

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RACHEL R CALSYN
Claimant

APPEAL NO. 08A-UI-06824-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

**OC: 06/22/08 R: 04
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.4-3 – Ability to and Availability for Work

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated July 1, 2008, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 26, 2008. The claimant participated. Participating on her behalf was Ms. Leann Tyler, Attorney at Law. The employer participated by Ms. Quinn Vandenberg, Attorney at Law, and a witness, Mr. Chris Moran. Claimant's Exhibits A, B, and C were received into evidence. Employer's Exhibits One through Twenty-Two were received into evidence.

ISSUES:

The issues in this matter are whether the claimant was discharged for misconduct in connection with her and whether the claimant 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: The claimant worked for this employer from March 2000 until approximately January 2007. Ms Calsyn was a full-time department manager. In November 2006, the claimant began experiencing back problems and was taken off work by her physician. The claimant attempted to return to work on more than on one occasion but was unable to remain due to back pain. The claimant filed a first injury report with the employer and was taken to Occupational Health by her supervisor to be examined by a company physician. Ms. Calsyn later attempted to return to work on a half-time basis with a light duty limitation but was taken off work by her physician, as the work duties were determined to be aggravating the claimant's medical condition. The claimant was receiving workers' compensation benefits during this time. Although the claimant was away from work and unable to return due to a work-related injury and had filed a first injury report and was receiving workers' compensation benefits, the employer, for its own reasons, required the claimant to complete leave of absence documentation under the Family Medical Leave Act.

Various opinions were expressed by doctors who were treating and/or examining the claimant regarding her ability to return to work. The claimant, however, had not been released to return to work by her physician at the time she was separated from employment. The employer was aware of the claimant's status and a number of extensions of the leave of absence had been given.

The employer was aware that the claimant continued to be off work because of a work-related injury and had not been released to return. Medical procedures and surgeries were recommended by some of the claimant's treating doctors but not approved by the workers' compensation carrier. The claimant continued to be off work, under the care of her physician, and not released to return to work due to her work-related injury.

The most recent request for a leave of absence was completed by a company physician on October 5, 2007, and had initially indicated the claimant's expected return date was "TBD (To Be Decided)." Subsequently, without the knowledge of Ms. Calsyn, the return date was changed to "1/15/08." The claimant reasonably believed that the employer was aware of her status and believed that the employer was saving her job or a similar position for her.

By letter dated January 15, 2008, but not deposited with U.S. Postal Service as certified mail until January 18, 2008, the claimant was informed that she had until January 18, 2008 to respond to the letter informing her that her failure to return or to respond by that date would be considered a "voluntary termination." Because the claimant did not receive the correspondence until after the January 18, 2008 "termination" date had elapsed, she reasonably concluded that she had been discharged from employment while still unable to return to work and under the care of a physician for a work-related injury.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Calsyn was discharged for misconduct in connection with the employment. It does not.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App 1992).

The evidence in this case establishes that Ms. Calsyn did not choose to voluntarily quit her employment with Wal-Mart Stores. A voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980) and Peck v. Employment Appeal Board, 492 N.W. 2d 438 (Iowa Ct. App. 1992).

The claimant's employment in this case ended when the claimant did not respond to a notice sent to her by the employer. The notice was sent by certified mail through the U.S. Postal Service and was deposited with the Postal Service on the date it was due for the claimant to respond. The employer, through its act or omission, in effect made it impossible for the claimant to comply. The administrative law judge concludes, based upon the evidence in the record, that the employer was aware of the claimant's inability to report back to work due to a work-related medical condition and was aware that the claimant was receiving workers' compensation

benefits from that injury. The employer chose to discharge the claimant prior to her being released by her physician to return to work. Based upon the evidence in the record, the administrative law judge concludes that intentional disqualifying misconduct on the part of Ms. Calsyn has not been established.

Each week a claimant files a claim for unemployment insurance benefits, he or she must be able and available for work. Iowa Code section 96.4-3.

Iowa Code section 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.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which 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. On the other hand 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 24.22(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.

For the reasons stated herein, the administrative law judge concludes that the claimant was separated from employment under non disqualifying conditions and is able and available for work. The claimant is eligible to receive unemployment insurance benefits, providing that she meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated July 1, 2008, reference 01, is affirmed. The claimant was separated under non-disqualifying conditions and is eligible for job insurance benefits, provided she meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/kjw