

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JENNIFER M WISER
Claimant

APPEAL 17A-UI-02117-DG-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

RISEN SON CHRISTIAN VILLAGE
Employer

**OC: 01/15/17
Claimant: Respondent (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:

Employer filed an appeal from a decision of a representative dated February 15, 2017, (reference 01) that held claimant was eligible for benefits. After due notice, a hearing was scheduled for and held on March 20, 2017. Employer participated by Trista Driscoll, Director of Nursing. Claimant failed to respond to the hearing notice and did not participate. Employer's Exhibit 1 was admitted into evidence.

ISSUE:

The issue in this matter is whether claimant is able and available for work?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant sustained a work-related injury and was receiving treatment in September, 2016. Claimant was released to return to work with lifting and other restrictions on or about September 20, 2016.

Employer met with claimant and discussed her work restrictions in September, 2016. Claimant was not able to lift patients, and perform certified nurse's aid duties at that time. Claimant requested other work at the facility that did not require lifting. Employer was not able to accommodate claimant's request, and was not able to offer claimant any type of work during that time.

Employer later learned that claimant had been released back to work without restrictions sometime in early 2017. Employer made claimant an offer to work at their facility as a certified nurse's aid on or about February 22, 2017. Claimant never responded to employer's offer.

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 effective January 15, 2017.

96.4(3) 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".

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 Court found no separation from employment and allowed partial benefits where claimant's work aggravated chronic lung disease prevented him from full-duty work but he reported daily for assignments as available. *FDL Foods v. Emp't Appeal Bd. and Lambers*, 460 N.W.2d 885 (Iowa Ct. App. 1990).

Iowa Code § 216.6 (previously 601A.6) requires employers to make "reasonable accommodations" for employees with disabilities. Reasonable accommodation is required only to the extent that refusal to provide some accommodation would be discrimination itself. Reasonableness is a flexible standard measured in terms of an employee's needs and desires and by economic and other realities faced by the employer. *Sierra v. Emp't Appeal Bd.*, 508 N.W.2d 719 (Iowa 1993). See also, *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162 (Iowa 1982) and *Cerro Gordo Care Facility v. Iowa Civil Rights Comm'n*, 401 N.W.2d 192 (Iowa 1987).

Another fairness problem in treating employees with restrictions as quitting is posed by disability discrimination laws. Some employees with restrictions will be considered disabled and thus protected by the Iowa Civil Rights Act and the American's with Disabilities Act. Although disabled these employees may still be "able and available" if reasonable accommodation by employers would make them so. *Sierra v. Emp't Appeal Bd.*, 508 N.W.2d 719, 721 (Iowa 1993). Consider a disabled employee who presents restrictions and asks for reasonable accommodation. The employer (in this example) ignores its legal obligation and refuses to accommodate the employee. Under the alternate rule, the employee would be treated as quitting by demanding recognition of the right to accommodation. And yet if this same employee presents the same restriction to subsequent employers the employee under *Sierra* could remain "able and available." The employee is not automatically be deemed to be unduly restricted from employment under Iowa Admin. Code r. 871-24.22(2)m. Thus, in this example the employee would not be adversely affected by the need for reasonable accommodation in any but the first job. Again this result is unfair and seems to serve no policy. *Id.*

The applicable law and precedent led the Court to conclude that an employee who presents valid restrictions inconsistent with their employment duties should not be treated as quitting by that fact alone and recognized that the claimant did not just present restrictions, but also stayed

off work because the work the employer offered did not accommodate the restrictions. Nevertheless, the claimant did not intend to quit, but intended to remain on leave until released to do the work offered. The separation occurred when the employer decided it could no longer wait for further recovery. The separation is thus either a termination or lay off, but not for misconduct, or another separation. Neither type of separation was disqualifying.

Inasmuch as the injury is considered work-related for the purposes of unemployment insurance benefits only and the treating physician has released the claimant to return to work, even with restrictions the claimant has established her ability to work. Because the employer had no work available or was not willing to accommodate the work restrictions, benefits are allowed.

Claimant is on notice that she must conduct at least two work searches per week and file weekly claims in order to retain eligibility for benefits.

DECISION:

The February 15, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant is able to work and available for work effective January 15, 2017. Benefits are allowed, provided she is otherwise eligible.

Duane L. Golden
Administrative Law Judge

Decision Dated and Mailed

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