

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

JOHN RICHARDSON

Claimant

and

HY-VEE, INC

Employer

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HEARING NUMBER: 20B-UI-04763

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** and **DENIES REGULAR BENEFITS** because although the Claimant went on a leave of absence rather than quit for that same reason the Claimant is not available for work, as set forth below.

FINDINGS OF FACT:

The Administrative Law Judge's findings of fact are adopted by the Board as its own, **except** for the final sentence of the first paragraph of the findings of fact.

REASONING AND CONCLUSIONS OF LAW:

No Disqualification For Quitting/Leaving Work

The theory of the Administrative Law Judge is that a worldwide change of circumstance means that working under unchanged terms of employment constitutes a change in the contract. The idea seems to be that when non-contract conditions change then a failure to change the contract is a change in contract. This is not the law of contract, nor

of how contract changes work in the unemployment case. Were this a quit case, it would not be a quit for a change in contract of hire. Perhaps it could be a quit on advice of a licensed and practicing physician, which would only disqualify until the person returns and offers services to the Employer. Iowa Code §96.5(1)(d). But we do not rule this way because the case is just not a quit case.

In this case the Claimant did not permanently separate from employment. Nor did he simply leave work, without obtaining a leave from the employer. We do recognize that a voluntary leaving of work that is not meant to be permanent may, nevertheless be disqualifying as a leaving of work. But we do not think it is a voluntary leaving where the parties agreed to a leave of absence, and a resulting suspension of work. In that instance the Claimant did not quit, nor did he “leave work” with an intent to return. He went on a leave of absence. This is **not** a disqualifying leaving of work, and so we do **not** disqualify the Claimant based on a quit theory.

Benefits Disallowed While On Leave of Absence

The question of allowing *regular state benefits* in this case is decided on regular principles of the Employment Security Law. Regular unemployment benefits are not paid just because you are unemployed. They are paid while you look for work during your unemployment. Both state and federal law require that the worker be able and available for work during any week that the worker claims for benefits. Iowa Code §95.4(3). Even during the Pandemic, the state statute remains unchanged and the federal Department of Labor instructs that states must continue to apply the availability requirements as set forth in their laws, or else run afoul of federal requirements. *See UIPL 23-20 (DOLETA 5/11/20)* (“EUISSA emergency temporary flexibility provision does not apply to the ‘able to work’ and ‘available to work’ provisions of Section 303(a)(12) of the [Social Security Act].”).

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:

The individual is able to work, is available for work, and is earnestly and actively seeking work....

871 IAC 24.22 expounds on this:

871—24.22 Benefit 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.

24.22(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.

b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, **but able to work in some reasonably suitable, comparable, gainful, full-time endeavor**, other than self-employment, which is generally available in the labor market in which the individual resides.

The reasons that can render an individual no longer available to work include:

24.23(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.

871 IAC 24.23(34)-(35).

"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 v. Employment Appeal Board*, 508 N.W.2d 719, 723 (Iowa 1993). Generally, the worker must be "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." 871 IAC 24.22(2).

Iowa Administrative Code 871 IAC 24.22(2) states:

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is **deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.**

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed

Similarly, rule 871 IAC 24.23(10) states:

24.23 Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

...

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

In this case the Claimant received an agreed-to leave of absence. This is why we did not find that he had quit without good cause *attributable to the Employer*. But by the same token we **must** find that he is not available for work so long as he is on the leave of absence.

He is therefore **denied benefits so long as he remains unavailable for work.**

Pandemic Unemployment Assistance

PUA is a benefit payable to people for various COVID related reasons. One of these is that the individual is unable to reach their place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. Again, the issue is not before us, but the information submitted by the Claimant seems to go a long way to establishing PUA eligibility. We note that PUA is payable for up to 39 weeks but no later than the week ending 12/26/20. It is 39 weeks from the week the Claimant filed for benefits to 12/26/20. The weekly amount of PUA is set to the weekly amount of the regular benefits.

We thus give this very important information to the Claimant:

THE CLAIMANT SHOULD APPLY FOR PANDEMIC UNEMPLOYMENT ASSISTANCE AS SOON AS POSSIBLE.

To do so the Claimant should Visit:

<https://www.iowaworkforcedevelopment.gov/pua-information>

We make this statement because the databases we can access do not show that the Claimant has yet applied for this benefit. PUA is not a lesser benefit. It is an alternate benefit designed for people who do hands-on work, but whose medical condition is such that they have been advised to self-quarantine. We now take the time to explain how PUA would work in this case. We note that this discussion is for information purposes and none of this influenced our decision today on the separation from employment.

Summary Of Effect Of Our Decision

Since we denied benefits based on the lack of availability to work, the Claimant is denied benefits so long as his unavailability to work, or his leave of absence (whichever is longer) lasts. But since we affirmed that he is not disqualified on a quit theory the Claimant does **not** have to earn 10 times his weekly benefit amount in order to start collected regular unemployment benefits.

If we allowed regular benefits in this case starting on March 29, 2020 then the Claimant at most could get 26 weeks of regular benefits, plus an additional 13 weeks of a federal benefit called PEUC. He could thus collect 39 weeks of benefits, plus \$600 for the weeks between March and August.

If the Claimant applies for and receives PUA, he will be allowed to backdate his claim. **“An individual does not need to demonstrate good cause to backdate a PUA claim.** Rather, the claim must be backdated to the first week during the Pandemic Assistance Period [starting on 2/2/2020] that the individual was unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related reason...” *UIPL 16-20, Attachment I, Change 1* (DOLETA 4/27/2020)(emphasis added). Since the weekly PUA is set to the same amount as the regular UI, the Claimant could receive the same weekly benefit but for, at most, 39-weeks. Clearly, the main difference is that Claimant has to remain *unavailable* for work because of COVID reasons (such as self-quarantine) to get PUA. PUA is the benefit of last resort, meaning that for any week that the Claimant is able to collect regular benefits he is *not* able to collect PUA. The two benefit periods thus would never overlap.

Now today we have made a decision that denies regular unemployment, but allows **regular** benefits once the Claimant offers to return to work, but is rejected. 871 IAC 24.22(2)(j)(1) (“If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.”).

This all means that **if** the Claimant applies for and receives PUA this is what seems likely:

He stays on PUA so long as advised to self-quarantine. He could backdate his PUA claim and this would offset any overpayment. If he is no longer required to self-quarantine, and becomes available to work then he would no longer be eligible for PUA. He could then offer his services to Hy Vee. If rehired he has a job. If not rehired he can start state benefits again, and be paid PEUC (the extra 13 weeks) once he exhausts state benefits. If he remains on self-quarantine throughout 2020 he would collect the same benefit under PUA than if we allowed regular benefits.

Clearly the big difference to the Claimant between PUA and Regular State benefits is that for regular benefits he must be available to work, and for PUA he must *not* be available for work for COVID reasons. But either one will be payable for the 39 weeks of 2020, and have the extra \$600 payable over the period from March 22 to July 25. Plus if the Claimant goes on PUA, comes off quarantine, and then his offer of employment is rejected by Hy Vee, then he could end up getting PUA during 2020 *and then* regular benefits through, at the latest, March 21, 2021 (assuming he is otherwise eligible for regular benefits). Following that he may be eligible for PEUC, again assuming he is otherwise eligible. Only regular benefits would be chargeable to Hy Vee. If he were allowed regular benefits from the start, exhausted 39 weeks of those, and then became available in 2021 he would not have any eligibility left since PUA runs out before 2021. Thus he could benefit by having additional weeks of availability left by charging PUA first and *then* (once available) regular benefits.

We do not rule on any of this at this point because the Claimant has not applied for PUA from what we can see. We explain all this so the Claimant will understand the importance, and utility, of PUA to someone in his circumstances. Meanwhile, Hy Vee should note that if the Claimant returns and offers services Hy Vee can avoid benefit charges by bringing him back to work and off his leave.

DECISION:

The administrative law judge’s decision dated June 26, 2020 is **REVERSED**. The Employment Appeal Board concludes that the Claimant did not leave employment but went on an agreed-to leave of absence. For this reason, **BENEFITS ARE DENIED SO LONG AS THE CLAIMANT REMAINS UNAVAILABLE FOR WORK**. Accordingly, the Claimant is denied **regular state** benefits until the Claimant is available to work, and has returned to Hy Vee to let them know that the leave of absence can be ended. The claim is locked for availability, **not** based on the nature of the separation.

The Board remands this matter to the Iowa Workforce Development Center, Benefits Bureau, for a calculation of the overpayment amount based on this decision. We again note that if the Claimant is allowed PUA, this should offset any overpayment. Again, the Benefits Bureau should note the claim is **locked for availability, not based on the nature of the separation**.

The Claimant should in the interim apply for Pandemic Unemployment Assistance. Again, information on how to do so is found at:

<https://www.iowaworkforcedevelopment.gov/pua-information>

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