

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

MARNIE K RIVERS
220 S WALNUT
LAMONI IA 50140

SODEXHO OPERATIONS LLC
c/o JON-JAY ASSOCIATES INC
PO BOX 182523
COLUMBUS OH 43218-2523

Appeal Number: 05A-UI-04422-HT
OC: 12/05/04 R: 03
Claimant: Appellant (1-R)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The claimant, Marnie Rivers, filed an appeal from a decision dated April 19, 2005, reference 02. The decision disqualified her from receiving unemployment benefits. After due notice was issued a hearing was held by telephone conference call on May 17, 2005. The claimant participated on her own behalf. The employer, Sodexho, participated by General Manager Darin Dickerson. Exhibit A was admitted into the record.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Marnie Rivers began working for Sodexo in October 1998. She was a full-time food service worker.

The claimant was on FMLA beginning in September 2004 for a non-work-related knee injury. She was released to return to work without restrictions effective December 16, 2004. However, she was unable to work a full-time shift, and the doctor reduced her hours to 4.5 per day, with a required break halfway through the shift. The employer accommodated the restrictions but claimant was still not able to work those hours and was leaving the work place after only a few hours without always notifying a supervisor.

General Manager Darrin Dickerson met with the claimant about her inability to work the hours prescribed and her failure to notify the supervisor. Another leave of absence was discussed and she was given papers to fill out and take to her doctor. However, the doctor would not agree that a leave of absence was necessary. The claimant and employer discussed her options and it was agreed she would be taken off the schedule until she felt her knee was recovered enough to return to her duties.

There has been a subsequent separation from employment effective March 30, 2005, which has not been determined by Iowa Workforce Development.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is able and available for work. The judge concludes she is not.

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".

The claimant maintains she is able and available for work and submitted a document from her physician. The document states she has reached maximum recovery however there is residual osteoarthritis. Ms. Rivers was never able to work her regular full-time schedule since December 2004 when she was originally released to return to work, and not able to work even the half-day schedule the employer accommodated pursuant to a revised restriction from her doctor. The administrative law judge does not believe the claimant would have been willing to return to work on her full-time schedule in March 2005, in spite of the doctor's order, which was why she elected to be removed from the schedule until she fully recovered.

The employer has nothing from her doctor dated in March 2005, releasing her to return to work without restrictions. Her insistence that she provided the final release from her doctor to the employer is not credible as she maintained she provided it before going off the schedule, but she did not sign it until three days later. This change in her story appears to have been prompted by the fact she discovered she was not eligible for unemployment benefits in her current situation.

Technically the claimant would not have been eligible for benefits beginning in December 2004 because she was not fully released to return to work under the provisions of Hedges v. IDJS, 368 N.W.2d (Iowa App. 1985) which provides that a "recovery" under Section 96.5-1-d means a complete recovery without restriction.

The claimant is ineligible for benefits until such time as she provides current information from her physician she is able and available to return to her regular job duties without restrictions.

The issue of the claimant's separation from employment should be remanded for determination.

DECISION:

The representative's decision of April 19, 2005, reference 02, is affirmed. Marnie Rivers is not able and available for work and is ineligible for unemployment benefits.

The issue of her separation from employment is remanded to the Claims Section for determination.

bgh/s