on a leave of absence until February 25, 2006 as shown at Employer's Exhibit Two. The claimant's testimony that she did not know that she was supposed to return from a leave of absence on February 25, 2006 and further did not see the physician write in that date on her request for leave of absence is not credible. The claimant's leave of absence at Employer's Exhibit Two clearly shows the return date of February 25, 2006 and the handwriting of that date appears consistent with the handwriting of other numbers contained in the physician's section of the request for leave of absence. The claimant even testified that she was able to work on February 25, 2006. The claimant testified that she was just waiting for a release from her physician. Again this is not credible. If the claimant was able to work on February 25, 2006 and she truly did not know the return date on the request for leave of absence, the claimant should have called the physician to obtain a release instead of waiting. It appears that the claimant simply did not want to return to work and this is consistent with the claimant's later testimony that she intended to quit by failing to go back to work or contact the employer.

The claimant testified that on or about February 27, 2006 she went to Georgia because her mother was in the hospital. While in Georgia the claimant did not call the employer. The claimant testified that she had no time to call the employer but this again is not credible. Surely, if the claimant intended to return to work, she could have found one minute or two minutes to call the employer even from the hospital. The claimant did not do so. The claimant returned from Georgia on March 9, 2006 and received the letter which the employer had sent at Employer's Exhibit One. The employer sent this certified mail, return receipt requested. The

letter is clear that if the employer does not hear from the claimant within three days of receiving the letter the employer will have no choice but to terminate the claimant. The claimant received the letter as shown by the return receipt although the return receipt does not indicate a date of receipt. In any event, the claimant never contacted the employer. Even the claimant concedes that she did not do so. Again later in her testimony the claimant said she did not do so because she intended to quit. Even if the claimant's trip to Georgia was with good cause and her failure to call the employer was justified, the claimant still could have protected her job by simply calling the employer immediately after receiving the letter at Employer's Exhibit One and informing the employer of the situation. The claimant chose not to do that. For all these reasons, the administrative law judge concludes that the claimant left her employment voluntarily on March 10, 2006. 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. When invited to give reasons for her quit the claimant testified that she had no reasons. Leaving work voluntarily when one is absent for three days without giving notice to the employer in violation of employer's rules is not good cause attributable to the employer. The administrative law judge must conclude here that the claimant simply wanted to quit apparently because she was dissatisfied with her work environment but again this 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. There is also no evidence that the claimant quit because of any employment-related illness or injury or, for that matter, any illness or injury not related to her employment. The claimant was on a leave of absence for an injury to her knee unrelated to her employment. There is no evidence that she quit because of this injury but even if she had, there is clearly no evidence that the claimant has returned to her employer and offered to go back to work and no suitable comparable work was available. See 871 IAC 24.26(6)(a) and (b). Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily effective March 10, 2006 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. Before the leave of absence the claimant had two absences for which she gave no reason to the employer even though they were properly reported. After the leave of absence the claimant was absent to go to Georgia to see her mother in the hospital. Although these absences may have been for reasonable cause, they were not properly reported. After the claimant returned to Iowa from Georgia she continued to be absent and those absences were not for reasonable cause and were not properly reported. The administrative law judge would conclude that all of these absences discussed herein establish excessive unexcused absenteeism and disqualifying misconduct. See 871 IAC 24.32(7). Accordingly, the administrative law judge would conclude, if the claimant's separation was a discharge, that the claimant was discharged for excessive unexcused absenteeism which is disqualifying misconduct and she would still be disqualified to receive unemployment insurance 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 \$1,197.00 since separating from the employer herein on or about March 10, 2006 and filing for such benefits effective March 5, 2006. 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 March 24 2006, reference 01, is reversed. The claimant, Kristy M. Brittain, 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 \$1,197.00.

cs/tjc