

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MALIXANDRA ANES
112 – 3RD AVE SW
BELMOND IA 50421

MIDWEST NORTH IOWA JANITORIAL
SERVICES INC
PO BOX 925
MASON CITY IA 50402-0925

Appeal Number: 04A-UI-10676-RT
OC: 08-29-04 R: 02
Claimant: Appellant (5)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Malixandra Anes, filed a timely appeal from an unemployment insurance decision dated September 21, 2004, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on October 25, 2004, with the claimant participating. Mary Ellen Andolino, Owner, and Dawn E. Kramer, Office Manager, participated in the hearing for the employer, Midwest North Iowa Janitorial Services, Inc. Claimant's Exhibit A was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a full-time janitor from August 17, 2002 until she separated from her employment on September 30, 2004. The claimant was pregnant and met with the employer and asked to have a leave of absence to have her baby. The employer agreed. The claimant said that after the leave of absence which was to begin on August 13, 2004, that she would return to work part-time when she was released by her physician. This was acceptable to the employer. The claimant was to call the employer when she was released by her physician. However, the claimant's last day of work was August 10, 2004. The claimant had her baby on August 18, 2004. On August 19, 2004, the claimant called Dawn E. Kramer, Office Manager and one of the employer's witnesses, about her aunt who was also employed by the employer. Nothing was said at that time about the claimant but only her aunt. At that time the claimant was not released by her physician to return to work. Approximately two weeks later, Ms. Kramer called the claimant and asked the claimant to turn in her keys. This was on or about September 2, 2004. The employer needed the claimant's keys because they were short on keys and since the claimant had not yet returned to work, they needed her keys. Ms. Kramer did not tell the claimant that she was fired or discharged. On September 30, 2004, the claimant was released to return to work as shown by Claimant's Exhibit A. However, the claimant never returned to the employer and offered to go back to work. The claimant has placed no restrictions on her ability to work since being released by her physician nor has she placed any restrictions on her availability for work. The claimant is earnestly and actively seeking work by making two in-person job contacts each week. The claimant filed for unemployment insurance benefits effective August 29, 2004 but has received no unemployment insurance benefits, records showing she is disqualified as a result of not being able and available for work.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant has separated from her employment and if so, whether that separation is a disqualifying event. The claimant has separated from her employment on September 30, 2004 and it was a disqualifying event.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because she is and was at relevant times not able, available, and earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits to September 30, 2004 or through benefit week ending October 2, 2004.

Iowa Code Section 96.5-1 provides:

An individual shall be disqualified for benefits:

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.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant has never separated from her employment since she went on a medical leave,

which was open-ended to last until the claimant was released to return to work by her physician and the employer has not heard from the claimant. The claimant seems to imply that she was discharged. The administrative law judge concludes that the evidence establishes that the claimant actually voluntarily left her employment on September 30, 2004 when she was released by her physician to return to work but did not return to work. The claimant's testimony to the contrary is not credible. The claimant equivocated about much of her testimony finally conceding that she was released by her physician to return to work on September 30, 2004 but filed for benefits effective August 29, 2004, one month before she was released to return to work by her physician. The claimant also finally conceded that she had requested a leave of absence to begin on August 13, 2004 but stopped going to work August 10, 2004. The claimant testified that she spoke to Mary Ellen Andolino, Owner, and one of the employer's witnesses, on August 10, 2004 and Ms. Andolino accused the claimant of not doing her work properly. Ms. Andolino denies any such conversation and the administrative law judge believes that Ms. Andolino's testimony is more credible. The administrative law judge notes that even the claimant does not allege that she was discharged during this telephone call with Ms. Andolino. The claimant then testified that she called and spoke to Dawn E. Kramer, Office Manager, and one of the employer's witnesses on August 19, 2004. This is true insofar as it goes but it only related to the claimant's aunt and had nothing to do with the claimant. The claimant's testimony to the contrary again is not credible. The administrative law judge notes that the claimant called Ms. Kramer just one day after she had delivered her baby on August 18, 2004 and would certainly not be able to return to work that day. Two weeks later the claimant concedes that she got a phone call from Ms. Kramer asking that the claimant return the keys. The claimant does concede that she was never told that she was fired or discharged. The administrative law judge concludes that it is quite reasonable for the employer to ask for the keys from the claimant since they were short keys and the claimant had not yet returned to work. In fact, the claimant had not been released by her physician to return to work. When the claimant was released to return to work on September 30, 2004, she did not do so. Accordingly, the administrative law judge concludes that when the claimant failed to return to work after promising that she would do so when released by her physician, that she left her employment voluntarily. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. There is not a preponderance of the evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental or that she was subjected to a substantial change in her contract of hire. Rather, it appears to the administrative law judge that the employer attempted to accommodate the claimant and all of the claimant's wishes including giving her a leave of absence and allowing her to return part-time whenever it was that she was released by her physician. The administrative law judge also notes that there is no evidence that the claimant ever expressed any concerns to the employer about her working conditions or indicated or announced an intention to quit prior to her quit. Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant voluntarily left her employment on September 30, 2004 and, as a consequence, she is disqualified to receive unemployment insurance benefits from and after September 30, 2004 or from and after benefit week ending October 2, 2004. Unemployment insurance benefits are denied to the claimant from and after September 30, 2004 for benefit week ending October 2, 2004, and continuing thereafter until or unless the claimant requalifies to receive such benefits.

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 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.

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she is and was able and available for work through September 30, 2004 or benefit week ending October 2, 2004. Eventually, the claimant testified that she was not released by her physician to return to work following her pregnancy until September 30, 2004 and this is confirmed by the Claimant's Exhibit A. Accordingly, the administrative law judge concludes that the claimant was not able and available for work until September 30, 2004 and is ineligible to receive unemployment insurance benefits until September 30, 2004 or ineligible to receive unemployment insurance benefits through October 2, 2004. The claimant has failed to demonstrate by a preponderance of the evidence that she is either temporarily unemployed or partially unemployed under Iowa Code section 96.19(38)(b) and (c), so as to be excused from the requirement that she be able and available for work. Accordingly, the administrative law judge concludes that the claimant was not able and available for work through September 30, 2004 or through benefit week ending October 2, 2004 and is ineligible to receive unemployment insurance benefits during that time. As noted above, the administrative law judge concludes that the claimant is

disqualified to receive unemployment insurance benefits beginning with benefit week ending October 2, 2004 and continuing thereafter until or unless she requalifies for such benefits.

DECISION:

The representative's decision of September 21, 2004, reference 01, is modified. The claimant, Malixandra Anes, is not entitled to receive unemployment insurance benefits, beginning on August 29, 2004 and continuing thereafter, until or unless she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer on September 30, 2004 or benefit week ending October 2, 2004 and further was not able and available for work and would be ineligible to receive unemployment insurance benefits to September 30, 2004 or benefit week ending October 2, 2004 for that reason.

pjs/kjf