

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMIE J HAGEN
Claimant

APPEAL NO. 17A-UI-00665-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

3M COMPANY
Employer

OC: 12/04/16
Claimant: Appellant (5/R)

Iowa Code section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Jamie Hagen filed a timely appeal from the January 12, 2017, reference 01, decision that denied benefits effective December 4, 2016, based on the claims deputy's conclusion that Mr. Hagen was on a leave of absence, was voluntarily unemployed and, therefore, could not be deemed available for work. After due notice was issued, a hearing was held on February 9, 2017. Mr. Hagen participated and presented additional testimony through Scott Lyon. The employer provided written notice that it was waiving participation in the hearing. Exhibits A through I were received into evidence. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant and of his weekly benefit claims.

ISSUES:

Whether the claimant has been able to work and available for work since establishing his claim for benefits.

Whether the claimant has been on a leave of absence that he requested and that employer approved.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jamie Hagen began his employment with 3M Company in 2010 and last performed work for the employer on or about August 28, 2016. Throughout the employment Mr. Hagen worked as a full-time, third-shift fork lift/order filler operator. In 2011, Mr. Hagen was diagnosed with chronic fatigue syndrome. After an extended absence in 2011 during which Mr. Hagen underwent medical tests and received his diagnosis, Mr. Hagen returned to perform his regular duties with reasonable accommodation from the employer. For the last several years, the employer approved intermittent leave under the Family and Medical Leave Act for those times when Mr. Hagen's medical condition flared and he needed to be off work for up to a few days. Mr. Hagen exhausted his most recent FMLA leave approval in July 2016. On or about August 16, 2016, Mr. Hagen opened a "job accommodation request" through the employer's third-party leave administrator, Sedgwick. Through the job accommodation request, Mr. Hagen

asked for the same reasonable accommodations the employer had provided during the preceding years as FMLA intermittent leave. On August 28, 2016, the employer's on-site nurse notified Mr. Hagen that Mr. Hagen was being placed on a paid administrative leave "until they figure out the job accommodation request." Mr. Hagen continued on the paid administrative leave until September 28, 2016, when Sedgwick denied the job accommodation request.

On September 28, 2016, the 3M on-site nurse telephoned Mr. Hagen and told him he could not return to work until he was cured and no longer symptomatic. The nurse told Mr. Hagen that he should see different doctors and try different treatments, such as acupuncture. Mr. Hagen explained that he had already sought treatment from Mayo Clinic and that his medical condition was a chronic condition. The nurse suggested that Mr. Hagen direct further questions to the 3M human resources representative. Mr. Hagen immediately contacted the 3M human resources representative and was advised to apply for short-term disability benefits. Sedgwick subsequently denied Mr. Hagen's application for short-term disability benefits.

In October 2016, Ms. Hagen applied for and interviewed for another position with 3M that would meet his medical restrictions. The employer did not choose Mr. Hagen for the position.

In November 2016, Mr. Hagen enlisted the assistance of Scott Lyon, an attorney with Disability Rights Iowa. Since that time, Mr. Lyon and Mr. Hagen had continued discussion with the employer with the goal of returning Mr. Hagen to the employment. As of the date of the unemployment insurance appeal hearing, Mr. Lyon and Mr. Hagen believed they were nearing an agreement with the employer to restore Ms. Hagen to his employment.

Mr. Hagen established a claim for unemployment insurance benefits that was effective December 4, 2016. Since that time, Mr. Hagen has not applied for work and has instead focused his efforts on returning to the employment at 3M. As of February 7, 2017, Mr. Hagen's unemployment insurance claim had been active for 10 weeks.

James McGuire, P.A. provides medical care to Mr. Hagen for chronic fatigue syndrome. On December 20, 2016, P.A. McGuire provided Mr. Hagen with a medical excuse document that sets forth Mr. Hagen's medical restrictions as follows:

This patient has been under my care for chronic fatigue syndrome and anxiety since September 2011. These episodes are recurrent but of short duration and do not cause any permanent disability. He has no work restrictions what-so-ever when his is not having symptoms. When he does have the onset of an episode of dizziness, he is aware of this developing 30 to 60 minutes prior to the onset of any significant symptoms. He would need to be restricted from the use of machinery when the symptoms become active but not at any other time.

On January 31, 2017, Dr. Betsy Buehrer, D.O., sent a letter to James McGuire, P.A., as a proposed memorialization of their telephone discussion on January 27, 2016 regarding Mr. Hagen's medical condition. Dr. Buehrer signed the copy of the document that was submitted for the unemployment insurance appeal hearing, but P.A. McGuire has not. Dr. Buehrer is an occupational medicine physician employed by 3M. P.A. McGuire is Mr. Hagen's primary medical provider. Dr. Buehrer wrote, in relevant part, as follows:

You indicated fatigue is an ongoing symptom associated with Mr. Hagen's chronic fatigue syndrome. Mr. Hagen experiences fatigue 50% of the day. The dizziness occurs as isolated episodes. Over the last two years, the episodes of fatigue that limit his ability to use machinery has increased from 1-2 times/year to now 3-4 times/year. The fatigue

does not limit Mr. Hagen as much as the dizziness. When the fatigue is worse, dizziness occurs with a couple of days. He is aware of the onset of an episode of dizziness 30-60 minutes prior to the dizziness becoming more significant. The dizziness will progressively get worse. The duration of the episodes of fatigue and dizziness last 3-5 days. During these episodes of fatigue and dizziness, he would need to be restricted from use of machinery.

I asked about restrictions related to head motion and bending, you indicated that these motions do not [sic] precipitate the dizziness, but rather make the dizziness worse. When Mr. Hagen is not having dizziness, he is able to do these motions. I also asked about working at unprotected heights, you indicated this is a concern when Mr. Hagen is having an episode of dizziness. The restrictions would become more restricted when he had the episodes of dizziness.

Regarding Mr. Hagen's gait or falling, you indicated you have not evaluated Mr. Hagen for ataxia or for sustaining a fall. You reported Mr. Hagen's gait is slow and purposeful. Mr. Hagen does not do vigorous activity and he is not super energetic.

You stated when Mr. Hagen experienced these episodes of fatigue and dizziness outside of work, he would call into work to report he would not be coming into work. If the episodes occurred while at work, he would typically leave work.

REASONING AND CONCLUSIONS OF LAW:

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.

Iowa Admin. Code r. 871-24.22(2) 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.

(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 Admin. Code r. 871-24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

The evidence in the record establishes that Mr. Hagen did not *request* a leave of absence from the employer at or about August 28, 2016, when the onsite nurse told him that he was being placed on paid administrative leave. Nor has Mr. Hagen *requested* a leave of absence since that time. Mr. Hagen has not been on a leave of absence for unemployment insurance purposes since he established the claim for benefits that was effective December 4, 2016.

The remaining question is whether Mr. Hagen has satisfied the requirements that he able to work and available for work each week since he established his claim for unemployment insurance benefits. The weight of the evidence in the record establishes that Mr. Hagen's diagnosis of chronic fatigue syndrome does not prevent him from being able to perform full-time employment with reasonable accommodations. An employer has an obligation to provide reasonable accommodations that would allow an employee to continue in the employment. See *Sierra v. Employment Appeal Board*, 508 N.W. 2d 719 (Iowa 1993). Mr. Hagen demonstrated as recently as August 2016 the ability to perform full-time work at 3M with reasonable accommodations. The employer demonstrated its ability to provide such reasonable accommodations over the multiple years during which Mr. Hagen continued in the employment with the reasonable accommodation of intermittent leave when his chronic medical condition flared. The weight of the evidence indicates that Mr. Hagen has been physically able to perform work other than the work at 3M, with reasonable accommodation of his chronic medical condition, since he established his claim for benefits.

Iowa Administrative Code rule 871-24.1(113) defines a layoff as follows: provides as follows:

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees *and employees placed on unpaid vacations*.

[Emphasis added.]

Iowa Code Section 96.19(38)(c) defines a temporary layoff as follows:

An individual shall be deemed *temporarily unemployed* if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Despite the ongoing discussion between the parties and their legal counsel regarding a potential return to the employment, the evidence in the record indicates that Mr. Hagen has now been involuntarily separated from the employment for five and a half months. That period of involuntary absence from the employment cannot be deemed a *temporary* layoff. By the time Mr. Hagen established the claim for unemployment insurance benefits that was effective December 4, 2016, he had been involuntarily absented from the employment for more than three months. Mr. Hagen has not been temporarily laid off at any point since he established his claim for benefits.

Iowa Admin. Code r. 871-24.23(20) provides:

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

(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.

The weight of the evidence in the record establishes that Mr. Hagen has unduly restricted his availability for work to availability for work only at 3M since he established the claim that was effective December 4, 2016. For that reason, Mr. Hagen has not met the work availability requirement since he established the claim and is not eligible for benefits. Benefits are denied effective December 4, 2016. The availability disqualification continued as of the February 9, 2017 appeal hearing.

This matter is remanded for formal adjudication of the August 28, 2016 separation.

DECISION:

The January 12, 2017, reference 01, decision is modified as follows. The claimant has been able to work since he established the claim that was effective December 4, 2016. Since establishing the claim, the claimant has unduly restricted his availability for work to one employer and, thereby, has not demonstrated that he is available for work within the meaning of the law. The claimant may demonstrate his availability for work in connection with future benefit weeks by commencing an active and earnest search for new employment.

This matter is remanded for formal adjudication of the August 28, 2016 separation and for amendment of the claimant's group code category from group 3, job attached, to group 6, separated.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs