

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALISHA L ABBY
Claimant

APPEAL NO. 09A-UI-01852-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 01/11/09 R: 03
Claimant: Appellant (1)

Section 96.5-1 – Voluntary Quit
Section 96.5-1-d – Voluntary Quit for Medical Reasons
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Alisha Abby (claimant) appealed a representative's January 28, 2009 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she voluntarily quit work with Wal-Mart Stores (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 26, 2009. The claimant participated personally. The employer participated by Joyce Gitch, Market Human Resource Manager.

ISSUE:

The issue is whether the claimant voluntarily quit work without good cause attributable to the employer and whether she is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on November 10, 1999, as a full-time department manager of cosmetics. As a manager, the claimant understood she was to report her absences each day by calling an 800 number, receiving a confirmation number, staying on the line while being transferred, and speaking to a member of management.

The claimant injured her back and her mother had a brain tumor. The claimant shared the information about her mother with some people at work. The claimant stopped appearing for work after December 11, 2008. Her physician did not say she was restricted from working in any manner. The claimant spent time with her mother, who was in the hospital in Iowa City, Iowa.

The claimant called the 800 number every day save one. She never spoke to a member of management, because she had trouble with the telephone system. The claimant never contacted a member of management in any way. On December 26, 2008, the employer sent the claimant a certified letter. The claimant signed for receipt of the letter on December 27, 2008. The letter asked her to complete paperwork requesting Family Medical Leave or a Personal Leave of Absence. The claimant did not complete the documents.

On January 9, 2009, the claimant appeared at work and clocked in. The employer met with the claimant and asked her why she had been absent. The claimant told the employer that she had personal reasons and it was no one else's business. The claimant was a long-time employee and the employer begged the claimant to let it help her with whatever the claimant's issues were. The claimant completed an exit interview for a voluntary termination on January 9, 2009. Continued work was available had the claimant not resigned.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily quit work without good cause attributable to the employer.

Iowa Code section 96.5-1-d 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. But the individual shall not be disqualified if the department finds that:

d. The individual 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, 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, if so found by the department, provided the individual is otherwise eligible.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). A claimant is not disqualified for leaving employment if he or she (1) left employment by reason of illness, injury or pregnancy; (2) on the advice of a licensed and practicing physician; (3) and immediately notified the employer or the employer consented to the absence; (4) and when certified as recovered by a physician, the individual returned to the employer and offered services but the regular or comparable suitable work was not available. Area Residential Care, Inc. v. Iowa Department of Job Service, 323 N.W.2d 257 (Iowa 1982).

The claimant left work due to an injury, but not under the advice of her physician. The employer did not consent to her leaving, because it was unaware of the injury. The claimant has not provided the employer with certification from her physician that she has recovered. The claimant has failed to meet the requirements of the statute and, therefore, is not qualified to receive unemployment insurance benefits.

Iowa Code section 96.5-1-c 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. But the individual shall not be disqualified if the department finds that:

c. The individual left employment for the necessary and sole purpose of taking care of a member of the individual's immediate family who was then injured or ill, and if after said member of the family sufficiently recovered, the individual immediately returned to and

offered the individual's services to the individual's employer, provided, however, that during such period the individual did not accept any other employment.

The claimant left work to be with her mother who was ill. The claimant was not the necessary and sole caretaker of her mother. The claimant has failed to meet the requirements of the statute and, therefore, is not qualified to receive unemployment insurance benefits.

The next issue is whether the claimant was able and available for work. For the following reasons the administrative law judge concludes she was not available for work from December 12, 2008, through January 9, 2009.

871 IAC 24.23(1) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(1) An individual who is ill and presently not able to perform work due to illness.

871 IAC 24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

When an employee is ill and unable to perform work due to that illness she is considered to be unavailable for work. The claimant was never restricted from working by her physician. The claimant took time away from work to be with her mother. She is considered to be unavailable for work from December 12, 2008, through January 9, 2009. The claimant is not eligible to receive unemployment insurance benefits for that period due to her unavailability for work.

DECISION:

The representative's January 28, 2009 decision (reference 01) is affirmed. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant is considered to be unavailable for work from December 12, 2008, through January 9, 2009, and not eligible to receive unemployment insurance benefits for that period.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw