

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**MICHELL N BERRY**  
Claimant

**BURLINGTON CARE CENTER INC**  
Employer

**APPEAL 18A-UI-02666-JP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 01/28/18**  
**Claimant: Appellant (1)**

---

Iowa Code § 96.4(3) – Ability to and Availability for Work  
Iowa Admin. Code r. 871-24.23(10) – Availability Disqualifications – Leave of Absence

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the February 22, 2018, (reference 01) unemployment insurance decision that denied benefits as of January 28, 2018. The parties were properly notified about the hearing. A telephone hearing was held on March 26, 2018. Claimant participated. Employer participated through director of nursing Sharon Annegers. Official notice was taken of the administrative record with no objection.

**ISSUES:**

Is the claimant able to work and available for work effective January 28, 2018?

Is the claimant on an approved leave of absence?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was hired on October 5, 2005 as a full-time CNA (certified nurse's aide). Claimant is still employed with the employer.

Claimant normally works eight hours per shift for the employer; however, if claimant is working on the floor, the employer can mandate her to work four hours of overtime at the end of her shift. If claimant is on light duty, she does not work on the floor. Claimant's normal job duties require her to lift residents in and out of bed. Claimant needs to be able to lift more than twenty pounds to perform her normal job duties. A ten or twenty pound weight/lift restriction would require claimant to work on light duty.

On November 23, 2016, claimant had rotator cuff surgery due to a work related injury. Claimant's doctor placed her on a ten pound weight restriction until she had a follow-up MRI. Claimant provided her work restrictions to the employer.

Claimant worked on light duty for the employer until October 3, 2017. On October 3, 2017, claimant's doctor put her on bed rest due to her pregnancy and hypertension. Claimant was on Family and Medical Leave Act (FMLA) leave from October 3, 2017 to January 1, 2018. Approximately a week before Christmas, claimant had a conversation with the interim director of nursing Alisha at the employer's Christmas party. During the conversation, claimant informed Alisha about her upcoming doctor's appointments. Claimant and the employer agreed that she would return to work on February 1, 2018. From January 1, 2018 until February 1, 2018, claimant was on an approved leave of absence.

Around January 11, 2018, claimant's doctor released her to return to work with no restrictions from her pregnancy. Ms. Annegers testified the employer was not aware of this release to return to work. Claimant still had the 2016 ten pound weight restriction due to her rotator cuff surgery in place.

On January 12, 2018, claimant had an MRI due to a back injury/issue that was causing her pain. Claimant has not filed a work compensation claim about her back injury/issue.

On January 17, 2018, claimant had a follow-up MRI on her rotator cuff injury. On January 25, 2018, claimant met with her doctor about the January 17, 2018 MRI results. Claimant's doctor released her to return to work from her rotator cuff injury with no work restrictions. Claimant was advised that if there were any complications she was to return to her doctor. Claimant provided the January 25, 2018 doctor's note to the employer around January 27 or 28, 2018.

On January 26, 2018, claimant met with her Iowa City doctor regarding the January 12, 2018 MRI for her back injury/issue. On January 26, 2018, claimant's doctor gave her a twenty pound weight/lift restriction due to her back injury/issue. Claimant provided the January 26, 2018 doctor's note to the employer around January 27 or 28, 2018.

On January 29, 2018, the employer discovered claimant's three doctor's notes (dated: January 25, 2018, January 26, 2018, and January 30, 2018) releasing her to return to work. The employer received the doctor's note dated January 25, 2018 from claimant's orthopedic surgeon that released her to return to work with no restrictions from her rotator cuff injury as of January 25, 2018. The January 25, 2018 doctor's note removed her previous ten pound weight restriction from 2016. The employer also received a doctor's note dated January 26, 2018 from claimant's doctor in Iowa City, which released to her returned to work with a twenty pound lifting restriction. The January 26, 2018 doctor's note did not mention it was due to a back injury/issue. The employer did not discover the January 26, 2018 work restriction was due to claimant's back injury/issue until a phone call later on January 29, 2018. The employer also received a doctor's note dated January 30, 2018 from claimant's primary doctor that she may return to work with an eight hour per day work restriction. The January 30, 2018 hour work restriction did not mention it was due to claimant's hypertension issue. The employer did not discover the January 30, 2018 work restriction was due to claimant's hypertension issue until a phone call later on January 29, 2018.

On January 29, 2018, Alisha called claimant and they discussed her work restrictions. Alisha told claimant she would have to contact corporate because of claimant's work restrictions. The January 29, 2018 phone call was the first time the employer became aware of claimant's back injury/issue. The employer is not aware of any injury report or work compensation claim by claimant regarding her back injury/issue. Claimant never told the employer her back injury/issue was work related.

Later on January 29, 2018, Leslie, the business office manager, called claimant. Leslie told claimant not to return to work on February 2, 2018; February 2, 2018 was the first day the employer had scheduled claimant for work since her leave of absence. Leslie told claimant not to come to work until someone from the employer calls her back.

On January 31, 2018, Alisha informed claimant that corporate would not allow her to return to work due to her twenty pound lifting restriction. On February 6, 2018, claimant called Alisha and wanted to know the status of her employment. Alisha told claimant she was still a full-time employee. The employer considers claimant to be on a personal medical leave of absence. The employer does not have light duty available for claimant at this time. The employer does have work available for claimant if she has no work restrictions.

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

For the reasons that follow, the administrative law judge concludes that claimant is not able to work and available for work effective January 28, 2018. Benefits are denied.

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".

Iowa Admin. Code r. 871-24.22(1)a provides:

**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.

Iowa Admin. Code r. 871-24.22(2) provides:

**Benefit 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.

**(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.

Iowa Admin. Code r. 871-24.23(35) provides:

**Availability disqualifications.** The following are reasons for a claimant being disqualified for being unavailable for work.

**(35)** Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

Iowa Admin. Code r. 871-24.22(2)(1) and (2) provides:

**Benefit 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.

**(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.

*j.* Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

Iowa Admin. Code r. 871-24.23(10) provides:

**Availability disqualifications.** The following are reasons for a claimant being disqualified for being unavailable for work.

**(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.

To be 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); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

Prior to October 3, 2017, the employer provided claimant light duty work due to a work related injury. On October 3, 2017, claimant went on FMLA leave because she was placed on bed rest due to her pregnancy and hypertension. Claimant's FMLA leave expired on January 1, 2018. Prior to January 1, 2018, claimant requested and was given a leave of absence for the period from January 1, 2018 to February 1, 2018, because of her medical appointments. On January 25, 2018, claimant was released to return to work with no restrictions from her work related rotator cuff injury. On January 30, 2018, claimant was also released to return to work with only an eight hour work day restriction due to her non-work related hypertension. However, on January 26, 2018, claimant's doctor in Iowa City placed her on a twenty pound lifting restriction due to a back injury/issue. Claimant testified that she has not filed a work compensation claim for this injury/issue. Ms. Annegers credibly testified claimant did not file an injury report or work compensation claim due to a back injury/issue. Claimant has failed to establish her back injury/issue, which resulted in the January 26, 2018 work restriction, was due to a work related injury. While claimant may be able to perform light work duties, the employer is not obligated to accommodate a non-work related medical condition, and since she has not been released to perform her full work duties, she is not considered able to or available for work effective January 28, 2018. Accordingly, benefits are denied.

**DECISION:**

The February 22, 2018, (reference 01) decision is affirmed. Claimant is not able to work and available for work effective January 28, 2018. Benefits are withheld until such time as claimant obtains a full medical release to return to work, offers her services to the employer, and no suitable, comparable work is available considering reasonable accommodation; or if she is involuntarily separated before that time.

---

Jeremy Peterson  
Administrative Law Judge

---

Decision Dated and Mailed

jp/rvs

**NOTE TO EMPLOYER:**

If you wish to change the address of record, please access your account at:

<https://www.myiowau.org/UITIPTaxWeb/>.

Helpful information about using this site may be found at:

<http://www.iowaworkforce.org/ui/uiemployers.htm> and

[http://www.youtube.com/watch?v=\\_mpCM8FGQoY](http://www.youtube.com/watch?v=_mpCM8FGQoY)