

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AUTUMN L HALL
Claimant

APPEAL NO. 09A-UI-01858-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BENDERS ENTERPRISES INC
BENDER'S FOODS
Employer

Original Claim: 11/23/08
Claimant: Appellant (4)

Iowa Code section 96.4(3) – Able & Available
871 IAC 24.22(2)(j)(1) – Failure to Re-employ at the End of Approved Leave of Absence

STATEMENT OF THE CASE:

Autumn Hall filed a timely appeal from the January 27, 2009, reference 02, decision that denied benefits effective May 14, 2008 based on a conclusion that Ms. Hall was not able to work due to pregnancy. After due notice was issued, a hearing was held on February 26, 2009. Ms. Hall participated. Randy Bender, President, represented the employer. Exhibit A was received into evidence. The administrative law judge took official notice of the Agency's administrative record (DBRO) of wages reported by the claimant and benefits disbursed to the claimant.

ISSUE:

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

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer operates a grocery store in Guttenberg. Ms. Hall commenced her employment on August 15, 2005 and last performed work for the employer on April 10, 2008. Ms. Hall worked as a deli clerk/deli manager. At the time Ms. Hall performed work for the employer, Jerry Balk was the store manager.

On April 10, 2008, Ms. Hall slipped on some steps in the workplace and hurt her back. Ms. Hall was three months pregnant at the time. Ms. Hall sought evaluation and treatment from a General Practitioner in Guttenberg. The employer handled the matter as a workers' compensation matter. Ms. Hall received workers' compensation benefits for the period of April 10, 2008 until May 14, 2008, when the work-related situation with her back was considered deemed resolved.

While Ms. Hall was away from work in connection with the workplace injury, she became increasingly ill. Ms. Hall was subsequently diagnosed with a staph infection located in abscesses on her back. Ms. Hall was admitted to the University of Iowa Hospital (UIHC) on April 16, 2008 and underwent surgery to remove the abscesses on her back and hip. Ms. Hall's treatment was provided by the infectious diseases department at the UIHC. Ms. Hall was discharged from the UIHC on May 1, 2008. On May 14, 2008, the Guttenberg General Practitioner provided a medical release. The release indicated that if all Ms. Hall were dealing with was the back injury, she could return to work without restrictions. However, the doctor added that due to the complications related to the abscesses and the pregnancy, Ms. Hall could not return to work at that time. The employer received a copy of the work release and the employer's workers' compensation provider terminated the worker's compensation benefits.

Ms. Hall continued off work and received weekly in-home evaluation and treatment from a nurse. On July 2, 2008, Ms. Hall was admitted to the hospital in Guttenberg for complications relating to the staph infection. On July 4, Ms. Hall was transported by ambulance the University of Iowa Hospital, where she remained until she was discharged on July 14, 2008. When Ms. Hall was released, she went home with a medical device that allowed her to self-inject antibiotics. Ms. Hall continued to have problems with the abscess on her hip. This situation was aggravated by Ms. Hall's progressing pregnancy. Ms. Hall could not stand for any significant period. Ms. Hall continued to receive in-home visits from a nurse.

In mid-August, the University of Iowa physician removed the device that allowed Ms. Hall to self-inject antibiotics. The physician told Ms. Hall that she could return to work when she was able to stand for long periods. The staph infection had resolved, but the abscess on Ms. Hall's hip remained.

In August, Ms. Hall made contact with the deli manager, Terry Moser. Ms. Hall notified Ms. Moser that she planned to return to the employment six to eight weeks after her baby was born. Ms. Hall's baby was due in October. Up to this point, Ms. Hall had maintained contact with Ms. Moser. Ms. Moser told Ms. Hall that she looked forward to her return to the employment.

Ms. Hall gave birth on October 22, 2008. In anticipation of meeting with her ob-gyn doctor on December 4, 2008 to obtain a medical release so she could return to work, Ms. Hall contacted the workplace on December 3 for the purpose of notifying the employer to discuss her return to work. Ms. Hall spoke first with Ms. Moser, who told Ms. Hall that Ms. Hall would need to speak with Julie Gueder, the new store manager. Ms. Hall spoke with Ms. Gueder, who told Ms. Hall that her position had been filled and that the employer did not have work for her. This was the first time Ms. Hall learned that she did not have a job to return to and that the employer was not expecting her to return to the employment.

The employer has a written leave of absence policy that requires a written request for a leave of absence. Though Ms. Hall had gone to the workplace on several occasions during her time away from work, no one from the management staff had indicated that the employer considered her to have separated from the employment or indicated that she was not on an approved leave of absence. Instead, at the time Ms. Hall made contact with the employer in December, the employer decided Ms. Hall had been away too long and terminated the employment. The employer had actually filled Ms. Hall's position after Ms. Hall did not return to work on May 14, 2008.

Ms. Hall met with her doctor on December 4, 2008, and the doctor told her she could return to work without restrictions. Because Ms. Hall did not have a job to return to, she did not obtain a

medical release document from her doctor at that time. Ms. Hall returned to her doctor to obtain a written medical release after she received the January 27, 2009, reference 02, decision that concluded she was not able to work due to her pregnancy and denied benefits effective May 14, 2008. The medical release Ms. Hall obtained is dated February 6, 2009 and indicates that she may work without restrictions and without limitations as of that date.

Ms. Hall commenced her search for new employment at the same time she established her claim for unemployment insurance benefits. Since that time, Ms. Hall has been actively engaged in search for new employment and has sought employment throughout Guttenberg and several other communities within driving distance.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first address Ms. Hall's separation from the employment.

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

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.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

The weight of the evidence in the record indicates that Ms. Hall was on an approved leave of absence from the time of her work related accident on April 10, 2008 until May 14, 2008, when the work-related aspect of her medical condition was resolved. However, Ms. Hall was at that time unable to meet the physical requirements of the employment. Ms. Hall was not released to return to the employment without restrictions and, accordingly, did not return to the employment at that time. The employer did not notify Ms. Hall that she was discharged and Ms. Hall did not notify the employer that she had quit. In other words, there was neither a disqualifying discharge for misconduct in connection with the employment nor a disqualifying voluntary quit without good cause attributable to the employer. See Iowa Code section 96.5(1) and (2)(a). If May 14, 2008 is deemed Ms. Hall's date of separation from the employment, then the evidence indicates a separation falls within the category of "other separations." See 871 IAC 24.1(113)(d). Such a separation would not disqualify Ms. Hall for unemployment insurance benefits. In addition, the employer may be assessed for benefits paid to Ms. Hall.

However, the weight of the evidence indicates that Ms. Hall reasonably concluded that she was on an approved leave of absence while she was away from the workplace. Ms. Hall was in regular contact with the employer. The employer did nothing to disabuse Ms. Hall of the idea that she was on an approved leave of absence. The employer did not raise the issue of the written leave of absence policy until unemployment insurance proceedings. In addition, the employer's assertion that Ms. Hall voluntarily separated from the employment on May 14, 2008, is contradicted by information the employer included in its initial protest of the claim for benefits. When the employer filed its protest, the employer indicated that it had paid a health insurance benefit for the period of April 1, 2008 through November 1, 2008. This fact suggests Ms. Hall was indeed on an approved leave of absence through November 2008. In addition, Workforce Development records of wages reported by Ms. Hall and benefits disbursed to Ms. Hall indicate that the employer paid Ms. Hall the balance of her vacation pay benefit in December 2008. This, too, contradicts the employer's assertion of an earlier separation. The weight of the evidence indicates that the separation from the employment occurred on December 3, 2008, when the employer failed to re-employ Ms. Hall at the end of an approved leave of absence. If at the end of a period of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits. 871 IAC 24.22(2)(j)(1).

Regardless of whether the administrative law judge concludes the separation date was May 14, 2008 or December 3, 2008, the separation from the employment did not disqualify Ms. Hall for unemployment insurance benefits. The remaining issue is whether Ms. Hall has been able to work and available for work since she established her claim for benefits.

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 and (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.

The weight of the evidence indicates that Ms. Hall was under the care of one or more doctors and was unable to work from April 10, 2008 until December 4, 2008, when her ob-gyn doctor advised her she could return to work without restrictions. Ms. Hall is ineligible for benefits through the week that ended December 6, 2009. Ms. Hall's failure to obtain a note from the doctor on December 4, 2008 was understandable, given that fact that Ms. Hall no longer had a job to return to. The weight of the evidence indicates that Ms. Hall has been available for work, and has actively and earnestly searched for work, since she was released to return to work without restrictions on December 4, 2008. Accordingly, Ms. Hall is eligible for benefits effective the benefit week that began December 7, 2008, provided she was otherwise eligible. Ms. Hall has continued to be eligible for benefits, provided she is otherwise eligible.

DECISION:

The Agency representative's January 27, 2009, reference 02, decision is modified as follows. The claimant separated from the employment for no disqualifying reason. The claimant was not able and available for work during the period of April 10, 2008 through December 3, 2008, and was ineligible for benefits through the benefit week that ended December 6, 2008. The claimant has been able and available for work since the benefit week that began December 7, 2008, provided she was otherwise eligible. The claimant has continued to be eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw