

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARY A MOSHER

Claimant

APPEAL NO. 10A-UI-09837-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 05/09/10

Claimant: Respondent (1)

Section 96.5-2-A – Misconduct
Section 96.5-1 – Voluntary Quit

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated June 28, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 24, 2010. Claimant participated. Employer participated by Brian Egli, Market Health and Wellness Director. The record consists of the testimony of Mary Mosher and the testimony of Brian Egli.

ISSUE:

Whether the claimant voluntarily left for good cause attributable to the employer.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was employed as a pharmacist at the Wal-Mart store located in Marion, Iowa. She began her employment as a pharmacy intern on May 15, 2005. She obtained her pharmacist license on August 30, 2007, and then worked as a full-time pharmacist. She notified her employer on March 22, 2010, that she was resigning. Her last day of work was March 24, 2010.

The immediate events that led up to the claimant's resignation began on March 14, 2010. There are three steps in the employer's procedures concerning the filling of prescriptions. A pharmacist first does what is known as a four point check. In the four point check, the pharmacist verifies the strength; dose; drug; and patient name. The actual medication is then retrieved by a technician and placed in the bottle. A pharmacist then does what is called a visual, which means that the pharmacist opens the bottle and empties the medication into the lid to be certain that the correct drug has been put in the bottle. If a pharmacist makes a mistake during the four point check or a visual, an error is assigned. Termination results when a pharmacist gets a certain number of errors.

The claimant had an error on March 14, 2010. She was having difficulty with a prescription during the four point check and there had been a lot of back and forth on how to properly fill that prescription. It came time for the claimant to go on break and as she was leaving, she told the

other pharmacist to review the prescription to make certain it was correct. That pharmacist did not review the prescription and it was given to the patient with an incorrect dosage. Since the claimant had been the pharmacist assigned to the four point check, she was given the error. The claimant had another error on March 18, 2010, but she was never informed on the exact nature of the error. The claimant knew that with this error she would be terminated. She elected to resign instead of being terminated.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.26(21) 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:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

Although the claimant did resign her position, she did so rather than be terminated by the employer. If an employee quits in lieu of termination, the claimant is not considered to have voluntarily quit her employment. Rather the separation is characterized as a discharge and a determination must be made on whether the claimant was discharged for misconduct.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes negligence in isolated situations and unsatisfactory performance. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988),. The employer has the burden of proof to show misconduct.

The administrative law judge fully recognizes that errors made by pharmacists in filling prescriptions can be very serious and that the employer has a material interest in insuring that prescriptions are accurately dispensed. The employer can reasonably expect that pharmacists will follow procedures designed to minimize the occurrence of errors. The difficulty in this case is that there is insufficient evidence concerning the final error on March 18, 2010. The claimant knew that she had been given an error for something that happened on March 18, 2010, and that this error would lead to her termination. She testified that she was never told what the error was and Mr. Egli, the employer's witness, had no direct knowledge about the error either. He could only say it was a "visual" error.

The employer has the burden of proof to show misconduct. Absent more definitive evidence on the nature of the error and how it occurred, the administrative law judge cannot determine whether there was a final act of misconduct that would lead to disqualification. Accordingly, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 28, 2010, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css