

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GRACE C GABRIELSEN
Claimant

APPEAL NO. 08A-UI-04716-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

**OC: 04/13/08 R: 01
Claimant: Appellant (2)**

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Grace Gabrielsen filed a timely appeal from the May 9, 2008, reference 02, decision that denied benefits effective April 13, 2008 and that concluded Ms. Gabrielsen was not able to perform work. After due notice was issued, a hearing was held on June 2, 2006. Ms. Gabrielsen participated. The hearing in this matter was consolidated with the hearing in Appeal Number 08A-UI-04783-JTT. The administrative law judge received Exhibits A and B and Department Exhibit D-1 into evidence. The administrative law judge took official notice of the Agency administrative record of the claimant's responses to the automated telephonic weekly claim reporting system.

ISSUE:

Whether Ms. Gabrielsen has been able to work and available for work since she established her claim for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Grace Gabrielsen established a claim for benefits that was effective April 13, 2008, but has not received benefits. Ms. Gabrielsen has most recently been employed as a full-time Certified Nursing Assistant (CNA) and separated from that employment on April 15, 2008. Ms. Gabrielsen has worked as a full-time CNA for approximately 18 years. During that time frame, Ms. Gabrielsen performed associated laundry and kitchen work for approximately four and a half years. Ms. Gabrielsen has some college experience. Ms. Gabrielsen has very limited minimal computer experience.

Ms. Gabrielsen has a history of back problems. Ms. Gabrielsen's customary occupation as a CNA has not helped with her back problems. On March 13, 2008, Ms. Gabrielsen injured her back while helping a nursing home resident. After this incident, Ms. Gabrielsen sought chiropractic care. On April 10, 2008, Ms. Gabrielsen re-injured her lower back while moving a nursing home resident. Ms. Gabrielsen initially treated the injury during the shift by putting ice on her lower back. On April 11, Ms. Gabrielsen contacted Nurse Practitioner Patsi Nystrom,

A.R.N.P., and made an appointment for Monday, April 14, 2008. In the meantime, Ms. Gabrielsen decided she should apply for leave under the Family and Medical Leave Act (FMLA). Ms. Gabrielsen desired to go on leave, in part, to rest her back. Ms. Gabrielsen desired to go on leave, in part, to get away from mental stress related to a nursing home resident's complaint about her.

Ms. Gabrielsen also has a history of hypertension. At or about the beginning of March 2008, Ms. Gabrielsen stopped taking her blood pressure medication.

On April 14, Ms. Gabrielsen saw Nurse Practitioner Nystrom for evaluation of her back injury. Nurse Practitioner Nystrom diagnosed lower back pain. Nurse Practitioner Nystrom indicated the following in her notes concerning the appointment: "She does have paravertebral tenderness of the lumbosacral area, mostly on the left side. I did not elicit trigger point tenderness however. Her deep tendon reflexes are symmetrical intact." Nurse Practitioner Nystrom also diagnosed hypertension. Nurse Practitioner Nystrom noted that Ms. Gabrielsen had stopped taking her blood pressure medication six weeks earlier. Ms. Gabrielsen's blood pressure at the time of the appointment was 194/94. Nurse Practitioner Nystrom prescribed blood pressure medication. Nurse Practitioner Nystrom prescribed an anti-inflammatory medication and a pain killing to treat Ms. Gabrielsen's back pain. Nurse Practitioner Nystrom referred Ms. Gabrielsen for physical therapy or further chiropractic care, but left the choice to Ms. Gabrielsen. Nurse Practitioner Nystrom noted that she had discussed FMLA leave with Ms. Gabrielsen and expected Ms. Gabrielsen to return with an application if she desired to go forward with a request for leave.

On May 6, Patsi Nystrom, A.R.N.P., completed an FMLA Certification of Physician or Practitioner form in support of Ms. Gabrielsen's application for leave. It is unclear why Ms. Gabrielsen went forward with completing an application for FMLA leave in light of the fact that she had been discharged from her employment on April 15, 2008. On the FMLA Certification, Nurse Practitioner Nystrom indicated that Ms. Gabrielsen suffers from a "serious health condition." The serious medical condition was the lower back pain. Nurse Practitioner Nystrom indicated that, "[Patient] is partially incapacitated while treating back pain. Nurse Practitioner repeated the information from the April 14 visit regarding the referral for additional treatment and the medications she had prescribed. In response to the question of whether Ms. Gabrielsen was unable to perform work of any kind, Nurse Practitioner Nystrom stated the following: "She could perform light work—not lifting more than 15 lbs. Having opportunity to sit or stand as needed to improve discomfort." Nurse Practitioner Nystrom indicated that Ms. Gabrielsen was "probably" unable to perform the essential functions of her Certified Nursing Assistant Position. Ms. Gabrielsen's health condition has remained unchanged.

Ms. Gabrielsen had used the automated telephonic weekly claim reporting system to report her work search efforts to Workforce Development. Ms. Gabrielsen has made at least two in person job contacts during each week she had claimed benefits. Ms. Gabrielsen has focused her work search on "courthouse" or clerical work, but appears to lack the work skills to perform such work. Ms. Gabrielsen has also sought work in a grocery store and a gift shop. Prior to becoming a nursing assistant, Ms. Gabrielsen worked in a variety of other positions.

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, (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.

(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.

Despite Ms. Gabrielsen's health concerns, the administrative law judge concludes that Ms. Gabrielsen is able to engage in gainful employment. The evidence indicates that despite a history of back problems, Ms. Gabrielsen continued to perform her duties as a Certified Nursing Assistant for a period of 18 years. The evidence indicates that Ms. Gabrielsen's blood pressure is managed through medication. The evidence indicates that Ms. Gabrielsen is able to perform work that does not require her to lift more than 15 pounds. Such employment exists in the labor market. There is no question that Ms. Gabrielsen is willing to work and willing to learn new skills. The administrative law judge would encourage Ms. Gabrielsen to take advantage of any skill-building services offered by Workforce Development and/or a community college in her area.

DECISION:

The Agency representative's May 9, 2008, reference 02, decision/warning is reversed. The claimant has been able to work and available for work since establishing her claim for unemployment insurance benefits. The claimant is eligible for unemployment insurance benefits, provided she is otherwise eligible.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs