IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KATHY L PEDRIN
Claimant

FRIENDSHIP HOME ASSN
Employer

APPEAL NO. 13A-UI-14940-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/4/12
Claimant: Appellant (5)

Iowa Code Section 96.4(3) – Able & Available
871 IAC 24.1(113) – Layoff

STATEMENT OF THE CASE:

Kathy Pedrin filed a timely appeal from the December 10, 2012, reference 03, decision that denied benefits effective November 4, 2012, based on an agency conclusion that Ms. Pedrin had requested and been granted a leave of absence, was involuntarily unemployed, and was not available for work. After due notice was issued, a hearing was held on February 11, 2013. Ms. Pedrin participated personally and was represented by Attorney Richard Schmidt. Attorney Tara Hall represented the employer and presented testimony through Jenny Fox and Mary Gross. The administrative law judge took official notice of the agency's administrative record (DBRO) concerning the claim for unemployment insurance benefits that was effective November 4, 2012. The parties waived formal notice on the issues of whether Ms. Pedrin has been able to work and available for work since she established her claim for benefits, whether Ms. Pedrin was discharged from the employment for misconduct, and whether Ms. Pedrin voluntarily quit the employment without good cause attributable to the employer.

ISSUES:

Whether the claimant has been on approved leave of absence since she established her claim for unemployment insurance benefits.

Whether the claimant separated from the employment and, if so, whether she separated from the employment for reason that would disqualify her from unemployment insurance benefits.

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

Whether the employer's account may be charged for benefits paid to claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kathy Pedrin began her employment with Friendship Home Association in September 2011. Ms. Pedrin worked as a full-time cook and worked four ten-hour shifts per week. Ms. Pedrin

was responsible for preparing meals, preparing snacks, and performing associated cleaning. Ms. Pedrin's duties included lifting boxes of frozen food that weighed ten to eighty pounds, carrying trays of food, carrying pots containing up to a few gallons of water, and lifting and emptying a portable steam table that weighed about 40-pounds. Roxanne Tross, Dietary Supervisor, was Ms. Pedrin's immediate supervisor.

Ms. Pedrin last performed work for the employer on January 10, 2012. At about 4:00 p.m. that day, Ms. Pedrin suffered an abdominal hernia while moving boxes of frozen food in the walk-in freezer. Ms. Pedrin immediately reported the injury to Ms. Tross. Ms. Tross told Ms. Pedrin to complete her work duties before Ms. Tross would complete an accident report. Ms. Pedrin worked another hour or two with a hernia. At the end of her shift, Ms. Pedrin's husband drove her to the Audubon Emergency Room.

At the Emergency Room, a Nurse Practitioner prescribed vicodin for the pain, instructed Ms. Pedrin not to lift, and took her off work for one or two days or until a doctor released her to return to work. The Nurse Practitioner instructed Ms. Pedrin to follow up with her family physician, Dr. Terry Sprague, D.O., so that he could refer her for a surgical consult. The Nurse Practitioner provided Ms. Pedrin with a medical form containing the above information and Ms. Pedrin promptly provided the form to the employer. On the same form, the Nurse Practitioner documented in a different area that Ms. Pedrin should lift *no more than five pounds*.

The employer provided Ms. Pedrin with another form for her to take back to the Audubon hospital. On January 12, Paul Stebbins, M.D., an Emergency Room physician at the Audubon hospital completed the progress report document supplied by the employer. Dr. Stebbins wrote that Ms. Pedrin was unable to perform any work activities due to a "huge ventral hernia" and pain on movement. Dr. Stebbins documented that Ms. Pedrin had been prescribed hydrocodone. The completed form was promptly returned to the employer.

Dr. Sprague or Dr. Stebbins referred Ms. Pedrin to General Surgeon Don Cheney, D.O. The employer's worker's compensation insurance carrier had arranged an appointment for Ms. Pedrin with Dr. Cheney. Ms. Pedrin maintained appropriate contact with the employer's worker's compensation carrier. The employer was also in contact with the worker's compensation carrier. Ms. Pedrin also maintained appropriate contact with the employer until May 2012, when Mary Gross, Administrator, told her she could not return to work until she could do so without any restrictions.

On January 25, 2012, Dr. Cheney performed a hernia repair procedure on Ms. Pedrin. Dr. Cheney placed a piece of mesh into Ms. Pedrin's abdomen as part of the hernia repair. Dr. Cheney referred Ms. Pedrin for physical therapy and Ms. Pedrin participated in physical therapy. Dr. Cheney deemed the procedure successful.

On February 14, 2012, Mary Gross, Administrator for Friendship Home Association, spoke to Ms. Pedrin. Ms. Gross told Ms. Pedrin that she could not return to work until she was released to return without any restrictions. The employer had recently decided, as a matter of policy, that no employee would be allowed to work with medical restrictions. The employer applied this policy to Ms. Pedrin even though she was off work due to a work-related injury.

On April 10, 2012, Dr. Cheney provided a note indicating that Ms. Pedrin could return to work "After Physical Therapy evaluation of Work Level." The employer received a copy of the April 10 note. Ms. Pedrin participated in the physical therapy assessment. *Ms. Pedrin demonstrated the ability to lift and carry 30 pounds.* The employer received a copy of the work level assessment document.

Ms. Pedrin subsequently reported to the physical therapist that she thought she had suffered re-injury and was going to forego additional physical therapy until she met again with Dr. Cheney. On May 14, Ms. Pedrin had another follow up appointment with Dr. Cheney. Dr. Cheney apparently concluded that Ms. Pedrin had not suffered any significant re-injury to her abdomen. Dr. Cheney released Ms. Pedrin to return to work as soon as she completed two more weeks of physical therapy. Dr. Cheney also indicated that Ms. Pedrin should complete an additional two weeks of physical therapy after she returned to work. Ms. Pedrin did not return for additional physical therapy. Instead, she did some exercises at home.

On May 15, 2012, Physical Therapist Barb Jacobsen documented that Ms. Pedrin had not returned for additional therapy sessions after seeing Dr. Cheney on May 14, just one day earlier. Ms. Jacobsen's documentation that day appears to have been at the request of the employer and/or the worker's compensation case manager. The documentation was copied to Ms. Gross and to June Walker, the worker's compensation case manager, but not to Ms. Pedrin.

On June 21, 2012, Ms. Gross sent Ms. Pedrin a letter stating that she had not heard from Ms. Pedrin. Ms. Gross stated that if she did not hear from Ms. Pedrin by July 2, 2012, she would consider Ms. Gross to have voluntarily terminated the employment. On July 1, Ms. Pedrin telephoned Ms. Gross and indicated that she had an appointment with Dr. Cheney set for the next day.

After the May 2012 follow up visit with Dr. Cheney, Ms. Pedrin continued to see Dr. Cheney until her most recent visit with Dr. Cheney on November 12, 2012. At that time, Dr. Cheney noted as follows:

> Kathy is very familiar to us. She is a 44-year-old female who we did a hernia repair on for a ventral hernia. She had done fairly well until within the last month or so and began claiming that she is having some chronic pain type symptoms mainly in the right upper quadrant and somewhat around the edge of the ventral hernia that she had repaired. I did have her undergo a CAT scan to evaluate this hernia mesh. There are no acute findings on this and essentially the mesh is in good placement. There are no persistent fluid pockets. I am quite pleased with how things have healed.
>
> Unfortunately, Kathy seems to be continuing with chronic pain and it is difficult to know just how much of this is related to the mesh or not. I do think a second opinion would be of value. I will have her see someone who does multiple hernias and deals with chronic pain at Creighton. We will therefore have her see Dr. Fitzgibbon's to see if he has any recommendations or further testing which may be of value. It is also difficult to know whether she would do better on an anti-inflammatory such as Celebrex, but obviously insurance will not cover this. Potentially further testing or evaluation with a pain clinic may be of value, but we do not have that ability to do that here at our facility in Audubon and therefore I think referral is reasonable as well. I did talk with the patient and discussed her CT scan result with her. I also discussed the option of seeing Dr. Fitzgibbons for a second opinion. She is in agreement with this plan and we will therefore set up an appointment for her with Dr. Fitzgibbons.

At the time of the appeal hearing, Ms. Pedrin had an appointment with Dr. Fitzgibbons scheduled for February 15, 2013.

Since Ms. Pedrin went off work in January 2012 she has continued under the belief that she was still an employee of Friendship Home Association and would be returning to that

employment as soon as she is release to do so without restrictions. Ms. Pedrin has never been released to return without restrictions. Since Ms. Pedrin went off work, she has not sought other employment.

REASONING AND CONCLUSIONS OF LAW:

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.

Ms. Pedrin *involuntarily* went off work effective January 10, 2012 in response to a workplace injury. Ms. Pedrin did not request to be off work. Instead, a medical provider treating her for the workplace injury took her off work to prevent further injury. At the time of the appeal hearing, Ms. Pedrin had not performed any work for the employer in more than a year. This was due, first and foremost, to Ms. Gross telling Ms. Pedrin on February 14, 2012, that she could not return to the employment until she could do so without any restrictions. That position taken by the employer set the stage for what followed. The employer had a duty to provide reasonable accommodations to Ms. Pedrin so that she could continue in the employment. See Sierra v. Employment Appeal Board, 508 N.W. 2d 719 (Iowa 1993). The employer's February 14, 2012, statement clearly indicated to Ms. Pedrin that the employer would not provide such accommodations. The weight of the evidence indicates that as of February 14, 2012, Ms. Pedrin was laid off. A layoff, unlike a discharge for misconduct or a voluntary quit without good cause attributable to the employer, would not disqualify Ms. Pedrin for unemployment insurance benefits. See Iowa Code section 96.5(1) and (2)(a) regarding disqualifying separations. Ms. Pedrin would still have to meet all other eligibility requirements. The employer's account would be liable for benefits. See Iowa Code section 96.7(1) and (2) regarding employer liability for benefits.

From that moment of the layoff, the onus was on the employer to *recall* Ms. Pedrin to the employment. The employer did not do that because the employer continued to take the position that Ms. Pedrin could not return to work with any restrictions. The employer did not recall Ms. Pedrin to work after she demonstrated in April 2012 that she could lift and carry 30 pounds. Nor did the employer recall Ms. Pedrin to the employment at any later point. Ms. Pedrin maintained appropriate contact with the employer in the context of the position the employer had taken from February 2012 that the employer was going to hinder her return to the employment. Ms. Pedrin was under no obligation to return and offer her services because she had never voluntarily separated from the employment.

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:
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> 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.
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> (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.
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> 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.
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> (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 in the record establishes that Ms. Pedrin had demonstrated the ability to lift and carry 30 pounds as of the April 2012 physical therapy assessment. While that

demonstrated ability might not be sufficient to demonstrate that Ms. Pedrin could perform the hardest aspects of her cooking duties at Friendship Home Association, it was sufficient to establish that Ms. Pedrin would be physically able to perform many types of work that laborers perform in the labor market. That is the test. The weight of the evidence indicates that Ms. Pedrin did not lose the ability to lift 30 pounds after the physical therapy assessment. Nor does the evidence concerning Ms. Pedrin's chronic pain indicate that she is unable to perform work. Many workers continue to work despite chronic pain. The weight of the evidence indicates that Ms. Pedrin was taking affirmative steps to deal with the pain issues. The administrative law judge concludes that Ms. Pedrin has been *able* to work since she filed her claim.

The problem for Ms. Pedrin arises with her *availability* for work. Ms. Pedrin testified that she has not looked for other work since she went off work from Friendship Home Association in January 2012. More importantly, Ms. Pedrin has apparently continued, even after she filed her claim for unemployment insurance benefits in November 2012, to wait indefinitely to be recalled to the work at Friendship Home Association. Where availability for work is unduly restricted because the claimant is waiting to be recalled to work by a former employer or is waiting to go to work for a specific employer and will not consider suitable work with other employers, the claimant does not meet the work availability requirements and is not eligible for unemployment insurance benefits. See Iowa Admin. Code rule 871 – 24.23(20). The administrative law judge concludes that Ms. Pedrin did not meet the work availability requirement from the time she filed her claim that was effective November 4, 2012 through the February 11, 2013 appeal hearing date. The availability disqualification continued as of that date and will continue until Ms. Pedrin provides proof to Iowa Workforce Development that she has engaged in an active and earnest search for new employment.

DECISION:

The Agency representative's December 10, 2012, reference 03 is modified as follows. The claimant was laid off effective February 14, 2012 and has never been recalled to the employment. The layoff does not disqualify the claimant for unemployment insurance benefits. Instead she would be eligible for benefits in connection with the layoff, provided she meets all other eligibility requirements. The employer's account may be charged for benefits paid claimant.

Claimant has been able to work, but not available for work, since she filed her claim for unemployment insurance benefits, because she has unduly restricted her work availability. Claimant is disqualified for benefits, due to the availability issue, effective November 4, 2012.

The availability disqualification continued as of the February 11, 2013 appeal hearing date and will continue until the claimant provides proof to Iowa Workforce Development that she has engaged in an active and earnest search for new employment.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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