

**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**

**ANTHONY J BEHNCKE  
2560 – 170<sup>TH</sup> ST  
RIVERSIDE IA 52327**

**EBERT SUPPLY COMPANY INC  
PO BOX 762  
BURLINGTON IA 52601**

**Appeal Number: 05A-UI-00557-RT  
OC: 11-14-04 R: 03  
Claimant: Appellant (1)**

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

**Section 96.5-1 – Voluntary Quitting**

**STATEMENT OF THE CASE:**

The claimant, Anthony J. Behncke, filed a timely appeal from an unemployment insurance decision dated January 4, 2005, reference 03, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on January 31, 2005, with the claimant participating. Mark Scott, Manager, participated in the hearing for the employer, Ebert Supply Company, Inc. 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 was employed by the employer as a full-time sales representative from August 2, 2004 until he separated from his employment on November 1, 2004, which was his last day of work. On that day the claimant came to a required sales meeting at 8:30 a.m. and picked up his check thereafter and talked to the manager, Mark Scott, the employer's witness. They discussed among other things, a wage garnishment which the employer had received on the claimant and a realignment of the claimant's sales routes. When the claimant was first hired, his sales route was initially the northern route with a few stops in the southern route or on the border between the northern and the southern route. Another employee left and the claimant was also given the southern route but the employer replaced the employee who left with another employee and Mr. Scott informed the claimant that this other employee that had been hired would be taking back the southern route. They also discussed the claimant's lack of sales and orders. The claimant was not told that he was going to be discharged at that time. However, Mr. Scott did indicate to the claimant that he should go home and think about his job. The employer had spent considerable effort in training the claimant and working with him and Mr. Scott did not want to discharge the claimant because the employer had too much invested in the claimant. The claimant was to be left on a draw as he had been rather than working just on a straight commission. Mr. Scott wanted the claimant to grow the northern area. In any event, the claimant went home and never returned to work.

On Tuesday, November 2, 2004, the sales manager, Rich, attempted to call the claimant. Rather, he reached the claimant's voice mail and left a message. The next day, Wednesday, November 3, 2004, Mr. Scott tried to call the claimant three times; Mr. Scott's secretary tried to call the claimant three times; and the sales manager, Rich, tried to call the claimant two times. All failed to reach the claimant but reached his voice mail and all left voice mail messages. On Thursday, November 4, 2004, the employer received the first complaint about a missing order from the claimant. Mr. Scott again tried to call the claimant at least three times and failed to reach him. He left messages each time on the claimant's voice mail. Although all of these messages were received by the claimant's voice mail, the claimant did not hear the messages until Thursday, November 4, 2004. The claimant did not have the phone with him personally and although he did have it at home and went home each day, he just did not check his voice mail until November 4, 2004. When the claimant heard all those messages, he did not respond to any of them and did not call the employer. On Friday, November 5, 2004, the employer received a second complaint about a missing order from the claimant and Mr. Scott tried to call the claimant four times and again was unable to reach the claimant but left four messages. The claimant did not return any of these messages.

Finally, on Monday, November 8, 2004, the claimant failed to show for the 8:30 a.m. required sales meeting. At approximately 1:00 p.m. the claimant called Mr. Scott and apologized for not returning the calls indicating he had personal problems and telling Mr. Scott that he would return the employer's property. The claimant then came into the employer's location at approximately 3:00 p.m. and turned in his sales samples and the employer's property and stated to Mr. Scott that he was having personal problems but had a job lined up. Mr. Scott did not ask for the sales samples or the store property but accepted it. The claimant did not tell Mr. Scott that he was quitting or resigning. Mr. Scott did not tell the claimant that he was fired or discharged. The employer has had no contact with the claimant since. The claimant never expressed any concerns to Mr. Scott about his working conditions nor did he do so to anyone else that Mr. Scott heard about. The claimant also never indicated or announced an intention to quit to Mr. Scott if any of his problems at work were not addressed by the employer, nor did he do so to anyone else that Mr. Scott heard about. Work remained available for the claimant if he had

returned his calls and worked as appropriate. The employer had been working with the claimant for months regarding time management and attempting to get the claimant to make all of his calls and had invested some time and energy into the claimant's performance. The claimant is not required to come in to the employer's location except on Mondays at 8:30 a.m. for a weekly sales meeting.

#### REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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 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.

871 IAC 24.25(20), (21), (27) provides:

(20) The claimant left for compelling personal reasons; however, the period of absence exceeded ten working days.

(21) The claimant left because of dissatisfaction with the work environment.

(27) The claimant left rather than perform the assigned work as instructed.

871 IAC 24.25(28) 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:

(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. The claimant maintains that he was discharged or forced to resign when given an option of quitting or being discharged. If the claimant had been forced to resign or be discharged, the claimant's separation would not be considered a voluntary leaving. See 871 IAC 24.26(21). However, the administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant voluntarily left his employment without being forced to leave his employment or being given a choice to resign or be discharged. Mr. Scott testified credibly that he never told the claimant that he was discharged or fired and further testified credibly that the employer had invested too much time and energy in training the claimant and trying to assist the claimant in time management and making calls to discharge the claimant. Mr. Scott did concede that he had talked to the claimant about returning the claimant's southern route to another employee but the claimant had initially only been given the northern route and he picked up the southern route only when a prior employee had resigned. The claimant testified that he was forced to resign or be discharged on November 1, 2004. The claimant's testimony is less credible than that of Mr. Scott's; there is too much inconsistency in the claimant's testimony to make it credible. The claimant testified that Mr. Scott told the claimant to go home and think about his job but gave no set time for the claimant to return. This is not credible. The claimant used this as an excuse to be absent for five days without notifying the employer. The claimant testified that he did not feel he had a job. However, if he felt that he was discharged on November 4, 2004, why would he have been sent home to think about his job. Further, the evidence establishes that the employer left numerous telephone messages with the claimant all week from November 2, 2004 through November 5, 2004, all of which the claimant received but none of which the claimant returned. The claimant testified that he did not actually hear his messages until November 4, 2004 simply because he did not check his phone messages. This does not seem credible. Further, when the claimant did hear the messages, whenever it was, the claimant should have known that he was not being fired or discharged and should have called the employer back but he did not do so. Finally, the claimant called the employer on November 8, 2004. If the claimant felt he had been discharged on November 1, 2004, why bother to call the employer on November 8, 2004. The claimant even apologized for failing to return the phone calls. The claimant then came to the employer's location and gave the employer his sales samples and the employer's property. This certainly indicates a quit. Mr. Scott credibly testified that he did not ask the claimant for this property but did accept it when the claimant gave it to him. Even the claimant seems to finally concede to some extent that Mr. Scott never did specifically tell him he was discharged or fired or would be discharged or fired. On the evidence here, the administrative law judge concludes that the claimant left his employment voluntarily on November 1, 2004 when he failed to return to work or do any work for the employer and did not notify the employer despite telephone messages from the employer everyday that the claimant was gone. 871 IAC 24.25(4) indicates that a claimant who is absent for three days without giving notice to the employer is a voluntarily quit and not for good cause attributable to the employer. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily on November 1, 2004. The issue then becomes whether the claimant left his employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that he has left his 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 his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. There is evidence that the claimant left his employment because his sales were down. There is no evidence that the claimant was actually discharged for this. Rather, at most, the evidence indicates that the claimant was reprimanded for his sales being down and not making his calls but leaving work voluntarily because of a reprimand is not good cause attributable to the employer. There is some evidence that the claimant was having personal problems but leaving work voluntarily for compelling personal reasons when the period of absence exceeds ten working days is not good cause attributable to the employer and the claimant here never returned to the employer or offered to go back to work. There is some evidence that the claimant's southern route was being given to another employee but the evidence also establishes that initially the claimant only had the northern route. The claimant's pay was not being changed; he was still on a draw. There is not a preponderance of the evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental or that he was subjected to a substantial change in his contract of hire. It does appear that the claimant was dissatisfied with his working conditions and chose not to perform the assigned work as instructed but these reasons also are not good cause attributable to the employer. Finally, there is no evidence that the claimant ever expressed any concerns to the employer or indicated or announced an intention to quit if any of his concerns were not addressed so as to give the employer a reasonable opportunity to address any of the claimant's concerns.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant left his employment voluntarily without good cause attributable to the employer and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

#### DECISION:

The representative's decision of January 4, 2005, reference 03, is affirmed. The claimant, Anthony J. Behncke, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he left his employment voluntarily without good cause attributable to the employer.

pjs/b