

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LYNN L KIELER
Claimant

APPEAL NO. 12A-UI-02404-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HOSPITAL
Employer

OC: 01/15/12
Claimant: Appellant (1-R)

Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Lynn Kieler filed a timely appeal from the February 29, 2012, reference 02, decision that denied benefits effective January 15, 2012, based the Agency's conclusion that she was unduly restricting her work availability and did not meet the work availability requirement. After due notice was issued, a hearing was held on March 27, 2012. Ms. Kieler participated personally and was represented by Paul McAndrew, attorney, and Pam Thompson, paralegal. Attorney Nancy Wood represented the employer and presented testimony through Barb Ditzler, nurse manager. Exhibits B and C were received into evidence.

ISSUE:

Whether Ms. Kieler has been able to work and available for work since establishing her claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lynn Kieler established a claim for unemployment insurance benefits that was effective January 15, 2012. Ms. Kieler is a 66-year-old register nurse. Ms. Kieler has spent 45 years in the nursing profession and does not want to work outside that profession. Ms. Kieler does not possess a bachelor's or graduate degree. Ms. Kieler most recently worked as a floor nurse at Mercy Hospital in Iowa City. Ms. Kieler underwent a right shoulder rotator cuff repair on October 3, 2011. At the time Ms. Kieler established her claim for unemployment insurance benefits, her only remaining medical restriction was that she not lift more than 20 pounds with two hands.

Ms. Kieler has made minimal work search efforts since she established her claim for benefits. There are multiple reasons for this. Virtually all nursing positions would require that Ms. Kieler be able to lift more than 20 pounds. Many nursing positions now require a bachelor's degree in nursing. For the most part, Ms. Kieler has limited her work search activities to reviewing the nurse job postings on the University of Iowa Hospitals and Clinics website, a local nursing home job clearinghouse website, and reviewing nursing jobs advertized in the Iowa City Press Citizen.

None of these websites or newspaper perusals has prompted Ms. Kieler to send a resume or otherwise make an actual job contact.

During the week that ended January 21, 2012, Ms. Kieler's work search activities were limited to reviewing nurse job postings on the University of Iowa Hospitals and Clinics (UIHC) website. Ms. Kieler did not send any resumes or otherwise make any job contacts.

During the week that ended January 28, 2012, Ms. Kieler's work search activities were limited to reviewing nurse job postings on the UIHC website, looking at the Iowa City Press Citizen, and talking to some nurse friends. Ms. Kieler did not send any resumes or otherwise contact any prospective employers.

During the week that ended February 4, 2012, Ms. Kieler applied for a Senior Helper position. The position would involve going to elderly persons homes to assist them with health issues. There is some question regarding whether Ms. Kieler could perform such work with her lifting restriction. During this same week, Ms. Kieler returned to the UIHC website and also looked at the Bickford Cottage website, but did not send any resumes or otherwise make any job contacts in connection with reviewing these websites

During the week that ended February 11, 2012, Ms. Kieler's work search activities were limited to reviewing nurse job postings on the UIHC website. Ms. Kieler did not send any resumes or otherwise make any job contacts.

During the week that ended February 18, 2012, Ms. Kieler again reviewed nurse job postings on the UIHC website. Ms. Kieler also looked on Find the Right Job, a jobs clearinghouse website used by some of the nursing homes in the Iowa City/Coralville area. Ms. Kieler did not send any resumes or otherwise make any job contacts as a result of reviewing either website.

During the week that ended February 25, Ms. Kieler received a couple e-mails from the Find the Right Job website. Ms. Kieler also returned to review the UIHC website. Ms. Kieler saw a couple of nursing assistant jobs posted on the UIHC website, but she could not do nursing assistant work with her lifting restriction. Ms. Kieler did not send any resumes or otherwise make any job contacts.

During the week that ended March 3, 2012, Ms. Kieler received two e-mails from the Find the Right Job website. Ms. Kieler also looked in the Press Citizen and the Cedar Rapids Gazette. Ms. Kieler did not send any resumes or otherwise make any job contacts.

During the week that ended March 10, 2012, Ms. Kieler spoke to the director of the Riverside Casino to see whether the casino might have a nursing job she could do. Ms. Kieler reviewed the UIHC website, got a couple e-mails from Find the Right Job, and reviewed the Press Citizen. Aside from the contact with the casino, Ms. Kieler did not send any resumes or otherwise make any job contacts.

During the week that ended March 17, 2012, Ms. Kieler got one or more e-mails from Find the Right Job. One was for a decoder job. Ms. Kieler inquired about the nature of the decoder duties, but did not apply for the job. During that same week, Ms. Kieler spoke to the manager of an adult daycare center regarding whether the daycare might have a nursing position. The work would involve monitoring and assisting patients with dementia. There is some question whether Ms. Kieler could perform the work with her 20-pound lifting restriction.

During the week that ended March 24, 2012, Ms. Kieler received e-mails from Find the Right Job, saw no positions for registered nurses, and sent no resumes. Ms. Kieler reviewed the Press Citizen for nursing positions, found none that she could perform with her restrictions, and sent no resumes.

During the week of the appeal hearing, which was the week that ended March 31, Ms. Kieler had made no work search efforts as of the Tuesday afternoon hearing and cited time she was spending with her granddaughter as the basis for not looking for work so far that week.

Ms. Kieler has another appointment with her doctor scheduled for April 10, 2012 and has no intention of expanding her work search beyond nursing positions at least through April 10. Until then, Ms. Kieler's lifting restriction will remain unchanged.

Ms. Kieler would be able to pass medications, run errands, assist with patient admissions, perform assessments, and take patient vitals. However these nursing duties are usually but a portion of a nurse's duties, not a nurse's primary duties.

Ms. Kieler has additional financial means that diminish her incentive to make an active and earnest search for new employment. Since Ms. Kieler filed her claim for unemployment insurance benefits, she has continued to receive a \$679.00 per week in workers' compensation benefits and a \$714.70 monthly pension.

REASONING AND CONCLUSIONS OF LAW:

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 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.

871 IAC 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 Administrative Code rule 871 IAC 24.23 provides, in relevant part, as follows:

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

24.23(1) An individual who is ill and presently not able to perform work due to illness.

24.23(3) If an individual places restrictions on employability as to the wages and type of work that is acceptable and when considering the length of unemployment, such individual has no reasonable expectancy of securing work, such individual will be deemed not to have met the availability requirements of Iowa Code section 96.4(3).

24.23(6) If an individual has a medical report on file submitted by a physician, stating such individual is not presently able to work.

24.23(19) Availability for work is unduly limited because the claimant is not willing to accept work in such claimant's usual occupation and has failed to establish what other types of work that can and will be performed at the wages most commonly paid in the claimant's locality.

24.23(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.

The weight of the evidence in the record establishes that Ms. Kieler is able to work generally and would be able to perform nursing duties that do not require her to lift more than 20 pounds. As Ms. Kieler has found through her nominal work search efforts, and as she probably knew all along in light of her long tenure in the nursing profession, nursing positions that meet a 20-pound lifting restriction are scarce. The problem with Ms. Kieler's unemployment insurance benefit eligibility is not so much her ability to perform work, but the restrictions she has placed on her availability for work and her less-than-active-and-earnest work search. Given

Ms. Kieler's lifting restriction, Ms. Kieler has unduly restricted her work search by restricting it almost entirely to the nursing profession. Ms. Kieler has yet to make an *active* and *earnest* search for new employment. Because Ms. Kieler has satisfied neither the work availability requirement, nor the work search requirement, since she filed her claim for benefits, she is not eligible for benefits. Benefits are denied effective January 15, 2012. The disqualification will remain in place until Ms. Kieler provides proof that she is both available for full-time work and engaged in an active and earnest search for new employment.

This matter will be remanded to the Claims Division for determination of whether Ms. Kieler's workers' compensation benefits and pension are deductible from any unemployment insurance benefits she might receive.

DECISION:

The Agency representative's February 29, 2012, reference 02, is affirmed. The claimant has not met the work availability requirement and has not engaged in an active or earnest search for new employment since she established her claim for benefits. Benefits are denied effective January 15, 2012. The disqualification continued at the time of the March 27, 2012 appeal hearing.

This matter is remanded to the Claims Division for determination of whether the claimant's workers compensation benefits and pension are deductible from any unemployment insurance benefits she might receive.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw