

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AARON M ROSBURY

Claimant

APPEAL NO: 14A-UI-05988-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 05/11/14

Claimant: Appellant (4)

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Aaron M. Rosbury (claimant) appealed a representative's May 29, 2014 decision (reference 02) that concluded he was not eligible to receive unemployment insurance benefits because he was not able and available for work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 3, 2014. This appeal was consolidated for hearing with one related appeal, 14A-UI-04987-DT. The claimant participated in the hearing. Julie Liechty appeared on behalf of Wal-Mart Stores, Inc. (employer). One other witness, Shannon Messer, was available on behalf of the employer but did not testify. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The claimant started working for the employer on July 8, 2013. He worked full time as an order filler on a weekend shift in the employer's Mount Pleasant, Iowa distribution center. His last day of work was February 7, 2014. The employer decided to discharge him on May 16, 2014. The reason asserted for the discharge was excessive absenteeism.

On February 2, 2014 the claimant had been given in essence a final warning for his attendance. Prior to that warning he had seven absence occurrences. All but two of those were due to properly reported illness; the remaining two were for personal business. The warning indicated that if there was another absence within the six-month period, he would be discharged.

Upon his medical care provider's advice, the claimant sought and was granted a medical leave of absence to begin February 8, 2014. The claimant's care provider recommended that the leave continue through May 30, 2014. The employer had approved the claimant's leave request; the claimant believed it was approved through May 30. However, unbeknownst to the claimant until about April 25, the employer's third party leave administrator had only approved

the leave through May 1, so the employer expected him to return to work on May 2. While the claimant's initial medical issue had improved, he had not yet been released by his original medical care provider as able to return to work prior to May 30, and additionally, the claimant was now under the care of another medical care provider, which had resulted in him having a cast on his foot which was not due to be removed until May 28.

On May 2 the claimant called the employer and spoke to a human resources clerk. He advised the clerk that he had the cast on his foot and questioned whether he would even be allowed to work with the cast on his foot. On May 5 he again called the human resources clerk; he was told that he would not be allowed to return to work with a cast on his foot, but that if could not come back to work at that time, "you're done." Since he still had the cast on his foot, he could not return to work. The employer then considered him absent on May 9, May 10, and May 11. On May 16 it sent him a discharge exit interview document advising him that his employment was ended due to his absences.

REASONING AND CONCLUSIONS OF LAW:

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. To be found able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). A person who is under a medical practitioner's care and has not yet been released for work is not able and available for work. Rules 871 IAC 24.22(1)a; 871 IAC 24.23(1),(6),(34),(35).

The claimant was not able and available for work due to his medical issues through the benefit week ending May 31, 2014. Effective June 1, 2014 the claimant has demonstrated that he is able to work in some gainful employment. Benefits are allowed as of that date, if the claimant is otherwise eligible.

DECISION:

The representative's May 29, 2014 decision (reference 02) is modified in favor of the claimant. The claimant was not able and available for work through May 31, 2014. The claimant is able to work and available for work effective June 1, 2014. The claimant is qualified to receive unemployment insurance benefits as of that date, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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