

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CADY, PAMELA, S**  
Claimant

**APPEAL NO. 12A-UI-06178-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 02/19/12**  
**Claimant: Appellant (4)**

Iowa Code Section 96.4(3) – Able & Available  
Iowa Code Section 96.4(3) – Still Employed Same Hours and Wages  
Iowa Code Section 96.7(2) – Employer Liability

**STATEMENT OF THE CASE:**

Pamela Cady filed a timely appeal from the May 25, 2012, reference 02, decision that denied benefits effective March 25, 2012 based on an agency conclusion that she was not able to perform work due to injury. After due notice was issued, a hearing was started on June 20, 2012. Ms. Cady participated. The administrative law judge adjourned the hearing on June 20, 2012 after concluding that the employer should have had notice of the hearing and have been given the opportunity to participate in the hearing. The administrative law judge rescheduled the hearing to July 16, 2012. After due notice to both parties, the hearing continued on July 16, 2012. Ms. Cady again participated and presented additional testimony through Lois Wheeler. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Exhibits A through D were received into evidence.

**ISSUES:**

Whether the claimant has been able to work and available for work since establishing her claim for benefits.

Whether the claimant was partially unemployed from her employment.

Whether the employer's account may be assessed for benefits paid to the claimant.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Pamela Cady commenced her employment with Wal-Mart in 2008. On February 21, 2012, Ms. Cady commenced an involuntary leave of absence after the employer's human resources person, Emily, told her she could not work with her arm in a sling while performing her cashiering duties. Ms. Cady sometimes worked as a cashier and sometimes worked in the employer's money center.

When Ms. Cady worked in the money center, she helped customers with cashing payroll checks and other checks. She ran a computerized cash register. she created money orders and wire transfers. There was no lifting associated with that work.

Ms. Cady had begun to feel pain in her shoulder on February 8, 2012. The pain was later diagnosed as acromioclavicular joint, or AC joint, pain. There is no indication that the pain or the joint issue is work related. On February 9, Ms. Cady had gone to an emergency room with shoulder pain. The emergency room did not diagnose a problem at that time. Ms. Cady later learned the emergency room staff had x-rayed the wrong shoulder.

On February 21, 2012, when Emily said Ms. Cady could not work with her arm in a sling, that started a further discussion about why Ms. Cady had her arm in a sling. Ms. Cady told Emily that she did not know whether she had injured her shoulder. Emily told Ms. Cady that she would need to commence a leave under the Family and Medical Leave Act (FMLA). Ms. Cady had not asked to commence a leave. Emily directed Ms. Cady to take the FMLA questionnaire to her doctor. The employer subsequently used the completed FMLA paperwork to authorize FMLA leave and Ms. Cady continued off work.

Ms. Cady established a claim for unemployment insurance benefits that was effective February 19, 2012 and asserted at that time that she had been laid off. The employer did not protest the claim. Ms. Cady then received weekly unemployment insurance benefits of \$250.00 through the benefit week that ended May 19, 2012.

On April 13, 2012, a Nurse Practitioner at the University of Iowa Hospitals & Clinics provided Ms. Cady with a memo that said, "Pamela may return to work as of 4/13/12, with consideration of accommodations to assist her with performing her duties, i.e. ergonomic chair, vacuum/sweeper, assistance with lifting heavy mop and pail." On April 9, 2012, Emily had provided Ms. Cady with a Wal-Mart Request for Accommodation Form and a Wal-Mart Medical Questionnaire. Ms. Cady filled out the accommodation request. Ms. Cady indicated on the form that she was a money center sales associate. Ms. Cady indicated on the form that she was suffering from "AC joint – right arm – arthritis of AC Joint: right arm." Ms. Cady indicated on the form that she was limited to "Lifting with right arm & basic gravity with arm down at side." Ms. Cady requested that Wal-Mart accommodate her condition by providing an "ergonomic chair with ergonomic arms that adjust, vacuum or sweeper for rugs to maintain safe work environment & assistance with heavy mop pail."

Ms. Cady delivered the request for accommodations, nurse's note and Medical Questionnaire to the employer during the week that ended April 21, 2012. Ms. Cady asked Emily to let her return to work and told Emily that her doctor had cleared her to perform stocking duties with her one good arm. Emily told Ms. Cady that there was no stocking work available, that it would take three weeks to get her back on the schedule, and that her request for accommodations would be routed to the employer's corporate office. It ended up taking more than three weeks for Ms. Cady to get back on the work schedule.

Ms. Cady attached a copy of the nurse practitioner's memo and the Medical Questionnaire completed by her doctor. The doctor's response on the Medical Questionnaire is dated April 16, 2012. The doctor indicated a diagnosis of right AC joint pain with a fair prognosis. The doctor noted that Ms. Cady had "pain in ® shoulder that radiats [sic] into ® arm. Vaccum [sic] or sweeper to clean rugs would assist her greatly." The doctor noted that the expected duration of the limitation or impairment was unknown and that Ms. Cady had been referred to a pain clinic. The doctor further indicated that Ms. Cady "experiences ® shoulder pain when lifting heavy

objects such as floor rugs to shake dust out of. A vacuum [sic] would assist to do her job without pain. Accessing mop would be easier if it did not require heavy lifting."

Ms. Cady returned to work at Wal-Mart on May 27, 2012. The rugs had been removed her work area. Ms. Cady was able to sweep the floor with one arm. The ergonomic chair, which the employer had only ordered on May 21, was shipped on May 29.

When Ms. Cady returned to work, she completed an availability statement that reduced the number of hours she was available to work from hours she had previously been available to work. Ms. Cady wanted to gradually build her work hours back up to what they had been prior to February 21. Ms. Cady believes that 20 hours per week is the most she can work. Prior to February 21 Ms. Cady had worked up to 33 hours per week and had averaged around 30 hours per week.

Since Ms. Cady returned to work on May 27, 2012, her work hours have been as follows. During the week that ended June 2, Ms. Cady worked 13 hours. During the week that ended June 9, she worked 19.5 hours. During the week that ended June 16, she worked 19.5 to 21 hours. During the week that ended June 23, she worked 18.5 hours. During the week that ended June 30, Ms. Cady worked 20 hours. During the week that ended July 7, she worked 18 hours. Ms. Cady discontinued her claim for unemployment insurance benefits after the week that ended July 7, 2012 because she had been approved for Social Security Disability Insurance (SSDI).

On Friday, July 13, 2012, Ms. Cady underwent an MRI ordered by the pain specialist in anticipation of Ms. Cady's initial appointment with an orthopedist on July 20, 2012. The initial information concerning the MRI is that Ms. Cady has two small tears in her supra spinatus tendon, bursitis, and degenerative disease compatible with a slap type supra lateral tear.

### **REASONING AND CONCLUSIONS OF LAW:**

The employer failed to participate in the hearing despite being given notice of the hearing.

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".

871 IAC 24.22(1)a and (2) provide:

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.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

An individual shall be deemed *partially* unemployed in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars. Iowa Code section 96.19(38)(b).

An individual shall be deemed *temporarily unemployed* if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed *due to a plant shutdown, vacation, inventory, lack of work or emergency* from the individual's regular job or trade in which the individual worked full time and will again work full time, if the individual's employment, although temporarily suspended, has not been terminated. Iowa Code section 96.19(38)(c).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

(a) However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

[Emphasis added.] Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed. 871 IAC 24.23(26). Contract for hire merely means the established conditions of the employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986).

The weight of the evidence in the record establishes that the employer temporarily laid off Ms. Cady effective February 21, 2012 because the employer did not wish to allow Ms. Cady to work with her arm in a sling or with an undiagnosed shoulder condition. The weight of the evidence indicates that the employer continued Ms. Cady in the temporary layoff status until Ms. Cady returned to work on May 27, 2012. The evidence indicates that Ms. Cady continued to be able to perform the same duties she had performed prior to the layoff and continued to be available to return to work while she was on the forced leave. Ms. Cady was eligible for benefits during the benefit week involved in the leave, provided she was otherwise eligible. The employer's account may be charged for benefits paid to Ms. Cady for the weeks involved in the temporary layoff/forced leave. Those weeks consisted of week ending February 25, 2012 through the week ending May 26, 2012.

The weight of the evidence establishes that Ms. Cady reduced her work availability once she returned to work to working no more than 20 hours a week. This was in contrast the 33 hours per week maximum and the average of around 30 hours per week Ms. Cady had worked prior to being temporarily laid off. Ms. Cady reduced her available work hours because she wanted to ease back into the employment while she continued to address the issue with her shoulder. Ms. Cady kept her work hours reduced because she had applied for and been approved for Social Security Disability Insurance, which would supplement her wages as soon as those benefits began. Ms. Cady did not meet the work availability requirements once she returned to work and therefore was not eligible for unemployment insurance benefits effective May 27, 2012.

#### **DECISION:**

The Agency representative's May 25, 2012, reference 02, decision is modified as follows. The claimant was temporarily laid off, but able and available for work during the benefit week that ended February 25, 2012 through the benefit week that ended May 26, 2012. The claimant was eligible for the benefits she received for those weeks, provided she was otherwise eligible. The employer's account may be charged for those benefits. The claimant was no longer temporarily

unemployed or partially unemployed, and did not meet the availability requirement effective May 27, 2012. The claimant continued not to meet the availability requirement through the week that ended July 7, 2012, when she discontinued her claim. The claimant was not eligible for benefits for the weeks that ended June 2, 2012 through July 7, 2012.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/css