BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

MILDRED A SPEGAL	:	
	:	**HEARING NUMBER:** 10B-UI-15657
Claimant,	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
WAL-MART STORES INC	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1D

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Mildred Spegal (Claimant) worked for Wal-Mart (Employer) from September 2007 as a part-time people greeter. (Rec. at 3:18-3:27; 3:50-55). With the consent of the Employer, the Claimant took a personal leave of absence from work in August 2009, because she had knee and back pain. (Rec. at 3:44; 4:18-4:36; 5:05-10). The Claimant saw her physician and her physician restricted her to performing work sitting down. (Rec. at 4:44-4:50; 5:09). The Claimant then offered to return to active duty on about September 9. (Rec. at 3:35-45). The Claimant at that time presented her restrictions to the Employer. (Rec. at 4:49-5:09; 7:05-7:15). The Claimant was then let go by the Employer because it would not accommodate her as requested. (Rec. at 4:49-5:09; 6:21-29; 7:05-7:15). The Claimant did not quit. (Rec. at 4:00-4:08; 5:02).

REASONING AND CONCLUSIONS OF LAW: Health related separations often present us with difficult analytical questions. The fighting issue in this case is the nature of the Claimant's separation. When reviewing this issue we keep in mind the basic rule of disqualification cases that claimants who meet the eligibility requirements of Iowa Code §96.4 can receive benefits *unless* they are disqualified by Iowa Code §96.5. This seems obvious but it has a result worth mention: if an eligible Claimant is separated from employment in a way that cannot be characterized either as a termination or a voluntary quit then, absent some special provision, the Claimant will not be disqualified from benefits. In other words, if the Claimant does not quit she cannot be disqualified because of a voluntary quit and if the Claimant is not terminated she cannot be disqualified because of a termination for misconduct.

Quit versus Discharge: The Claimant returned to work with restrictions, presented herself to the Employer as willing to work, and was told there was no work for her with the restrictions. The Claimant took this as the Employer telling her that she was released from employment. The question we face in this fact pattern is whether this is a quit, a discharge or something else. We start with basic principles.

Iowa Administrative Code 871—24.25(96) provides:

> Voluntary quit without good cause. 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 employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

"[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." *FDL Foods, Inc. v. Employment Appeal Board*, 460 N.W.2d 885, 887 (Iowa App. 1990), *accord Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992). Since the Employer has the burden of proving disqualification the Employer has the burden of proving that a quit rather than a discharge has taken place. Iowa Code §96.6(2); 871 IAC 24.25. On the issue of whether a quit is for good cause attributable to the employer the Claimant has the burden of proof by statute. Iowa Code §96.6(2).

Where a "claimant was compelled to resign when given the choice of resigning or being discharged" then "this shall not be considered a voluntary leaving." 871 IAC 24.26(21).

Furthermore, Iowa Workforce Development has defined the various types of separations from employment in 871 IAC 24.1 (emphasis added):

> 24.1(113) Separations. 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 laborsaving 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**.

Based on this record we cannot find that the Employer has proved that the Claimant quit. Here the Employer did not follow directions and did not appear at the telephone hearing. 871 IAC 26.14(7)a-c. Even when a party with the burden of proof fails to appear at hearing it is still possible for that party to carry its burden of proof through evidence introduced by the opposing party or through review of the file. *See Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 3 (Iowa 2005)(In finding that claimant, who did not appear, had proved good cause for her quit the Court holds that the "fact that the evidence was produced by [the employer]). Under the rules of the Department "a party's failure to participate in a contested case hearing shall not result in a decision automatically being entered against it." 871 IAC 26.14(9). Thus judgment is not automatic when the party with the burden fails to present evidence at hearing. Nevertheless it is markedly difficult to carry a burden based on no testimony at all.

The record is clear that when the Claimant went on leave she was *not separated* but remained an employee of the Employer. The separation occurred when the Claimant presented her restrictions and requested to return to active duty. The only evidence on the separation is that the Claimant testified the employer "released" her. We have nothing from the Claimant that she quit, or that she wanted to do anything but work under her restrictions. This is not a quit. Even interpreting the testimony in a way that is the most favorable to the Employer the best we could do would be to find an "other separation", that is, the parties mutually decided to sever the employment relationship because the Claimant had not obtained a full release and therefore failed "to meet the physical standards required." 871 IAC 24.1(113). This would not be a disqualifying quit nor a disqualifying termination.

Presenting Restrictions As Quitting: Although the precedent is, not surprisingly, less than crystal clear our review of similar cases in Iowa support our conclusion that an employee who presents work restrictions that are inconsistent with their job duties do not, by that fact, quit.

The earliest case of interest here is *Wilson Trailer Co. v IESC*, 168 N.W.2d 771 (Iowa 1969). In *Wilson* the claimant received a leave of absence for a non-work-related illness (tooth extraction). The claimant informed the employer of his continuing need to be absent but when he presented himself as fully recovered the employer had told him that it had "pulled his card." Although the case involved a full recovery it is notable that the case focuses on Iowa Code §96.5(1)(d). Iowa Code §96.5 provides that:

> 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.

This section applies only to quits and thus *Wilson Trailer*'s focus on the section seems to suggest that a leave of absence, even with full recovery, can be analyzed as a quit. This is, however, not an express issue in the case and the Court does state that "if a return to work before recovery would have been detrimental to his health or endanger his life, the absence would not amount to quitting voluntarily without good cause." *Wilson Trailer* at 775.

The next case of interest is *Hedges v. Iowa Dept. of Job Service,* 368 N.W. 862 (Iowa 1985) where the court was presented with an employee with lifting restrictions. Ms. Hedges had been placed on medical leave due to a heart ailment and then returned to work and presented her employer a thirty-pound lifting restriction. The employer refused to reinstate Hedges even though "she appeared willing to violate her physician's orders". *Hedges* at 864. Ms. Hedges applied for benefits citing Iowa Code §96.5(1)(d). "Ms. Hedges assert[ed] that the word 'recovery' for purposes of section 96.5(1)(d) is not synonymous with being able to perform all aspects of former employment when an employee returns to work." *Id.* at 866. The Supreme Court rejected this argument and found that the §96.5(1)(d) exception does not apply unless the employee has fully recovered.

If this were the extent of precedent we might be inclined to see *Hedges* as finding that full recovery is required to obtain benefits. But *Hedges* is not the last word. In *Wills v. Employment Appeal Board*, 447 N.W.2d 137 (Iowa 1989) the court again faced a Claimant with a lifting restriction. There the restriction was as a result of pregnancy and the employee again appeared at work with the restriction and again the employee was terminated. The Supreme Court found that this was not a quit since the employee had not intended to quit. Although the Court cited to *Ames v. Employment Appeal Board*, 439 669 (Iowa 1989) the Court did not turn its ruling on the "voluntariness" of the quit, which was the notable issue in *Ames.* Instead the *Wills* court emphasized that "Wills testified that she did not quit her job" and that the employer testified "she did not quit her job". *Wills* at 138. Because of this testimony the Court found that Ms. Wills had "repudiated the only evidence of a voluntary quit presented at the hearing". *Id.*

A critical point in this line of precedent is found in *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991). In this case the employee again went on medical leave, again returned with restrictions and again was told that she could not return. The *Geiken* court found for the employer on the basis that the claimant was not able and available to work. Interestingly the Board had cited to §96.5(1)(d) and *Hedges* and Ms. Geiken attacked this as error. Ms. Geiken argued that *Hedges* only applied where there was a quit and that her case was a termination. The Supreme Court then discussed *Hedges*:

> In *Hedges*, the court applied Iowa Code section 96.5(1)(d) to a case in which the employee appealed from a denial of benefits on the basis that she voluntarily quit her job and held that the claimant must be fully recovered to receive unemployment benefits. *Id*. at 867. We agree that this case does not present a voluntary quit situation, thus making section 96.5(1)(d) inapplicable.

The Court went on to find "any error in applying the voluntary quit standards of section 96.5 to the eligibility conditions of section 96.4(3) was harmless", *Id.*, and found for the employer. Thus even though the facts in *Hedges* and *Geiken* were identical on all relevant points the *Geiken* court found that it was not one in which the *Hedges* rule applies. This can only be reconciled if we understand that in *Hedges* the issue was whether §96.5(1)(d) can be invoked for partial recovery. The employee in *Hedges* never argued that she was fired rather than quit. Thus the *Geiken* view that this fact pattern is a termination rather than a quit is not inconsistent with *Hedges*. Notably, *Geiken* mentions neither *Ames* nor the issue of what is "voluntary".

The final point in the line of precedent is *White v. Employment Appeal Board*, 487 N.W.2d 342 (Iowa 1992). There the claimant was off work as an over-the-road truck driver for eight months due to a heart condition. When he returned to the employer he indicated that he would not be able to drive. The employer told him there was no work available. The Board found this to be a voluntary quit and the claimant appealed to the Supreme Court arguing that the *Ames* decision should be extended to the situation of health problems. In *Ames* the employees, out of fear of violence, refused to cross a picket line. The *Ames* court found that their quit was not "voluntary" and thus did not have to be attributable to the employer in order to allow benefits. The *White* plaintiff argued that *Ames* should be extended to the health setting. The Supreme Court wrote:

> Although we find considerable logic in the district court's extension of the *Ames* decision, we conclude that unemployment due to illness raises policy considerations which call for a continuation of the rules laid down in our cases on illness terminations antedating *Ames* and *Rooney*, decided the same year. Under these rules, if White's disability was not work related, the agency properly imposed a disqualification. If, however, the cause of White's disability was work related, the disqualification was improper.
>
> We have held that an illness-induced quit is attributable to one's employer only under two circumstances.

White at 345. The Court sets out the rules regarding illness-induced quits. No mention is made of *Geiken* or *Wills*. The Court does not discuss whether the separation should be termed a quit or a termination.

Reaching a conclusion regarding these cases is no easy task. Clearly, where a quit is involved, *White* sets the standards to apply. And if a person does quit and seeks to invoke 96.5(1)(d) then *Hedges* teaches us that a full recovery is required. But neither of these cases deals with the issue of whether the separation is a quit or a discharge in the first place. In *White* the claimant did not raise the argument and instead relied on an extension of *Ames*. In *Hedges* the claimant again did not raise the argument that she was fired and instead argued that partial recovery was sufficient under 96.5(1)(d). *Wilson Trailer* only deals with the issue of quit versus discharge in passing. While *Wills* does expressly resolve the issue and *Wills* has not been reversed *Wills* did assume that *Ames* applies in health contexts – an assumption repudiated by *White*. Although this assumption in *Wills* did not affect the analysis of "quit versus discharge" we are still somewhat reticent to rely on *Wills*. Finally, *Geiken* did expressly rule that this sort of case is not a quit. *Gieken* made clear that the "full recovery" requirement of *Hedges* does not apply in discharge cases. *Geiken* did not rely on *Ames* and was not mentioned in *White*. We thus conclude that we have the following situation: in cases of quits *White* and *Hedges* govern the decision on disqualification, in cases of

discharges the issue of misconduct governs the decision on disqualification, but in deciding whether a presentation of job restrictions is a quit or a discharge *Wills* and *Geiken* set the standard.

We recognize some policy tangles caused by treating the separation of an employee with restrictions as a separation that will not disqualify her. The typical problem is a sort of game of "chicken" between the employer and the employee. An employee who is likely to be injured if she does his regular job and makes this known to her employer may then be encourage to stay on the job to "force" her employer to fire her. The employer faces the dilemma between incurring liability for unemployment compensation or risking an injury to the employee. In effect, whoever flinches first loses the unemployment compensation case.

The main response to this policy problem is that regardless of the policy issues the usual understanding of "quit" as well as the rules of Iowa Workforce Development compel the conclusion that this situation does not present us with a quit. But in addition to this response, we point out that equally thorny policy problems are posed by the alternative approach.

Consider the dichotomy if we treated the separation of an employee who has an incapacity because of injury as voluntarily quitting. The usual rule in our cases is that simple incapacity is not misconduct. *Newman v. IDJS*, 351 N.W2d 806 (Iowa 1984); *Richers v. Iowa Department of Job Service*, 479 N.W.2d 308 (Iowa 1991); 871 IAC 24.32(1)"a"("failure in good performance as the result of inability or incapacity [is] not to be deemed misconduct"). Thus an employee who tries his best to perform his job but simply fails may very well be discharged but would not be disqualified. This would be true if, for example, the employee just did not have the strength to do the lifting required in the job. The employee earnestly tries to do the lifting but cannot do it because he is just too small. The employee keeps showing up to work, keeps trying and failing, and the employer is then forced to terminate the employee. We would, as a matter of routine, award benefits to this person. Should the rule be that if this same employee was unable to do the lifting because of a back injury, instead of just being small, then the employee should not receive benefits? Why should the employee be relieved of the consequence of being small but not of an accidental injury? This not only seems unfair, but makes little sense in terms of the law's purpose.

Another fairness problem in treating employees with restrictions as quitting is posed by disability discrimination laws. Some employee's with restrictions will be disabled and thus protected by the Iowa Civil Rights Act and the American's with Disabilities Act. Although disabled these employees may still be "able and available" if reasonable accommodation by employers would make them so. *Sierra v. Employment Appeal Bd.*, 508 N.W.2d 719 (Iowa 1993). Let us then consider a disabled employee who presents restrictions and asks for reasonable accommodation. The employer (in this example not in the case at bar) then ignores its legal obligation and refuses to accommodate the employee. Under the alternate rule, the employee would be treated as quitting by demanding recognition of the right to accommodation. And yet if this same employee presents the same restriction to subsequent employers the employee under *Sierra* could remain "able and available." The employee is not automatically be deemed to be unduly restricted from employment under 871 IAC 24.22(2)"m". Thus in this example the employee would not be adversely affected by the need for reasonable accommodation in any but the first job. Again this result is unfair and seems to serve no policy.

In sum, the applicable law and precedent lead us to conclude that an employee who presents valid restrictions inconsistent with their employment duties should not be treated as quitting **by that fact alone**. The separation is thus either a termination/lay off, but not for misconduct, or an "other separation." Neither type of separation disqualified the Claimant from benefits.

Leave of Absence Analysis: The same result attends if we analyze this case under the leave of absence rule. This rule, which is not limited to health-related leave, reads:

> 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 employee–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 becomes unemployed the individual is considered as having voluntarily quit and therefore is 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.

Iowa Administrative Code 871—24.22(2). In this case we have a mutually agreed upon leave of absence. The issue is what happened at the end of the leave period. Can we conclude that the Claimant by presenting a physician's restrictions "failed to return at the end of the leave" and that therefore she is considered to have quit? We cannot read this much into the "return at the end" language. First, the plain text of the rule means that the person just doesn't come back. In understanding this we keep in mind that this rule is also invoked where an employee is on leave during a seasonal shut down and then doesn't come back. Thus unlike 96.5(1)(d) the return is not integrally linked to a recovery from an injury. Second, the plain meaning of the rule is that this Employer "failed to reemploy the employee" and thus the Claimant would be considered laid off. Finally, rule 24.26(6) requires that the Employee, having quit, be *completely* released. This rule, however, applies only to quits. The failure of rule 24.22(2) to repeat the requirements of rule 24.26(6) implies to our mind that rule 24.22(2) has no "fully released" requirement.

This rule fits this case as well as a quit/discharge analysis. The Claimant went on medical leave. She returned, but with restrictions, and asked for work. The Employer then failed to "reemploy the individual" so she is eligible for benefits.

DECISION:

The administrative law judge's decision dated November 19, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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John A. Peno

_____
Elizabeth L. Seiser

RRA/ss

DISSENTING OPINION OF MONIQUE KUESTER :

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

_____
Monique F. Kuester

RRA/ss

The Claimant submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. A portion of the argument consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the argument and additional evidence (Dr.'s statement) were considered, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Elizabeth L. Seiser

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Monique Kuester

RRA/ss