

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

TAMARA A GAVIN-FREEMAN  
PO BOX 715  
CLEAR LAKE IA 50428

WILLOW POINTE RESIDENCES LLC  
17396 KINGBIRD AVE  
MASON CITY IA 50401-9251

Appeal Number: 04A-UI-09454-DT  
OC: 05/23/04 R: 02  
Claimant: Appellant (4)

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.4-3 – Able and Available  
871 IAC 24.22(2)j – Leave of Absence

STATEMENT OF THE CASE:

Tamara A. Gavin-Freeman (claimant) appealed a representative's August 27, 2004 decision (reference 03) that concluded she was not qualified to receive unemployment insurance benefits in connection with Willow Pointe Residences, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 27, 2004. This appeal was consolidated for hearing with one related appeal, 04A-UI-09455-DT. The claimant participated in the hearing. Rick Burke appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

#### FINDINGS OF FACT:

After a prior period of employment with the employer, the claimant most recently started working for the employer on August 23, 2003. She worked part time (approximately 24 to 32 hours per week) as a resident assistant in the employer's assisted living facility. Beginning in late May 2003, the claimant's hours were reduced due to low census, and she established an unemployment insurance benefit year effective May 23, 2004. She filed weekly claims seeking partial benefits based upon her reduction in hours. She worked through July 6, 2004. She called off work after that date due to a medical condition. She had a minor medical procedure on July 9, and remained off work pending a surgery on July 30. Her doctor told her she could return to work as soon as she felt comfortable, and she did go to paid training for a temporary job with another employer the week of August 1.

On July 30, prior to the surgery, the claimant notified the employer that she would remain unavailable even after her release because she was going to work another temporary job for up to a couple months. However, on or about September 13 the claimant contacted the employer about ending her leave early and returning to work. She did return to work with the employer on September 16, 2004.

#### REASONING AND CONCLUSIONS OF LAW:

The underlying issue in this case is whether the claimant is eligible for unemployment insurance benefits by being able and available for employment.

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, (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.

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.

871 IAC 24.23(1) provides:

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

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

The claimant's unemployment after July 6 was due to her being on a leave of absence, first due to medical reasons, and subsequently due to being otherwise occupied. She is not eligible for unemployment insurance benefits during that period

A related issue in this case is whether the period of time in which the claimant has been off work should be treated as a temporary voluntary quit for good cause attributable to the employer.

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 claimant did express her intent to be off work for the specified period of time. 871 IAC 24.25. The claimant would be disqualified for unemployment insurance benefits unless she was voluntarily off work for good cause attributable to the employer and was otherwise able

and available for work. The claimant has the burden of proving that the voluntary separation was for a good cause that would not disqualify her. Iowa Code section 96.6-2. Her reasons were good personal reasons, but were not attributable to the employer. 871 IAC 24.25(20). The claimant has not satisfied her burden. Accordingly, the temporary separation was voluntary and without good cause attributable to the employer and benefits during the period must be denied.

DECISION:

The representative's August 27, 2004 decision (reference 03) is modified in favor of the claimant. The claimant was not able and available for work effective the week ending July 10, 2004 through the week ending September 18, 2004; the period of temporary separation was voluntary without good cause attributable to the employer. The claimant is not qualified to receive unemployment insurance benefits for the weeks ending July 10, 2004 through September 18, 2004. The requirement of a ten times requalification does not apply should the claimant become otherwise eligible for full or partial unemployment insurance benefits after her return to employment with the employer as of September 16, 2004.

ld/b