

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MISTY G WHIPPLE
Claimant

APPEAL NO: 17A-UI-09177-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

VON MAUR INC
Employer

OC: 08/13/17
Claimant: Appellant (2)

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 31, 2017, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 26, 2017. The claimant participated in the hearing. The employer did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

ISSUE:

The issue is whether the claimant is able and available for work.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time sales clerk for Von Maur from August 15, 2016 to August 17, 2017. The claimant has severe back pain from two bulging discs with a possible tear and possible nerve damage that affects her hand and wrist. Standing on her feet at Von Maur for eight hours at a time aggravated her back problem and it worsened after May 10, 2017. The employer terminated the claimant's employment August 17, 2017.

The claimant's physician released her with the following restrictions effective August 18, 2017: part-time employment where she would be able to sit down for 30 minute increments followed by a period of walking for 10 minutes; no lifting more than 10 pounds; and, due to her medication, no operation of heavy machinery.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work

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".

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.

While the claimant cannot perform the type of retail sales work she did for Von Maur because of the standing required of that position, she is able to perform work in an office setting. In order to be considered able and available for work, the claimant must be able to perform some type of work, not necessarily the type of work she most recently performed. The claimant is able to meet that requirement with her restrictions. Accordingly, the claimant is able and available for work effective August 17, 2017. Because she was not able and available until Thursday, August 17, 2017, after the majority of the work week was over, she is eligible to begin receiving benefits the week ending August 26, 2017. Therefore, benefits are allowed.

DECISION:

The August 31, 2017, reference 02, decision is reversed. The claimant is able to work and available for work effective the week ending August 26, 2017. Benefits are allowed.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn