

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

BENJAMIN C KUNZ

Claimant

APPEAL NO. 12A-UI-02689-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 01/29/12

Claimant: Appellant (2)

Iowa Code Section 96.5(1)(d) – Voluntary Quit

STATEMENT OF THE CASE:

Benjamin Kunz filed a timely appeal from the March 8, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 3, 2012. Mr. Kunz participated personally and was represented by Attorney Benjamin Humphrey. Mr. Humphrey presented testimony through Benjamin Kunz and Gwenn Kunz. The employer did not respond to the hearing notice instruction to provide a telephone number for the hearing and did not participate. Exhibits A through D were received into evidence.

ISSUE:

Whether Mr. Kunz's quit was for good cause attributable to Wal-Mart.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Benjamin Kunz was employed by Wal-Mart from 2007 until January 30, 2012, when he voluntarily quit for health issues. During the final years of the employment, Mr. Kunz was a full-time employee. Mr. Kunz worked as a cart pusher and stocker. Ninety percent of his work week involved the cart pushing. The cart pushing involved retrieving empty carts from the parking lot and returning them to the store. When the motorized "mule" was operable, Mr. Kunz used the mule to increase the number of carts he could retrieve in a single trip. The mule was sometimes not available for a month. Mr. Kunz's stock duties involved assisting customers with moving heavy or bulky items from the store to their vehicles.

Mr. Kunz had health issues that factored in the employment and in Mr. Kunz's decision to leave the employment. During the last months of the employment, Mr. Kunz began to experience back problems and respiratory illness related to his cart pushing duties. Mr. Kunz sought medical evaluation and treatment for his back and respiratory issues. Mr. Kunz's medical doctor recommended that Mr. Kunz move to duties that would not require constant pushing and pulling and that would not require frequent trips between extreme hot and cold. In other words, Mr. Kunz's medical doctor recommended that Mr. Kunz no longer perform the cart pushing duties. Mr. Kunz and his mother provided the employer with medical documentation to support Mr. Kunz's health-based need for a change of duties. Mr. Kunz repeatedly requested that the

employer assigned different duties. The employer made some statements early on indicating that the employer was going to move Mr. Kunz to inside stocking duties, but the employer never followed through. The employer continued to mention various reasons for delaying action on Mr. Kunz's request for a change in duties. Mr. Kunz notified the employer that if his need for different work was not accommodated, he would have to quit the employment. The employer approved multiple periods of FMLA leave based on Mr. Kunz's back and respiratory issues. The employer then disqualified Mr. Kunz for transfer to other duties because of his use of the health-related leave. Mr. Kunz was on FMLA leave from January 6 until January 30, 2012, at which time he submitted his letter of resignation.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-1-d 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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Workforce Development rule 817 IAC 24.26(6) provides as follows:

Separation because of illness, injury, or pregnancy.

a. Nonemployment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.

b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with the employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is

reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

The employer failed to participate in the hearing and thereby failed to present any evidence to rebut the evidence presented by Mr. Kunz. The weight of the evidence in the record establishes that Mr. Kunz had two medical conditions caused and/or aggravated by his cart pushing work duties. The evidence indicates that Mr. Kunz requested that the employer reasonably accommodate his medical conditions by moving him to a different position within the store. Mr. Kunz told the employer he would leave the employment if the employer did not accommodate his medical conditions. Mr. Kunz provided medical documentation to the employer in support of his need for accommodations that would allow him to continue in the employment. The employer declined to provide reasonable accommodations even after being given sufficient time to provide such accommodations. The employer had the ability to provide reasonable accommodations, but elected not to.

The weight of the evidence establishes a quit for good cause attributable to the employer. Accordingly, Mr. Kunz is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Kunz.

DECISION:

The Agency representatives March 8, 2012, reference 01, decision is reversed. The claimant quit the employment for good cause attributable to the employer. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css