BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

MARILYN HAMILTON	:	
	:	**HEARING NUMBER:** 11B-UI-03275
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
WAL-MART STORES INC	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES AND REMANDS** as set forth below.

FINDINGS OF FACT:

Marilyn Hamilton (Claimant) was employed as a part-time cashier for Wal-Mart (Employer) from July 11, 2007 until she was separated on February 14, 2011. (Tran at p. 2). She went on a medical leave of absence November 21, 2010, and her leave was exhausted February 1, 2011. (Tran at p. 3; p. 5). As of February 1 the Claimant was still eligible for FMLA leave. (Tran at p. 3). As of February 1 the Claimant was not yet able to return to her previous position, or to an equivalent position. (Tran at p. 5). She provided the Employer with notes stating that she could work only if accommodated. (Tran at p. 7). The Employer did not offer or discuss the Claimant's remaining FMLA leave but instead took her to have quit. (Tran at p. 2-3). The Employer has failed to prove that the Claimant quit. (Tran at p. 4, ll. 30-31). Around February 28, 2011 the Claimant returned and offered her services to the Employer but she was told she would have to take a $2 an hour pay cut because she would be treated like a new hire. (Tran at p. 8; p. 9-10).

REASONING AND CONCLUSIONS OF LAW:

Quitting: Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits: Voluntary Quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Generally a quit is defined to be "a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." 871 IAC 24.1(113)(b). Furthermore, Iowa Administrative Code 871—24.25 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.

Since the Employer had the burden of proving disqualification the Employer had the burden of proving that a quit rather than a discharge has taken place. On the issue of whether a quit is for good cause attributable to the employer the Claimant had the burden of proof by statute. Iowa Code §96.6(2). "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." *FDL Foods, Inc. v. Employment Appeal Board,* 460 N.W.2d 885, 887 (Iowa App. 1990), *accord Peck v. Employment Appeal Board,* 492 N.W.2d 438 (Iowa App. 1992).

The FMLA & Its Regulations: The Claimant sought and received approval of her time from work under the Family and Medical Leave Act ("FMLA"). See e.g. 29 C.F.R. §825.112(a)(4)(leave available "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the employee's job."). We therefore examine the requirements of the FMLA.

Under the FMLA an employee triggers a process of communication about the leave by making clear the need for leave, although no specific request for leave need be made. 29 C.F.R. §825.302(c). The FMLA has a rather detailed procedure for the employer notifying an employee that FMLA leave is approved and to designate the leave as FMLA leave. 29 CFR §825.301 (notice); §825.208 (designation process). The notification of approval, or not, of leave is usually accomplished through Labor form WH-381 ("Employer Response to Employee Request for Family or Medical Leave"). This same notice from the employer may require that the employee supply medical certification. 29 CFR §825.301(b)(1)(ii). In fact, the "employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by §825.301." 29 CFR §825.305(a). Under §301 this notice "shall be given within a reasonable time after the notice of the need for leave is given by the employee – within one or two business days." 29 CFR §825.301(c). This means if the employer is to ask for medical certification this must be done soon after the request for leave, specifically, at the time that form WH-381 is provided to the employee. "An employer's oral request to an employee to furnish any subsequent medical certification is sufficient." 29 CFR §825.305(a). If the leave is not foreseeable then "the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least

15 calendar days after the employer's request)." 29 CFR §825.305(b).

If a certification is received the employer may seek clarification, additional opinions, or both. During the process of clarification (or authentication) of a medical certification the employer may not seek information directly from the health care provider. Under the regulations "[i]f an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider." 29 CFR §825.307(a) Instead, "a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification." Id.

Once certification is received, whether or not the employer seeks clarification of the certification, if the "employer has reason to doubt the validity of a medical certification [the employer] may require the employee to obtain a second opinion at the employer's expense." 29 CFR 825.307(a)(2). "Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act." *Id.* The employer, within guidelines, can designate the medical provider for the second opinion. If the second opinion differs with the first the employer can ask for a third opinion at the employer's expense. This third opinion comes from an agreed provider and is binding on the parties. If the ultimate opinion does not establish entitlement to leave "the leave shall not be designed as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies." *Id.* Of course, if the second opinion agrees with the certification then the leave should be treated as FMLA leave and there is no opportunity for a third opinion.

The certification, of course, is only an estimate of the anticipated duration of leave. The regulations anticipate that "[i]t may be necessary for an employee to take more leave than originally anticipated." 29 CFR 825.309(c). In such cases the Claimant should give notice of the need, where foreseeable, and the Employer is allowed to request status reports. 29 CFR 825.309(c).

When leave ends then under the FMLA "an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment." 29 CFR § 825.214(a). This is so "even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence." 29 CFR § 825.214(a). Ordinarily this obligation means that the employee must be restored to a job which is "virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially the similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. § 825.215(a). It must have "substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position." 29 CFR § 825.215(e).

Application of Standards: The facts show that the Claimant applied for and was approved for leave under the Family and Medical Leave Act. At the end of the leave as certified by the physician, the Claimant was not restored to her previous position. We do not fault the Employer for this, however. The Claimant in fact was not able to do her old job as of February 1, and wasn't really ready to return to that job or to an equivalent job. The fact that the Employer did not put the Claimant back to work was thus not a FMLA violation, it was just a result of the fact that the Claimant still needed leave "[b]ecause of a serious health condition that [made] the [Claimant] unable to perform the functions of the [Claimant]'s job." 29 C.F.R. §825.112(a)(4). Indeed, the Employer acknowledged that as of February 1, the Claimant was still eligible for leave merely by getting another certification. (Tran at p. 3). The Claimant did not ask for more FMLA leave only because she was unaware she could. (Tran at p. 6, ll.

32-34).

The law is clear that the Claimant was not required to specifically ask for FMLA leave. Under the applicable regulations no "magic words" need be spoken to apply for leave and an "employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken." 29 C.F.R. §825.302(c). Under those regulations, moreover, even where an employee has requested a specific period of leave "[i]t may be necessary for an employee to take more leave than originally anticipated." 29 CFR 825.309(c). In such a situation, "the employer may require that the employee provide the employer reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable." 29 CFR 825.309(c). Here the Claimant gave more than adequate reasonable notice for her need for extended leave. Had the Claimant been placed on her additional leave she could not be disqualified for taking federally protected leave. We cannot find it to be disqualifying to separate after the end of leave when the employee had a federal right to additional leave and the only reason this leave was not requested was a communication problem which the *employer* had the obligation to clear up.

The Employer failed to prove that the Claimant quit under these circumstances. As noted above, quitting requires an intent to quit and an overt act of quitting. The Employer has failed to establish either. The Claimant intended to be on leave a little while longer. Had she known she had more FMLA coming she would have requested it. She didn't want to quit, and indeed did come back once fully released. All she did was inform the Employer that she needed more leave, and could not work her old job. This is not an overt act of quitting. The Claimant is therefore not disqualified for quitting.

Even if we called this a quit the Claimant would not be disqualified. The best case scenario for the Employer is that the Claimant returned with restrictions that prevented her from doing her job and that this is some sort of quit. Let us now assume this is true. This would mean that the Claimant "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…" Iowa Code §96.5(1)(d). If this is a quit then the Claimant requalified on February 28 when she "returned to the employer and offered to perform services…" Iowa Code §96.5(1)(d). True, the Claimant did offer an alternate job. But this job paid $2 an hour less. It was not "comparable suitable work" as discussed in the statute. Thus even if we concluded that the Claimant quit still the Claimant would requalify as of February 28. We grant benefits from the date of application for benefits because we found the Claimant did not quit, but even if we were to find she quit then we would still grant benefits from the 28th.

We note that the Claimant appears to have applied for benefits in the week of February 6, 2011. This was before she was fully released. We caution that, of course, we rule only today that the Claimant is not disqualified. She must be otherwise eligible to receive benefits and this means that the Claimant ordinarily would not receive benefits for weeks during which the Claimant would not have been available for work. We remand this issue of available to the Claims Section of Iowa Workforce to address if not previously addressed.

DECISION:

The administrative law judge's decision dated May 5, 2011 is **REVERSED and REMANDED**. The Employment Appeal Board concludes that the claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

The Employment Appeal Board remands this matter to the Iowa Workforce Development Center, Claims Bureau, for a determination of the issue of whether or not the Claimant is able and available for work for any week in which she claimed for benefits, if such issue has not been otherwise addressed.

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John A. Peno

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Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

RRA/fnv