

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANE M THOMPSON

Claimant

APPEAL NO. 08A-UI-08976-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CAMPBELL'S NUTRITION CENTERS INC

Employer

**OC: 07/20/08 R: 02
Claimant: Respondent (4)**

Section 96.4-3 - Able to and Available for Work
Section 96.3-7 - Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated September 25, 2008, reference 01, that concluded she was able to and available for work. A telephone hearing was held on October 30, 2008. The parties were properly notified about the hearing. The claimant participated in the hearing with her representatives, Michael Carroll and David Goldman, and a witness, Michael Mintzer, M.D. Melanie Gibb and Diane Lahodny participated in the hearing on behalf of the employer with a witness, Jenny Gradowski. Exhibits A through D were admitted into evidence at the hearing.

ISSUE:

Was the claimant able to and available for work?
Was the claimant overpaid unemployment insurance benefits?

FINDINGS OF FACT:

The claimant worked full time for the employer as a cashier from February 5, 2005, to June 26, 2008. She was pregnant and her due date was September 24, 2008.

In June 2008, the claimant began experiencing problems with lower back pain, which was complicated by the fact that she suffers from spina bifida. She contacted her treating obstetrician, Michael Mintzer, M.D., about her medical problems on June 26, 2008. Dr. Mintzer provided the claimant with a medical statement stating that she had a weight restriction of five to ten pounds and requesting that she allowed to sit down during her workday.

The claimant reported to work on June 26 and submitted the doctor's statement to the employer. The owner, Diane Lohodney, and the director of operations, Jennifer Gradowski, met with the claimant about the cashier job requirements and her restrictions. The cashier job description states the cashiers were required to operate the cash register for up to four hours at a time and to lift five to twenty pounds. Lohodney and Gradowski informed the claimant that she would not be allowed to work until she was released by her doctor without any restrictions

and her job would remain open for up to six weeks after the birth of her baby. The claimant was sent home by the employer.

At the beginning of July 2008, Mintzer faxed a statement to the employer stating that the claimant was fully able to be at work 40 hours per week without restrictions, but he requested the accommodation of allowing her to have a chair at the register to sit down as needed due to edema in her lower legs and lower back issues. Around the same time, the claimant wrote a letter to Lohodney requesting an accommodation of having a suitable chair available behind the register so that she could sit when necessary. She indicated that her lifting restriction would not affect her ability to do her job as other employees had handled heavy items in the past. She stated that she would be returning to work on July 8 and requested that the accommodation be in place.

When the claimant reported to work on July 8, she was again sent home and was given the cashier job description to provide to her doctor. The doctor was required to sign a statement certifying that the claimant was able to perform all of her job duties without restrictions and that lifting five to twenty pounds and standing for extended periods of time would not jeopardize her pregnancy or put her or her pregnancy at increased risk. The claimant provided the statement to Mintzer, but he did not sign the statement because it conflicted with the claimant's weight restriction and accommodation request.

The claimant was able to work until September 18, 2008, when her baby was born. As of September 18, 2008, the claimant was unable to work until she was released to return to work without restrictions on October 28, 2008. The claimant is willing to return to work and has offered to return to work.

The claimant filed a new claim for unemployment insurance benefits with an effective date of July 20, 2008. She filed weekly claims for unemployment insurance benefits through the week ending September 27, 2008. She was paid \$282.00 in unemployment insurance benefits for the week ending September 27, 2008.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law provides for a disqualification for claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5-1 and 96.5-2-a.

There is no evidence the claimant quit her job or was discharged for work-connected misconduct. I recognize that Iowa Code § 96.5-1 provides a disqualification for individuals who voluntarily quit employment and Iowa Code § 96.5-1-d operates as an exception to that rule for individuals who voluntarily leave employment due to pregnancy under certain circumstances. To voluntarily quit, however, means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship and chooses to leave employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989); Peck v. Employment Appeal Board, 492 N.W.2d 438, 440 (Iowa App. 1992). In this case, the claimant never quit employment or intended to leave her job. She desired to continue to work, but the employer would not allow her to work.

This case is like Wills v. Employment Appeal Board, 447 N.W.2d 137 (Iowa 1989), in which the Supreme Court considered the situation of a pregnant certified nursing assistant who went to her employer with a physician's release limiting her to lifting no more than 25 pounds. Wills filed

a claim for benefits after the employer did not let her work because of its policy of never providing light-duty work. The Supreme Court ruled that Wills became unemployed involuntarily and was able to work because the weight restriction did not preclude her from performing other jobs available in the labor market.

The next issue is whether the claimant was able to and available for work as required by Iowa Code § 96-4-3. The unemployment insurance rules provide that a person must be physically able to work, not necessarily in the individual's customary occupation, but in some reasonably suitable, comparable, gainful, full-time endeavor that is generally available in the labor market. 871 IAC 24.22(1)b. The evidence establishes that the claimant was able to perform gainful full-time work, just not work that requires lifting of over ten pounds or extended standing. There are unquestionably jobs available in the labor market meeting such restrictions, and the claimant has shown she was available for such work and in fact could have continued in her job as a cashier with the employer with minimal accommodation.

The rules further provide that a claimant is considered unavailable for work if the claimant requested and was granted a leave of absence, since the period is deemed a period of voluntary unemployment. 871 IAC 23(10). In this case, however, the claimant did not request the leave of absence, she was involuntarily placed on leave by the employer so that she cannot be considered to have been voluntarily unemployed.

The rules require a claimant be available to work for a majority of the work week (871 IAC 24.22(2)h). The claimant was available for work for the majority of the week ending September 20, 2008. She was not available for work for the week ending September 27, 2008, due to the birth of her child.

The unemployment insurance law requires benefits to be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The claimant was, therefore, overpaid \$282.00 in unemployment insurance benefits for the week ending September 27, 2008.

DECISION:

The unemployment insurance decision dated September 25, 2008, reference 01, is modified. The claimant is qualified to receive unemployment insurance benefits through the week ending September 20, 2008. She is ineligible for benefits effective September 21, 2008, and continuing until she reopens her claim for benefits and provides proof that she is able to work to the

Agency. The claimant was overpaid \$282.00 in unemployment insurance benefits, which must be repaid.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css