IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MELISSA M HARMON
2007 HELMER ST
SIOUX CITY IA 51103

WAL-MART STORES INC
C/O FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-283

Appeal Number: 04A-UI-12701-JTT
OC: 10/31/04 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY
1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the November 18, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 20, 2004. Claimant did participate. Wal-Mart participated through Assistant Manager Jolinda Morris, with witness Co-Manager Bruce Schultz. Exhibits One through Three were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Melissa Harmon was employed by Wal-Mart as a cashier from September 17, 2002 until she was discharged by Co-Manager Bruce Schultz on October 21, 2004. The last incident that led

Wal-Mart to discharge Ms. Harmon was an alleged "no-call/no-show" for three consecutive workdays, October 15, 16, and 19.

Ms. Harmon started her employment with Wal-Mart as a full-time cashier and continued as a full-time employee until the end of August 2004. Wal-Mart considers full-time employment to be 34 or more hours per week. Despite her full-time status, the employer only scheduled Ms. Harmon to work 24 hours during the workweek of August 28 through September 3. Thereafter, the employer only scheduled Ms. Harmon for part-time hours. On or about September 18, Assistant Manager Jolinda Morris met with Ms. Harmon and had Ms. Harmon execute a document that indicated she was voluntarily changing her status from full-time to part-time. Ms. Harmon did not want to change her employment status, but believed she had to sign the document to avoid immediate termination. Thereafter, the employer formally reduced Ms. Harmon's employment status from full-time to part-time.

Ms. Harmon's attendance at work had been an on-going concern to Wal-Mart management. Prior to Ms. Harmon's change in employment status, she had been absent 16 days during 2004. Wal-Mart records indicate that 14 of these 16 absences were illness-related. Following Ms. Harmon's change in employment status to part-time, she was absent ten days in September and October before the alleged three-day "no-call/no-show." Wal-Mart records indicate that six of these ten absences were illness-related. Wal-Mart coded three of these ten absences as "no-shows": September 20, October 5 and October 11.

Wal-Mart's decision to reduce Ms. Harmon to part-time status had a significant impact on Ms. Harmon's finances and child-care arrangements. Ms. Harmon is a single parent to three children, ages six, five and two. So long as Ms. Harmon remained a full-time employee, she qualified for state-sponsored child-care. When Ms. Harmon's employment dropped below 34 hours per week, she no longer qualified for state-sponsored child-care. After the change in work status, Ms. Harmon had great difficulty in arranging appropriate child-care that she could afford and that would match her scheduled hours at Wal-Mart. This situation reached a breaking point right before the alleged three consecutive days of "no-call/no-show."

Ms. Harmon had made Ms. Morris aware of her child-care difficulties. On October 15, Ms. Harmon called Wal-Mart and spoke to Ms. Morris regarding her need to be absent that day due to child-care difficulties. Ms. Morris advised Ms. Harmon that she could have some time off to make appropriate child-care arrangements. Ms. Morris instructed Ms. Harmon to check in with Ms. Morris the middle of the next week and the two would talk about Ms. Harmon's options regarding continued employment. Ms. Morris does not recall this conversation.

The Wal-Mart management team decided to terminate Ms. Harmon's employment after the alleged "no-call/no-shows." When Ms. Harmon appeared for her shift on October 21, after what she believed had been an authorized leave, she was advised that she was being discharged for three consecutive "no-call/no-shows." Mr. Schultz conducted an "exit interview" with Ms. Harmon that lasted less than five minutes. During that time, Mr. Schultz had Ms. Harmon sign an "Exit Interview" form, acknowledging that she had "voluntarily" terminated her employment as the result of three days of unreported absences.

Ms. Harmon's application for unemployment insurance benefits was effective October 31. Ms. Harmon began receiving unemployment insurance benefits the benefit week that ended November 6 and has received benefits since that time.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be addressed is whether the evidence in the record establishes that Ms. Harmon voluntarily quit her employment. It does not.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). Ms. Harmon testified that Ms. Morris advised her during their conversation of October 15 that Ms. Harmon could take a brief leave to arrange for childcare. The administrative law judge found Ms. Harmon's testimony to be more credible than that offered by the employer's witnesses. Ms. Harmon testified candidly and in detail about the circumstances that resulted from her reduced work hours and about her on-going contacts with Wal-Mart management. On the other hand, Ms. Morris' testimony appeared less credible as a result of her failure to disclose the significant role she played and the employer's policy of reclassifying employees from full-time to part-time status played, in making it next to impossible for Ms. Harmon to provide childcare for her children so that she could come to work. The evidence in the record, as set forth in the findings of fact, does not demonstrate an intention on the part of Ms. Harmon to sever her employment relationship with Wal-Mart, or that Ms. Harmon engaged in an overt act carry out such an intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980); see also Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). Having considered all of the evidence, the administrative law judge concludes that Ms. Harmon had permission for the three-day absence during October 15, 16, and 19, and did not voluntarily quit her employment.

The next question is whether the evidence in the record establishes that Ms. Harmon was discharged for misconduct. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since Ms. Harmon was discharged, Wal-Mart has the burden or proof in this matter. See Iowa Code section 96.6-2. Wal-Mart alleges that Ms. Harmon engaged in misconduct in the form of excessive absenteeism, with the last absence being the alleged three-day no-call/no-show during October 15, 16,and 19.

871 IAC 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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The evidence in the record, as summarized in the Findings of Fact, indicates that the majority of Ms. Harmon's absences were related to illness. 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 evidence further indicates that Wal-Mart contributed to the other absences in September and October by changing Ms. Harmon's employment status to part-time. As previously noted, Wal-Mart's actions had a devastating impact on Ms. Harmon's ability to provide childcare for her children so that she could get to work. Having previously concluded that the evidence in the record establishes that Ms. Harmon had authorization for the leave of absence during October 15, 16,and 19, the administrative law judge concludes that there was no current act of misconduct that would disqualify Ms. Harmon from receiving unemployment insurance benefits. Accordingly, no disqualification will enter.

DECISION:

The representative's decision dated November 18, 2004, reference 01, is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

jt/b