

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHNSON, DEBRA, F
Claimant

APPEAL NO. 13A-UI-04571-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLEN MEMORIAL HOSPITAL
Employer

**OC: 03/24/13
Claimant: Appellant (1)**

Iowa Code Section 96.4(3) – Able and Available

STATEMENT OF THE CASE:

Deborah Johnson filed a timely appeal from the April 11, 2013, reference 03, decision that denied benefits effective March 24, 2013 based on an agency conclusion that she was not able to perform work and therefore did not meet the availability requirements of the law. After due notice was issued, a hearing was held on May 23, 2013 Ms. Johnson participated. Jill Grover represented the employer. The hearing in this matter was consolidated with the hearing in appeal number 13A-UI-04570-JTT. Exhibits A, B and C were received into evidence.

ISSUE:

Whether Ms. Johnson has been able to work and available for work said she established the claim for benefits that was effective March 24, 2013.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Deborah Johnson was employed by Allen Memorial Hospital as a part-time materials distribution technician (supply clerk) from 1993 and last performed work for the employer on January 9, 2013. On January 10, 2013, Ms. Johnson broke her ankle and tibia in an accident that occurred at home and at a time when she was off-duty. Ms. Johnson knew that she was scheduled to work on January 11, 2013. Tammie Cole, Manager of Distribution, was Ms. Johnson's immediate supervisor. Ms. Johnson notified Ms. Cole of her injury and of her need for time off to undergo surgery. Ms. Cole approved the absence and asked for an update regarding the surgery.

Ms. Johnson underwent surgery on January 15, 2013. The surgery involved placement of a metal plate and five screws. Ms. Johnson was in contact with Ms. Cole before and after the surgery. The employer notified Ms. Johnson that she was not eligible for leave under the Family and Medical Leave Act. The employer nonetheless approved Ms. Johnson for a 30-day non-FMLA "personal leave" of absence effective January 11, 2013. Ms. Johnson provided the employer with appropriate medical certification materials to support her need for the leave of absence.

On January 28, 2013, Ms. Johnson had her first post-surgery follow-up appointment with the orthopedic surgeon, who kept her off work at that time.

On February 5, the employer received a medical release from Ms. Johnson's doctor that indicated she was released effective February 11, 2013 to perform light-duty sedentary work. Ms. Johnson's regular duties did not include sedentary work. The employer notified Ms. Johnson that the employer did not have light-duty sedentary work for her.

On February 15, Jill Grover, Human Resources Business Partner, sent Ms. Johnson a letter dated February 15, 2013. The letter stated as follows.

You have exhausted the 30 day entitlement under a Personal Leave with a job guarantee on 2/9/2013. We are extending our personal leave until your next evaluation with Dr. Gorsche on February 18, 2013. We would like to review your work status provided at that time by your physician to determine if we can accommodate your restrictions.

Please have the enclosed Return to Work/Fitness for Duty form (enclosed) completed by your physician and fax to Allen's Human Resources ...

Please feel free to contact me at ... with any questions or updates regarding your leave.

On February 19, the employer received the Return to Work form back from Ms. Johnson's physician. The document indicated that Ms. Johnson was released to perform light-duty sedentary work for four to six weeks.

On February 21, Ms. Grover sent Ms. Johnson a letter dated February 21, 2013. The letter states as follows:

Human Resources has received a return to work form which indicates you have restrictions. Unfortunately, your department is unable to accommodate these restrictions; therefore, you will not be able to return to work.

Since you have exhausted the 30 day entitlement under a Personal Leave with a job guarantee on 2/9/2013, your employment is now in active and your job is no longer protected and may be filled, based upon company need.

You will need to have a Return to Work/Fitness for Duty form (enclosed) completed by your attending health care provider before you can apply for any currently posted position that you are qualified to apply for.

Since you are considered inactive, your benefits will end on 2/28 2013. You will be mailed COBRA paperwork at that time.

Please feel free to contact me at... with any questions or updates regarding your leave.

At no time did Ms. Johnson notify the employer that she intended to quit the employment. Ms. Johnson had at all times hoped to return to her employment at Allen Memorial Hospital when she was released by her doctor to return without restrictions, since the employer would not allow her to return with restrictions. At the time the employer elected to call the employment done, Ms. Johnson was transitioning from a soft cast to a walking boot and getting ready to start physical therapy. Ms. Johnson was still using a walker to help her get around.

Ms. Johnson last saw the orthopedic surgeon on March 11, 2013. At that time, the orthopedist instructed Ms. Johnson to return as needed. Ms. Johnson finished physical therapy on March 22, 2013.

Ms. Johnson established a claim for unemployment insurance benefits that was effective March 24, 2013. At that time, Ms. Johnson still planned to return to her employment at Allen Memorial Hospital if and when the employer would allow her to do that. This was still Ms. Johnson's plan at the time of the May 23, 2013 unemployment insurance appeal hearing. Ms. Johnson has not looked for other employment, even though Allen Memorial Hospital told her that her employment was done on February 21, 2013. Ms. Johnson has set her sights solely on returning to work at Allen Memorial Hospital. Ms. Johnson has not applied for additional positions at Allen Memorial Hospital. A former coworker offered to let her know if there were any openings.

Ms. Johnson has provided no medical documentation. Ms. Johnson cites a lack of insurance as a factor in not returning to see the orthopedist. The last documentation Ms. Johnson received from the orthopedist, a return to work/fitness document dated March 11, 2013, indicated that she would continue to require light-duty sedentary work for a month or more. Ms. Johnson has never been released to return to work without restrictions. Ms. Johnson understandably continues to have problems with her ankle. She uses a cane when she walks. Her foot swells up when she walks. The problem increases if she is on her feet for more than an hour or two at a time.

REASONING AND CONCLUSIONS OF LAW:

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.

Iowa Administrative Code rule 871 IAC 24.23 provides, in relevant part, as follows:

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

24.23(1) An individual who is ill and presently not able to perform work due to illness.

24.23(20) Where availability for work is unduly limited because the claimant is waiting to be recalled to work by a former employer or waiting to go to work for a specific employer and will not consider suitable work with other employers

24.23(27) Failure to report on a claim that a claimant made any effort to find employment will make a claimant ineligible for benefits during the period. Mere registration at the workforce development center does not establish that a claimant is able and available for suitable work. It is essential that such claimant must actively and earnestly seek work.

24.23(34) Where the claimant is not able to work due to personal injury.

24.23(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.

The weight of the evidence in the record establishes that Ms. Johnson has not met the work availability requirement since she established her claim for unemployment insurance benefits. She has not made an active or earnest search for new employment. She has instead decided to wait until she can return to employment with Allen Memorial Hospital. She has not applied for any additional positions at Allen Memorial Hospital. She has continued to have problems with her foot and leg, but has not returned to her doctor, and has not been released to return to work without restrictions. She remains restricted to performing light-duty sedentary work and has not been released by a doctor to do anything else. Based on the availability issue, benefits are denied effective March 24, 2013. The disqualification continued as of the May 23, 2013 appeal hearing. The disqualification will continue in place until Ms. Johnson presents the agency with proof that she is indeed available for work and work referrals, is engaged in an active in earnest

search for new employment, and that she is able to perform work that others perform in the Waterloo-Cedar Falls labor market.

DECISION:

The agency representative's April 11, 2013, reference 03 is affirmed. The claimant has not met the availability requirement since she established her claim for unemployment insurance benefits. Benefits are denied effective March 24, 2013. The disqualification continued as of the May 23, 2013 appeal hearing. The disqualification will continue in place until the claimant presents the agency with proof that she is indeed available for work and work referrals, is engaged in an active in earnest search for new employment, and that she is able to perform work that others perform in the Waterloo-Cedar Falls labor market.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css