

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARILYN A HAMILTON
Claimant

APPEAL NO: 11A-UI-13022-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 02/06/11

Claimant: Appellant (4)

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Marilyn A. Hamilton (claimant) appealed a representative's September 29, 2011 decision (reference 03) that concluded she was not qualified to receive unemployment insurance benefits in conjunction with her employment with Wal-Mart Stores, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 25, 2011. The claimant participated in the hearing and was represented by Tom Berg, attorney at law. The employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

As determined in a decision issued by the Employment Appeal Board on September 7, 2011 in 11B-UI-03275, the claimant worked for the employer "as a part-time cashier from July 2007 until she was separated on February 14, 2011." The Board decision concluded that the separation was not disqualifying. However, the Board remanded the matter to the Agency for a determination as to whether the claimant was otherwise eligible for unemployment insurance benefits as being able and available for work.

The claimant had begun a medical leave of absence on November 21, 2010. There was no showing that the medical issue was work-related; the diagnosis was lumbar disc degeneration. The claimant's leave was exhausted as of February 1. "As of February 1 the Claimant was not yet able to return to her previous position, or to an equivalent position." *Id.* As of February 9 the claimant still had a significant medical restriction under which she was not to stand for more than 30 minutes each hour.

After the February 14 separation date, the claimant again sought to return to employment with the employer, indicating she could perform most or all of her duties at least with some accommodations, but was informed she would be treated as a new hire. Since that time, while the claimant still has restrictions that she should not stand for more an hour at a time, the claimant has been performing a job search and applying for positions such as a receptionist which would allow her to sit for the majority of the work shift.

REASONING AND CONCLUSIONS OF LAW:

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. While an employment relationship still exists, an employee who is only temporarily separated from her employment due to being on a leave of absence is not "able and available" for work during the period of the leave, as it is treated as a period of voluntary unemployment. 871 IAC 24.22(2)j; 871 IAC 24.23(10). The claimant's unemployment until February 14 was due to her being on a leave of absence due to a non-work-related medical issue. As the condition causing her then temporary unemployment was not related to the work environment, to be "able and available" for work, she would have had to have had a complete recovery to full work duties without restriction. *Hedges v. Iowa Department of Job Service*, 368 N.W.2d 862, 867 (Iowa App. 1985); Iowa Code § 96.5-1-d.

However, after a separation from employment has occurred, to be found 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); 871 IAC 24.22(1).

The claimant has demonstrated that as of February 14, 2011 she has been able to work in some gainful employment. Benefits are allowed as of the benefit week beginning February 13, 2011, if the claimant is otherwise eligible.

DECISION:

The representative's September 29, 2011 decision (reference 03) is modified in favor of the claimant. The claimant is able to work and available for work effective February 13, 2011. As of that date the claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs