

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**NANCY L DANIELSEN**  
Claimant

**APPEAL 15A-UI-04497-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 03/22/15**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(1) – Voluntary Leaving  
Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.4(3) – Able and Available

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the April 9, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in person hearing was held on July 27, 2015. Claimant participated. With her but not testifying was her husband Alan Danielson. Employer participated through Meagan Schlemmer, Assistant Manager.

**ISSUE:**

Did the claimant voluntarily quit her employment without good cause attributable to the employer or was she 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: Claimant was employed part-time as a people greater beginning on April 24, 1989 through March 25, 2015 when she was discharged. The claimant has suffered from a back problem that is not work related for a number of years. She has work restrictions that the employer has at times fully accommodated. The claimant had been off work since February 5 due to her back problem. She had run out of Family Medical Leave Act (FMLA) leave. The claimant has meticulous records that indicate she properly reported each and every one of her absences.

On March 24 the claimant spoke to Peg, the human resources manager. At no time during that conversation did the claimant tell Peg that she was quitting or wanted to leave her job. The claimant was a long term employee and wanted to remain as an employee. On March 25 the claimant tried to sign on to the electronic scheduling system to learn her work schedule for the upcoming week and discovered that her access to that system had been cut off. She assumed she had been discharged because her access was cut off and because Peg had told her the day before that “something had to be done” about her attendance. Ms. Schlemmer had

terminated the claimant's access to the scheduling system due to Peg telling her the claimant had voluntarily quit. Peg did not participate in the hearing.

The claimant is currently able to work with the following restrictions: no lifting over ten pounds, no more than four hours of work at any one time, and that she be allowed to sit or stand as needed. The claimant had been working as a greeter successfully for at least one year.

The claimant's last three applications for leave of absence were denied by the employer.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-1 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.

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.

Iowa Admin. Code r. 871-24.32(7) provides:

- (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

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). The claimant offers the more credible testimony as she was the only person to testify who actually participated in the conversation with Peg. The claimant never told Peg she wanted to quit or that she was quitting. Such cases must be analyzed as a discharge from employment. *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992).

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *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). An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Because the final absence for which she was discharged was related to properly reported illness or injury, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work.

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".

Iowa Admin. Code r. 871-24.22(1)a 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.

(1) Able to work. An 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.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Claimant was able to perform the greeter job successfully for at least one year. Under these circumstances she is able to and available for work. Accordingly, benefits are allowed.

**DECISION:**

The April 9, 2015 (reference 01) decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. The claimant is able to and available for work effective March 22, 2105. Benefits are allowed, provided she is otherwise eligible.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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