

**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**

**DIANE J BERGER  
15797 CONCORD AVE  
ARCADIA IA 51430**

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

**ARTHUR NEU  
ATTORNEY AT LAW  
PO BOX 367  
CARROLL IA 51401**

**HEIDI GUTTAU-FOX  
ATTORNEY AT LAW  
BAIRD HOLM LAW FIRM  
1500 WOODMAN TOWER  
OMAHA NE 68102**

**Appeal Number: 05A-UI-00236-H2T  
OC: 12-05-04 R: 01  
Claimant: Appellant (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 96.5-2-a – Discharge/Misconduct  
Section 96.4-3 – Able and Available

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the December 29, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 7, 2005. The claimant did participate and was represented by Arthur Neu, Attorney at Law. The employer did participate through Bradley Rickett, Store Manager and Linda Knueven, Personnel Manager and was represented by Heidi Guttiau-Fox, Attorney at Law. Claimant's Exhibit's A through G were received. Employer's Exhibit One was received.

#### FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as an inventory control specialist full time beginning April 17, 1992 through November 22, 2004 when she was discharged after the employer was not able to accommodate her restrictions due to injury exacerbated by her work. As an inventory control specialist the claimant was required to use both arms to reach, often times above her head in a repetitive manner. The claimant has undergone five rotator cuff surgeries to both of her arms. She had been diagnosed as suffering from bilateral failed rotator cuff repair. As a result of those injuries and the surgery necessitated by them, the claimant has permanent work restrictions that prohibit her from lifting over 10 pounds with either arm, from lifting either arm over her head or from engaging in cashiering work. When the claimant offered to return to work, no work within her work restrictions was available for her. The company's determination that the claimant's injuries and subsequent need for surgery is not dispositive of the issue of whether her injury was work related or not. The claimant's uncontroverted testimony was that she was lifting shirts off of a rack at work when she felt the fourth tear happen.

#### REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Where disability is caused or aggravated by the employment, a resultant separation is with good cause attributable to the employer. Shontz v. IESC, 248 N.W.2d 88 (Iowa 1976). Where illness or disease directly connected to the employment make it impossible for an individual to continue in employment because of serious danger to health, termination of employment for that reason is involuntary and for good cause attributable to the employer even if the employer is free from all negligence or wrongdoing. Raffety v. IESC, 76 N.W.2d 787 (Iowa 1956).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The claimant offers the more credible evidence. She had ongoing injuries to her arms while performing her normal job duties. Notwithstanding the fact that the claimant has not filed a claim for workers' compensation benefits, the administrative law judge concludes her injuries were at minimum exacerbated by the work she performed. When the claimant presented her work restrictions, her employer refused to accommodate them. The claimant's discharge was for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Inasmuch as the injury was work-related and the treating physician has released the claimant to return to work, the claimant has established ability to work. The claimant has work restrictions, but she and the employer agree that the greeter position complies with all of her work restrictions. Because the employer had no work available or was not willing to accommodate the work restrictions, benefits are allowed.

DECISION:

The December 29, 2004, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The claimant is able to work and available for work effective September 2, 2004.

tkh/pjs