

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KERIM KREHO

Claimant

APPEAL NO. 11A-UI-05361-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 03-20-11

Claimant: Appellant (4)

Iowa Code § 96.5(2)a – Discharge/Misconduct

Iowa Code § 96.5(1) – Voluntary Leaving

Iowa Code § 96.4(3) – Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 19, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 19, 2011. The claimant did participate. The employer did participate through Heather Snyder, personnel coordinator, and Jim Brungardt, store manager, and was represented by Tom Kuiper of TALX UC eXpress. Claimant's Exhibit A was entered and received into the record. Employer's exhibit one was entered and received into the record.

ISSUES:

Did the claimant voluntarily quit his employment without good cause attributable to the employer or was he discharged due to job-connected misconduct?

Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as an inventory associate, full-time, beginning April 17, 2009, through March 16, 2011, when he was discharged. The claimant asked for and received four medical leaves of absences to deal with a foot problem that began in November 2010. At the time of the hearing, the claimant testified that he was still having problems with his foot and was currently unable to work. He is not able to and available for work; because, according to his own testimony, he physically cannot work. Employer's Exhibit One makes clear that the claimant had properly applied for and received four leaves of absence in the past. The claimant's last leave of absence was to expire on March 14, at which time he was expected to return to work. The claimant was sent a letter on March 4 informing him that he was expected to return to work on March 15. The claimant received the letter on March 5. On March 14 the employer called the claimant to find out if he was coming back to work, since they had not heard from him and he had not made an additional application to extend his leave of absence. The claimant told the employer he could not return to work. He was told that he either had to return to work on

March 15 or come in to fill out paperwork to request an additional leave of absence. On March 14 the claimant went into the store, where he sat with an employee who stayed late to help him fill out an additional request for more time off. The paperwork was faxed to the claimant's doctor's office and the claimant was given an additional seven days to provide the employer with documentation extending his leave of absence. The completed paperwork was never submitted back to the employer by either the claimant or his doctor. On March 22 the employer considered the claimant to have voluntarily quit when he did not return to work or return the proper paperwork for his leave of absence.

The claimant believed that his treating physician, Dr. Mahoney, had faxed to the employer the proper paperwork providing that the claimant should be off work at least until April 15. The claimant's copy of the leave paperwork shows that Dr. Mahoney filled it out on March 14 and it appears it was faxed back to the employer. The employer contends they never received the proper paperwork from Dr. Mahoney and thus considered the claimant to have voluntarily quit when he did not return to work by March 22.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 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.

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 issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial."

The claimant had no way to control whether his physician returned the paperwork to the employer. His copy of the doctor's release indicates that he was to be off work until April 15. Since it appears as though his physician did take him off work through April 15 and the claimant had no reason to suppose that his employer would not have received the documentation from his physician, the administrative law judge concludes that he was discharged for no disqualifying reason.

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective March 22, 2011.

Iowa Code § 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(2) 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.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The claimant's own testimony was that, due to his foot injury, he is not currently physically able to work. Since the claimant's foot condition renders him unable to work, he is not considered able to and available for work. Accordingly, benefits are denied effective March 22, 2011.

DECISION:

The April 19, 2011 (reference 01) decision is modified in favor of the claimant. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The claimant is not able to work and available for work effective March 22, 2011, thus benefits are denied at this time.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw