IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MELANIE R MCLANE Claimant **WAL-MART STORES INC** Employer	**APPEAL 17A-UI-07627-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/25/17** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 20, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 14, 2017. Claimant participated. Employer participated through store manager Steven Swift. Overnight co-manager Adam Feltes attended the hearing on behalf of the employer.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an assistant manager from September 30, 2014, and was separated from employment on June 23, 2017, when she quit.

The shift that claimant works on has a six month rotation. Claimant would work six months of weekends and then the next six months she would have the weekends off. Claimant started the weekend rotation in January 2017. The last day claimant worked for the employer was on February 26, 2017. On February 27, 2017, claimant went on a leave of absence. Mr. Swift testified claimant's leave of absence was to end on April 1, 2017, but on April 2, 2017, claimant made another application for a leave of absence. The employer uses a third party company to manage its employees' leave of absences.

Mr. Swift is the person responsible for determining what rotation an employee, including claimant, works. On May 18, 2017, Mr. Swift and claimant discussed, through text messages, when claimant would return to work and the rotation she would be on. Mr. Swift sent claimant a text message that she was going to be assigned to the weekend rotation. Claimant responded by text message that the weekend rotation would not work for her. Claimant had previously told the employer the weekend rotation would not work for her during the summers due to childcare

issues. Mr. Swift attempted to call claimant, but she did not answer and she did not have her voicemail setup. Claimant did not call Mr. Swift.

Around May 23, 2017, claimant sent a text message to Mr. Swift asking if something had been figured out regarding her schedule. Mr. Swift responded via text message that he gave claimant her schedule. Mr. Swift also responded to claimant that he would not respond to anymore text messages and she needed to either call him or come to the employer to talk to him. Mr. Swift attempted to call claimant when she texted him, but she did not answer and her voicemail was not setup. Claimant responded to Mr. Swift by text message that the weekend rotation does not work for her. Mr. Swift did not respond to this text message.

After May 23, 2017, claimant sent eight more text messages asking Mr. Swift about her rotation. Mr. Swift did not respond to claimant's text messages. Mr. Swift had previously informed claimant that she needed to either call him or come to the employer to talk to him, but he would not respond to her text messages anymore. Claimant never called Mr. Swift. Claimant also did not go to the employer to talk with Mr. Swift or report for work.

Claimant testified her doctor released her to return to work with no restrictions on June 1, 2017. Claimant did not return to work after June 1, 2017. Mr. Swift testified that on June 2, 2017, claimant was sent a letter informing her that her leave of absence was denied and she had three days from the receipt of the letter to return to work or make arrangements to return to work. Claimant signed for the letter on June 5, 2017. After June 5, 2017, claimant did not report to work or make arrangements to return to work. Since June 5, 2017 claimant has not returned to the employer or called the employer to make arrangements to return to work. On June 23, 2017, the employer determined claimant had quit because she had not returned to work and her leave of absence was over. The employer had work available for claimant. Mr. Swift testified that the employer would have been able to work with claimant to allow her to work a non-weekend rotation if she would have contacted the employer by phone or in-person. Mr. Swift did not think texting was professional and wanted her to come in or call to discuss her rotation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was not discharged but voluntarily left the employment without good cause attributable to employer. Benefits are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 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 disqualification shall continue 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.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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.

Iowa Admin. Code r. 871-24.26(1) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

Iowa Admin. Code r. 871-24.25(17) 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. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (17) The claimant left because of lack of child care.

Iowa Admin. Code r. 871-24.25(18) 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. However, the claimant has the initial burden to produce evidence

> that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (18) The claimant left because of a dislike of the shift worked.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. *LaGrange v. Iowa Dep't of Job Serv.,* (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. Claimant's argument that she did not quit but was discharged because the employer would not allow her to work the non-weekend rotation during the summer, is not persuasive. On May 18, 2017, claimant began contacting Mr. Swift via text messages about when she would return to work and what rotation she would be on. Mr. Swift told claimant she was on the weekend rotation. Claimant told Mr. Smith the weekend shift did not work for her; however, Mr. Swift, not claimant, had the final authority to determine her schedule. Claimant did not establish that she had an agreement with the employer that she would not work the weekends during the summer of 2017 and she failed to show any substantial change in the contract of hire. June 2017 was still within claimant's six month weekend rotation period that she was assigned to in January 2017. Claimant's six month rotation did not change until July 2017.

Mr. Swift also repeatedly told claimant not to contact him via text message and to either call him or come to the employer to discuss her rotation with him. The store manager's request for claimant to communicate on the phone or in-person was not unreasonable. Mr. Swift attempted to call claimant after she sent him text messages, but she refused to answer when he called. Around May 23, 2017, Mr. Swift told her he would not respond to any more text messages; however, claimant refused to call Mr. Swift or come to the employer to talk to him to discuss her rotation, she continued to only send text messages that the weekend rotation did not work for her. Although the store manager told claimant she was assigned to the weekend rotation and also gave her the opportunity to call him or come to the employer to discuss the rotation in-person, she failed return to work or call Mr. Swift as she had been directed. Claimant also failed to return to the employer after she was released to return to work by her doctor on June 1, 2017. Furthermore, claimant failed to return to work or make arrangements to return to work within three days after having been notified that her leave of absence was over.

Claimant's decision to not return to the employer because she did not agree with the supervisor about the rotation she was assigned was not for a good cause reason attributable to the employer. Claimant's failure to return to work due to child care issues was also not for a good cause reason attributable to the employer. Finally, claimant's failure to return to the employer after her leave of absence ended and she was directed to return renders the separation job abandonment without good cause attributable to the employer. While claimant's leaving the employment may have been based upon good personal reasons, it was not for a good-cause reason attributable to the employer according to Iowa law. Benefits must be denied.

DECISION:

The July 20, 2017, (reference 02) unemployment insurance decision is affirmed. Claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs