

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHELLY R GROVER
Claimant

APPEAL NO: 08A-UI-01024-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 12/16/07 R: 03
Claimant: Respondent (5)

Section 96.4-3 – Able and Available
871 IAC 24.23(10) – Leave of Absence

STATEMENT OF THE CASE:

Tyson Prepared Foods, Inc. (employer) appealed a representative's January 17, 2008 decision (reference 02) that concluded Shelly R. Grover (claimant) was qualified to receive unemployment insurance benefits in connection with her employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 13, 2008. The claimant participated in the hearing and was represented by Gary Nelson, attorney at law. Ron Wood appeared on the employer's behalf. During the hearing, Claimant's Exhibits A through D were entered into evidence. Based on the evidence, the arguments of the parties, 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? Was there a period of voluntary unemployment through a leave of absence?

FINDINGS OF FACT:

The claimant started working for the employer on July 1, 2004. She worked full time as a cooker and production team member in the employer's Waterloo, Iowa meat processing facility. Her last day of work was on or about October 15, 2007.

The claimant suffered a work-related injury to her shoulder on November 16, 2006. She received care under the employer's workers' compensation program for shoulder, neck, and back pain. During her treatment phase, after a brief period of time completely off work, she did return to work with the employer in some light duty positions. She was released from direct medical care as of July 5, 2007 as the physician provided through the employer's workers' compensation concluded that she was at maximum medical improvement (MMI). However, on July 11 the same doctor placed the claimant on renewed restrictions for three additional months: no repetitive use of the right shoulder, no work at or above shoulder level on the right, limit pushing, pulling and reaching on the right. The same doctor had previously also recommended that the claimant work in a warm environment. That recommendation was subsequently

reiterated by two other doctors, as a cold environment tended to aggravate the claimant's symptoms.

The claimant continued to suffer shoulder, neck, and back pain when she was returned to work under the July 11 restrictions. The employer's workplace temperature is normally in the mid- to upper-40s (degrees Fahrenheit). The recommendation for a warm environment was for a workplace in the vicinity of 70 degrees. The employer did not have any work available for the claimant in an area that was in the 70s rather than in the 40s. As she continued to have problems and as the employer could not provide the work in a warm environment, as of October 16 the claimant concluded that she could not continue to work in the employer's regular workplace. She was placed on a leave of absence status with the employer for up to a year so that if work with the employer in a warm environment became available during that time, she would be eligible to be placed into that position. The claimant remains able to perform duties such as would be available in a warm work environment, such as clerical or sales positions, for which she has been making application.

REASONING AND CONCLUSIONS OF LAW:

The underlying issue in this case is whether the claimant is eligible for unemployment insurance benefits by being able and available for employment.

Iowa Code § 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 24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

Normally persons on a leave of absence are not eligible for unemployment insurance benefits because it is deemed to be a "voluntary" period of unemployment. Here, the claimant is on a leave of absence not truly of her own volition, but because the employer is unwilling or unable to provide a warm work environment as recommended by her doctors in order to avoid workplace aggravation of her symptoms. If the claimant had quit outright as a result of the employer's inability to provide her with the warm work environment as recommended, the separation would have been attributable to the employer and non-disqualifying to the claimant under Iowa Code § 96.5-1-d and 871 IAC 24.26(6). Under the circumstances of this case, the fact that the claimant was placed into a leave status of up to a year, thereby creating what is in essence a

temporary separation that could become a permanent separation in a year, cannot result in a different outcome.

Since the claimant is in a period of non-voluntary unemployment and has suffered an at least temporary separation from employment with the employer due to a work-related condition, she need not be fully "recovered" in order to be eligible for unemployment insurance benefits. Hedges v. Iowa Department of Job Service, 368 N.W.2d 862 (Iowa App. 1985). Rather, she need only 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 she is able to work in some gainful employment. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's January 17, 2008 decision (reference 02) is affirmed as modified with no affect on the parties. The claimant is able and available for work effective as of the effective date of her claim December 16, 2007; the period of temporary separation which began October 16, 2007 was not truly "voluntary" and was for good cause attributable to the employer. Benefits are allowed, if the claimant is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs