

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ARLENE F WHITE
Claimant

CASEYS MARKETING COMPANY
Employer

APPEAL 18A-UI-12176-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/15/18
Claimant: Appellant (2R)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 10, 2018, (reference 03) unemployment insurance decision that denied benefits based upon a determination that she was on a voluntary leave of absence. The parties were properly notified about the hearing. A telephone hearing was held on January 8, 2019. Claimant participated and testified. Employer elected not to participate. Official notice was taken of the administrative record.

ISSUES:

Is the appeal timely?

Is the claimant able to and available for work effective July 15, 2018?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: In April 2018 claimant went on a leave of absence because she was experiencing severe pain, making it difficult for her to stand and work. Claimant had surgery to address this issue on April 10, 2018. While on that leave, and healing from her surgery, claimant fell and broke her femur requiring her to extend her leave.

On July 18, 2018, claimant's doctor released her to return to work, with the use of a walker or scooter and the permanent restriction that she must be sitting down. Claimant informed the employer of her release, but was told it could not accommodate the sedentary work restriction. Claimant was encouraged to contact the employer if anything changed. Sometime in August 2018 the employer contacted claimant to inform her that she was being taken off the payroll records, as she had not returned to work and there was no anticipated return date. Claimant was told she could reapply if anything changed. Since she was released to return to work claimant has been conducting her required work searches and was able to identify multiple job skills she is able to perform within her permanent restriction.

The unemployment insurance decision was mailed to the appellant's address of record on August 10, 2018. The claimant/appellant received the decision within the appeal period. The claimant was confused by the decision and immediately took it into her local office for clarification. Claimant spoke with an IWD employee who advised her that she just needed to present a doctor's note clearing her to return to work in order to resolve the disqualification. Claimant believed this action was part of the appeal process. Claimant complied with the request and presented a doctor's release. Her claim was subsequently unlocked and she began receiving benefits. Claimant did not realize she had not actually appealed the decision until she received an overpayment decision. Claimant timely appealed the overpayment decision.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant's failure to file an appeal within the appeal period was solely because of incorrect information received from an IWD representative. She found out about the misinformation upon receipt of the overpayment decision, which she timely appealed. This delay was prompted by and perpetuated by the agency. See, Iowa Admin. Code r. 871-24.35(2). Therefore, the appeal shall be accepted as timely.

The next issue to be decided is whether claimant is able to and available for work effective July 15, 2018. For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective July 15, 2018.

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)).

Claimant was on a medical leave of absence which began in April 2018. On July 18, 2018, claimant was released to return to work with a permanent restriction that she only perform sedentary work. The employer informed claimant it could not accommodate this restriction. At that point in time the employer knew, with reasonable certainty, that claimant would never be able to return to work, as her restriction was permanent in nature. Thus, while claimant may have been kept on the payroll records, she was effectively separated from employment, and therefore no longer on a leave of absence, as of July 18, 2018. At that point, where claimant was separated from employment upon medical advice, her ability to work is not measured by the job she held most recently, but by standards of her education, training, and work history. She is considered able to work even if she cannot return to a job as most recently performed for the employer. Thus, the claimant is considered as able to work as of July 15, 2018.

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 August 10, 2018, (reference 03) unemployment insurance decision is reversed. The claimant is able to work and available for work effective July 15, 2018. Benefits are allowed, provided she is otherwise eligible.

REMAND:

The issue of claimant's separation from employment with this employer is remanded to the Benefits Bureau of Iowa Workforce Development for initial investigation and determination.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs