

**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**

**ANGELA S TERRY
215 N 19TH APT #3
CLARINDA IA 51632**

**DUCKWALL-ALCO STORES INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 05A-UI-04537-RT
OC: 04/03/05 R: 01
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, 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 96.4-3 - Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Angela S Terry, filed a timely appeal from an unemployment insurance decision dated April 25, 2005, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on May 19, 2005, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. Rhonda Donahue, Group Operations Manager, participated in the hearing for the employer, Duckwall-ALCO Stores, Inc. The employer was represented by Cris Scheibe of TALX UC eXpress.

FINDINGS OF FACT:

Having heard the testimony of the witness 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 point of sale person, or POS, from August 2004 until she voluntarily quit March 17, 2005. On September 17, 2004, the claimant was transferred from a store in Iowa to the employer's store in Vandalia, Missouri where she was employed until her separation. The claimant requested, and was granted, time off for March 5, 6, 7, 8, 2005 to visit a sick relative in Iowa. The claimant was to return on March 9, 2005. The claimant called the employer on March 7, 2005 and explained to the employer that her car broke down and she would not be at work on March 9, 2005. The employer did not hear from the claimant again until March 13, 2005 when she again called the employer and indicated that her car was still broke down and she still could not come back to work. The employer consented to allow the claimant to be off work until March 17, 2005, but informed the claimant that she needed to report to work on March 18, 2005, because the employer could not keep her job open any longer and that the claimant was needed at work. The employer had no further contact with the claimant until three or four weeks later when the claimant requested her last paycheck. The claimant did have an attendance problem prior to the absences, as noted above, and had received three verbal warnings for her attendance. The employer had never promised the claimant that they would furnish any transportation to the claimant.

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 ineligible to receive unemployment insurance benefits because at relevant times she was not able, available, and earnestly and actively seeking work. She is ineligible to receive unemployment insurance benefits for these reasons.

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(1) 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:

- (1) The claimant's lack of transportation to the work site unless the employer had agreed to furnish transportation.

The administrative law judge concludes that the claimant voluntarily quit effective March 17, 2005 when she failed to return to work on March 18, 2005 as required and as instructed by the employer. The claimant had been off work since March 9, 2005 because her car broke down. The claimant had been on an approved leave from March 6 to March 8, 2005 to visit a sick relative in Iowa, but she was to return to work on March 9, 2005. The claimant could not do so because her car broke down. The claimant informed the employer of this on March 7, 2005. The claimant then called the employer again on March 13, 2005 and again informed the employer that her car was still broke down and she could not be at work. The employer consented to give the claimant a few more days and informed the claimant that she needed to return to work March 18, 2005. The claimant did not and the employer had no further contact with the claimant until she merely contacted the employer to inquire about her last check. Under the evidence here, the administrative law judge is constrained to conclude that the claimant voluntarily left her employment effective March 17, 2005 when she failed to report to work on March 18, 2005, as instructed. The claimant had been off work since March 9, 2005, because her car had broken down.

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 only reason in the evidence for the claimant's leaving her employment was a lack of transportation to the work site when her car broke down while visiting relatives in Iowa. This is not good cause attributable to the employer unless the employer had agreed to furnish transportation, and the employer had not. 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. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily on March 17, 2005, 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 numerous absences beginning March 9, 2005, because she had no transportation to get back to work. Previously, the claimant had an attendance problem and had received three verbal warnings about her attendance. Accordingly, the administrative law judge would conclude that the claimant's absences were excessive unexcused absenteeism and disqualifying misconduct. See 871 IAC 24.32(7). Therefore, even if the claimant's separation should be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism, and the claimant would still be disqualified to receive unemployment insurance benefits.

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".

The administrative law judge concludes the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence she is and was, at relevant times, able, available, earnestly and actively seeking work or that she was excused from such provisions. The claimant did not participate in the hearing and provide evidence that she is able, available, and earnestly and actively seeking work. There is certainly evidence in the file that the claimant may not be available for work because her car broke down. There is also no evidence that the claimant is either temporarily unemployed or partially unemployed under Iowa Code section 96.19(38)(b) and (c), so as to excuse her from the provisions that require her to be able, available, and earnestly and actively seeking work. Accordingly, the administrative law judge is constrained to conclude the claimant is not able, available, and earnestly and actively seeking work and, as a consequence, she is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, she requalifies for such benefits and demonstrates that she is able, available, earnestly and actively seeking work.

DECISION:

Representative's decision of April 25, 2005, reference 01, is affirmed. The claimant, Angela S. Terry, 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. The claimant is also ineligible to receive unemployment insurance benefits because she is not able, available, and earnestly and actively seeking work.

kjw/pjs