

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

LISA B DETTMAN
Claimant

WAL-MART STORES INC
Employer

APPEAL 17A-UI-11179-JP-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 11/27/16
Claimant: Appellant (1)

Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 24, 2017, (reference 02) unemployment insurance decision that denied benefits as of September 24, 2017. The parties were properly notified about the hearing. A telephone hearing was held on November 17, 2017. Claimant participated. Employer participated through assistant manager Collette Wall and personnel coordinator Marilyn Wilson. Official notice was taken of the administrative record with no objection.

ISSUE:

Is the claimant able to work and available for work effective September 24, 2017?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was hired part-time as a door greeter on July 28, 2016. As a door greeter, claimant usually worked Monday through Thursday, 8:00 a.m. to 4:00 p.m. July 3, 2017 was the last day claimant worked as a door greeter for the employer due to a non-work related foot injury. On July 7, 2017, claimant had foot surgery. Claimant was on a medical leave of absence until October 1, 2017 while she recovered from her surgery. While claimant was on her medical leave, the employer changed the door greeter hours to 5:00 p.m. to 11:00 p.m. Saturday, Sunday, and Monday. The hours claimant informed the employer she was available to work were from 8:00 a.m. to 5:00 p.m.

On October 1, 2017, the employer received a doctor's note that released claimant to return to work effective October 1, 2017 under certain work restrictions (six hour shifts and no more than four shifts per week; claimant needed to be able to work in a boot as needed and sit on stool as needed). After the employer received claimant's doctor's note, it investigated what positions it had available for claimant to work that met her work restrictions and her hours of availability. The employer had a position in maintenance that was available during her hours of availability and complied with her work restrictions. The maintenance position allowed claimant to work in her boot and rest as she needed too. The employer offered claimant the maintenance position on October 1, 2017. The employer explained to claimant that she could work in her boot and rest as needed. Claimant accepted the maintenance position.

On October 3, 2017, claimant did some computer based learning for the employer. On October 9, 10, 11, 12, 14, 16, and 17, 2017 claimant worked as a maintenance employee for the employer. On October 17, 2017, claimant brought in a doctor's note to the employer that she was not able to work as a maintenance worker because of her foot surgery, but she could work in the deli or produce section. The employer explained to claimant the work requirements (heavy lifting and a lot of walking) that were required to work in the deli and produce section. Claimant told the employer she was not sure she could handle the work in the deli and produce section. The employer requested more clarification from claimant's doctor as to what work claimant could perform. Claimant then provided another doctor's note dated October 17, 2017 to the employer. This doctor's note prohibited claimant from working in the maintenance department, but released her to work as a greeter or in the clothing/fitting department. The employer did not have any work available in those areas for claimant during her hours of availability.

After October 17, 2017, the employer discussed with claimant changing her availability hours, but she was unwilling to change her hours of availability. The employer does not have any work available that meet claimant's work restrictions and her hours of availability. Claimant's work restrictions are still in place. The employer still considers claimant to be an employee.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that claimant is not able to work and available for work effective September 24, 2017.

Iowa Code section 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.

Iowa Admin. Code r. 871-24.23(35) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

To be able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

The employer is not obligated to accommodate a non-work related medical condition; however, the employer did provide claimant the opportunity to work in a different position (maintenance) that complied with her work restrictions. Claimant tried to work in the maintenance position, but on October 17, 2017 she provided updated work restrictions that prohibited her from working in the maintenance position. Because claimant is still under work restrictions and she has limited the hours she is available to work for the employer (8:00 a.m. to 5:00 p.m.), the employer does not have any work available her. Benefits are withheld until such time as the claimant obtains a full medical release to return to work. Benefits are denied effective September 24, 2017.

DECISION:

The October 24, 2017, (reference 02) unemployment insurance decision is affirmed. Claimant is not able to work and available for work effective September 24, 2017. Benefits are withheld until such time as the claimant obtains a full medical release to return to work, offers her services to the employer, and no suitable, comparable work is available, or if she is involuntarily separated before that time.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs