

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

IFRAH ADEN
Claimant

OPTIMAE LIFESERVICES INC
Employer

APPEAL 20A-UI-12859-SN-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/05/20
Claimant: Appellant (1)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(1) - Able to Work - illness, injury or pregnancy
Iowa Admin. Code r. 871-24.23(35) - Availability Disqualifications

STATEMENT OF THE CASE:

On October 19, 2020, the claimant filed an appeal from the October 9, 2020 (reference 01) unemployment insurance decision that denied benefits because he requested and was granted a leave of absence as of April 5, 2020. After due notice was issued, a telephone conference hearing was scheduled to be held on December 9, 2020 at 3:00 p.m. Claimant participated. The employer participated through Regional Human Resource Manager Ida Newquist.

The administrative law judge took official notice of the following administrative records.

ISSUE:

Whether the claimant was able to work, available for work, and actively and earnestly as of April 5, 2020?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked direct support professional for the employer from April 25, 2019 to April 5, 2020. Claimant was terminated on August 22, 2020. Claimant's immediate supervisors were Barbara Harvey and Chyanna Suderock.

On April 5, 2020, claimant presented a doctor's note to Ms. Harvey stating she could not work due to the risks of Covid19 to her pregnancy. Ms. Harvey accepted the doctor's note.

On May 1, 2020, claimant gave a release to return to work to her employer based on the Covid19 precautions the employer put in place. Both parties acknowledge claimant spoke with a supervisor Ms. Harvey on that date. However, claimant alleges she last spoke an agent of the employer on this date because Ms. Harvey treated her in a rude manner and told her that her position had been filled during her absence.

Ms. Newquist alleges the remaining events described below occurred:

On May 9, 2020, Ms. Newquist sent an email to the supervisors that the employer could get her back on the schedule. Ms. Suderock said she had visited with claimant and her doctor did not want her to return to work yet. Ms. Newquist did reach out to the supervisors to verify that we had reviewed all the Covid protocols to put into place, so that she was confident about keeping everyone safe.

On May 20, 2020 Claimant's doctor did not want her to come back until June 20, 2020. Ms. Newquist and claimant spoke on May 20, 2020 with the precautions put in place. According to Ms. Newquist, the challenge was that claimant had inadequate childcare in May 2020.

According to Ms. Newquist, claimant was given two sixteen-hour shifts scheduled on June 27, 2020 and June 28, 2020. Initially, Ms. Newquist said claimant was scheduled these shifts at a location that was different from the one she was working in prior to going on pregnancy leave. When claimant was asked if she had been scheduled these shifts at another location, claimant asked the administrative law judge to specify whether it was at another facility or the one she worked at prior to her leave. Claimant then alleged she never worked at a separate facility. Later in the hearing, Ms. Newquist explained that it must have been at the same facility claimant had previously worked at.

On July 2, 2020, Program Director Lacey Nydle asked claimant why she did not show up to those shifts. Claimant replied she would not return to work and at that time we ended her employment. The employer terminated claimant because she had not showed up for the two sixteen-hour shifts scheduled on June 27, 2020 and June 28, 2020.

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 of April 5, 2020.

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. 871-24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

To be able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

Subsection d of Iowa Code § 96.5(1) provides an exception where:

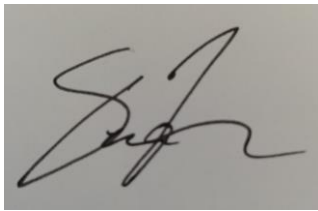
The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and ... the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

The statute specifically requires that the employee has recovered from the illness or injury, and this recovery has been certified by a physician. The exception in section 96.5(1)(d) only applies when an employee is *fully* recovered and the employer has not held open the employee's position. *White*, 487 N.W.2d at 346; *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985); see also *Geiken v. Lutheran Home for the Aged Ass'n.*, 468 N.W.2d 223, 226 (Iowa 1991) (noting the full recovery standard of section 96.5(1)(d)).

The parties agree that the claimant satisfied the first few elements of Iowa Code § 96.5(1)(d) because (1) claimant presented a doctor's note to Ms. Harvey on April 5, 2020, (2) the employer consented to claimant's absence, and (3) claimant returned with a release on May 1, 2020. What is in dispute is whether the employer offered regular or comparable suitable work when claimant returned. Ms. Newquist alleges claimant was scheduled shifts on June 27, 2020 and June 28, 2020. Claimant denies she was placed back on the schedule. The administrative law judge does not find claimant's denial credible because she asked whether she was scheduled at the location prior to her leave or at another location. If claimant's last conversation with an agent of the employer had been with Ms. Harvey on May 1, 2020, then she would not have needed that specified. Furthermore, it is claimant's burden to show she meets all of the elements of Iowa Code § 96.5(1)(d).

DECISION:

The October 9, 2020, (reference 01) unemployment insurance decision is affirmed. The claimant was not able to work and available for work as of April 5, 2020. Claimant refused work offered by the employer when she returned from her pregnancy leave. Claimant is entitled to benefits.



Sean M. Nelson
Administrative Law Judge
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January 5, 2021
Decision Dated and Mailed

smn/mh