IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHEYANNE M BROWN
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 11A-EUCU-00618-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/12/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving
Section 96.4-3 – Able to and Available for Work

STATEMENT OF THE CASE:

Cheyanne M. Brown (claimant) appealed a representative's July 19, 2011 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits in conjunction with his employment with Wal-Mart Stores, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 23, 2011. This appeal was consolidated for hearing with one related appeal, 11A-EUCU-00620-DT[1]. The claimant participated in the hearing. Sue Nuss appeared on the employer's behalf. 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.

ISSUES:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

Is the claimant able to and available for work?

FINDINGS OF FACT:

The claimant started working for the employer on June 14, 2005. She worked full-time as a sales associate in the tire and lube department at the employer's West Burlington, Iowa store. Her last day of actually working was February 16, 2011.

The claimant had surgery on her back on November 26, 2010. She went on medical leave covered under FMLA (Family Medical Leave) at that time. Her doctor gave her a partial release with restrictions against bending or stooping on or about December 14, 2010. At that time, the doctor suggested to the claimant that her back problems might be due to the heavy lifting she

[1] The decision in this case will deal with the claimant's status as of February 21, 2011. The decision in 11A- EUCU-00620-DT will deal with the claimant's status prior to February 21, 2011.

did at work. When she told the employer's human resources representative, the representative told her it was too late to claim that the injury was work-related. She also told the claimant she could not to return to work until she could return 100 percent. As a result, she remained on the leave of absence until January 26, 2011.

The claimant again saw her doctor on or about January 26, 2011. He indicated she should remain on work restrictions through February 14, 2011, so the claimant's leave was extended until that time. The claimant returned to work on February 15 and February 16, 2011. However, she again began having significant back pain, and she returned to her doctor on February 17. The doctor then gave her a note completely excusing her from work through February 28, and then indicated she could return with a 20-pound lifting restriction to last for four weeks.

The claimant brought the note to the human resources representative on February 21, 2011. The representative told the claimant that since she could not then return to work without any restrictions, the claimant was "required" to "quit."

REASONING AND CONCLUSIONS OF LAW:

There are only three provisions in the law which disqualify claimants from unemployment insurance benefits (until they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount). An individual is subject to such a disqualification if the individual (1) is discharged for work-connected misconduct (Iowa Code § 96.5-2-a); (2) "has left work voluntarily without good cause attributable to the individual's employer." (Iowa Code § 96.5-1); or (3) refuses to accept an offer of suitable work without good cause (Iowa Code § 96.5-3). Here, there is no question of an actual offer of work or refusal of work, so the focus will be on whether there was a disqualifying separation from employment.

Separations are categorized into four separate categories under Iowa law. Rule 871 IAC 24.1(113) defines "separations" as:

> All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of labor-saving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
>
> b. Quits. A quit is 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.
>
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
>
> d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

As the representative's decision characterized the separation in this case as a voluntary quit, I will first determine whether Iowa Code § 96.5-1 regarding voluntary quits applies in this case. Rule 871 IAC 24.25 provides that, 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 claimant had been willing to continue working, but the employer was unable or unwilling to provide work within the claimant's restrictions. The administrative law judge notes that where the reason for the work restriction is due to a work-related injury, as appears at least possible in this case, the burden is on the employer to seek to provide such accommodating work.

Further, Iowa Code § 96.5-1-d provides an exception that an individual who otherwise could be subject to disqualification is not disqualified:

> If the individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury, or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available.

The Agency rule implementing this section explains that "[r]ecovery is defined as the ability of the claimant to perform all of the duties of the previous employment." 871 IAC 24.26(6)a.

The issue then is whether a person is subject to voluntary quit disqualification under Iowa Code § 96.5-1 under the following circumstances: The person is actively working but then suffers a medical condition that prevents her from performing her normal job duties, and the employer determines there is no work available for her with those restrictions. The claimant never stated that she in fact wished to quit the employment. The employer did not formally discharge the claimant from employment but has indicated that the claimant "involuntarily" quit.

The problem is that the case law points in several directions and has not addressed this issue head on. Additionally, the statute and rules are unclear as to this issue. For example, in Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989), the Iowa supreme court considered the case of a pregnant certified nursing assistant (CNA) who went to her employer with a physician's release that limited her to lifting no more than 25 pounds. Wills filed a claim for benefits because the employer would not let her return to work because of its policy of never providing light-duty work. The court ruled that Wills became unemployed involuntarily and was able to work, because the weight restriction did not preclude her from performing other jobs available in the labor market. Id. at 138. The court characterized the separation from employment as a termination by the employer, but in essence the employer informed the claimant that it did not have any jobs available meeting her restrictions and would not create a job to accommodate her restrictions. The court does not mention Iowa Code § 96.5-1-d at all. Perhaps significantly, the facts do not indicate that the claimant had stopped working at any point, and it was the employer who requested that she go to her doctor to get a release to continue working.

On the other hand, in White v. Employment Appeal Board, 487 N.W.2d 342, 345 (Iowa 1992), the Iowa supreme court considered the case of a truck driver who was off work due to a heart attack for about three months, returned to work for a month, and then was off work for seven months after a second heart attack. He then returned to his place of employment and informed

management that his doctor had instructed him that he was unable to drive because of his pacemaker device. The employer told the claimant that there was no available work for him with his restriction. The claimant then applied for unemployment insurance benefits. Id. at 343. The facts did not indicate whether the claimant stated that he was quitting employment or intended to permanently sever the employment relationship at any point. In White, the court reversed the district court's decision that the claimant quit work involuntarily due to a physical disability and stated that "unemployment due to illness raises policy considerations which call for a continuation of the rules laid out in cases antedating [the cases relied on by the district court] … Under these rules, if White's disability was not work-related, the agency properly imposed the disqualification. If, however, the cause of White's disability was work related, the disqualification was improper." Id. at 345. The court decided that there had been no finding as to whether the disability was or was not work-related and remanded the case. The court does not refer to or distinguish the Wills case. It does not explain how the first prong of the voluntary quit disqualification test set forth earlier in its decision—"it must be demonstrated that the individual left work voluntarily"—had been met.

To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship, and chooses to leave the employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989); Peck v. Employment Appeal Board, 492 N.W.2d 438, 440 (Iowa App. 1992). In my judgment, the facts of the Wills case more closely resemble this case. The claimant was actively employed until the restrictions from her work-related medical condition prevented her from performing her normal job duties. She did not intend to quit her employment. The employer informed the claimant that no other work was available and that she was "required" to "quit." Further, even under White, as in this case, it is clear that the condition causing the restrictions were work-related, the onus was on the employer to accommodate the restrictions to prevent the separation. The action initiating the separation was therefore taken by the employer, and the separation therefore could be considered for unemployment insurance purposes as a discharge, but not for disqualifying misconduct.[2]

Perhaps this type of separation would meet the definition of "other separations" found in 871 IAC 24.1(113)(d): "Termination of employment for military leave lasting or expecting to last longer than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required." The problem with this definition section is that it does not provide guidance

[2] In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer has not asserted the claimant committed conduct that could be characterized as misconduct under these criteria.

on whether such a separation is qualifying or disqualifying. Obviously, if a person terminates employment because she decides to retire, it is a voluntary quit and a disqualification would be imposed. On the other hand, if the employer mandates that an employee retire due to reaching a certain age, the termination is involuntary and initiated by the employer and is a discharge for reasons other than misconduct and no disqualification is imposed. Likewise, if a claimant decides that she no longer meets the physical standards required by the job and leaves employment, it should be treated a quit and benefits will only be awarded if the person meets the exceptions to the voluntary quit statute.

Further guidance is provided by 871 IAC 24.22(2) which provides:

> j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee—individual, and the individual is considered ineligible for benefits for the period.
>
> (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the individual, the individual is considered laid off and eligible for benefits.
>
> (2) If the employee—individual fails to return at the end of the leave of absence and subsequently become unemployed the individual is considered having voluntarily quit and is therefore ineligible for benefits.
>
> (3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

In this case, apparently there was a mutually agreed upon leave of absence, at least initially. Because the restrictions imposed by the claimant's doctor prevented the claimant from performing her normal job duties, the employer declined to allow the claimant to return to work by accommodating her restrictions. She was allowed to return when she was fully released on February 15. However, when a new period of leave and restriction was authorized by the claimant's doctor on February 17, the employer obviously determined it could not wait any longer for the claimant to fully recover, and determined there would be a separation on February 21. As such, even though the separation that occurred on February 21 is considered an "Other Separation," it is ultimately treated as a layoff, because it was initiated by the employer. There is no valid reason to disqualify the claimant from benefits for being laid off for a lack of work within her restrictions or for her additional absence due to the medical condition.

The claimant, therefore, is not subject to the voluntary quit statute, since she has not quit. She is not disqualified under the discharge statute, since her separation was not due to misconduct. The refusal of suitable work statute does not apply here.

The remaining question is whether the claimant is eligible to receive unemployment insurance benefits by being able and available for work. 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). There was a period from February 17 until February 28 where the claimant's

doctor again had her completely off work; she was not able and available for work for that period. As of February 28 the claimant's doctor had released her to return to work, with only the 20-pound lifting restriction, which would not preclude her from all employment. The claimant has demonstrated that, as of that date, she is able to work in some gainful employment, even if not the same work she did with the employer. As of the benefit week beginning February 27, 2011, benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's July 19, 2011 decision (reference 01) is reversed. The claimant did not voluntarily quit and was not discharged for misconduct. As of February 27, 2011, the claimant is able and available for work, and is eligible to receive unemployment insurance benefits, if she is otherwise qualified.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw