

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY M KAHLE
Claimant

APPEAL NO. 09A-UI-01059-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 01/06/08 R: 04
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Kimberly Kahle (claimant) appealed a representative's January 20, 2009 decision (reference 02) that concluded she was not eligible to receive unemployment insurance benefits because she had voluntarily quit employment 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 10, 2009. The claimant participated personally. The employer participated by Pamela Tribbett, Assistant Manager, and Maria Green, Co-Manager.

ISSUE:

The issue is whether the claimant is denied unemployment insurance benefits because she voluntarily quit work without good cause attributable to the employer. In addition whether the claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on April 12, 2008, as a part-time cashier. The claimant signed for receipt of the employer's handbook on April 12, 2008. The claimant had surgery and was released to return to work in August 2008. The claimant had attendance issues at work.

The claimant stopped appearing for work after December 5, 2008, due to a non-work-related medical issue. The claimant's physician said she should perform other duties at work. The claimant did not notify the employer of her absences by calling the telephone number provided by the employer and obtaining a confirmation number. After the claimant did not appear for work for three shifts without notification the employer removed the claimant from the schedule. The claimant contacted the employer on or about December 13, 2008. The employer told the claimant she had been removed from the schedule for failing to appear for work.

On February 4, 2009, the claimant's physician released her to return to work without restrictions. The claimant did not notify the employer of the release or contact the employer.

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 under the advice of her physician. The employer did not consent to her leaving because it was unaware of the injury. The claimant has failed to provide the employer with certification that she has recovered. In addition the claimant has failed to offer services to the employer. The claimant has failed to meet the requirements of the statute and, therefore, is not eligible 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 is.

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.

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 released to return to work without restrictions on February 4, 2009. She is considered to be available for work after February 4, 2009. The

claimant is disqualified from receiving unemployment insurance benefits until February 4, 2009 due to her unavailability for work.

The claimant's and the employer's testimony is contradictory. The administrative law judge finds the employer's testimony to be more credible. The claimant's testimony was internally inconsistent.

DECISION:

The representative's January 20, 2009 decision (reference 02) is affirmed. The claimant voluntarily left work without good cause attributable to the employer. Benefits are denied. She is able and available for work as of February 4, 2009

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs