

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

CHRISTINE F TIBESAR

Claimant,

and

MERCY MEDICAL CENTER

Employer.

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HEARING NUMBER: 11B-UI-14977

**EMPLOYMENT APPEAL BOARD
DECISION**

N O T I C E

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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Christine F. Tibesar, was employed by Mercy Medical Center from April of 1982 through August 19, 2010 (Tr. 2, 4) as a full-time clinician three staff nurse (registered nurse). (Tr. 3) In September 2009, the claimant had to reduce the number of hours that she was working due to personal illness, which was aggravated by her work. (Tr. 2, 4) She worked reduced hours until April 30th (Tr. 2), at which time her physician advised her to remain off work entirely wherein she began partial hospitalization treatment on May 3, 2010. (Tr. 3)

Ms. Tibesar had applied for and received family medical leave (FMLA) leave in September 2009. She also received two thirty-day extensions from the employer during her time off. On July 8, 2010, the claimant was advised that her leave would expire on August 19, 2010 and that "...if [she was] unable to return to work as of [that date], [they would] need to terminate [her] employment...due to staffing and patient care needs..." (Tr. 4) The claimant had not yet received a medical release to return to work.

The claimant did not want to quit her employment, but she didn't want to be fired either. (Tr. 5, 6) Feeling compelled to resign, Ms. Tibesar submitted her written resignation on August 2, 2010 to be effective August 19, 2010. (Tr. 5) The claimant did not receive a release to return to work until September 30, 2010. (Tr. 5) When she contacted the employer about her medical release without restrictions, the employer told her that "... [her] position was no longer available..." (Tr. 5)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1)(d)(2007) provides:

An individual shall be disqualified for benefits: *Voluntary Quitting*. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:

The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department provided the individual is otherwise eligible.

There is no doubt that the claimant left employment because of illness based on her physician's advice, and with the employer's consent within the meaning of the aforementioned statute. That being said, the record also establishes that Ms. Tibesar provided unrefuted testimony that upon her full medical release, she returned to the employer to offer her services, but work was not available. The employer failed to participate in the hearing to provide any evidence to refute the claimant's testimony. According to the Iowa law, Ms. Tibesar "...shall not be disqualified..." for benefits given the facts presented in this case. Because the claimant established that she has been able and available for work since September 30, 2010 and has been looking for work, we conclude that she has satisfied her burden of proving her eligibility.

DECISION:

The administrative law judge's decision dated December 10, 2010 is **REVERSED**. The claimant is considered a voluntarily quit without good cause attributable to the employer; however, the

circumstances of her quit place her squarely within the purview of Iowa Code section 96.5(1)"d". She has returned to the employer to offer her services, but work was not available, she is allowed benefits provided she is otherwise eligible.

The claimant's submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. A portion of the argument consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the argument and additional evidence were considered, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

John A. Peno

Monique F. Kuester

Elizabeth L. Seiser

AMG/fnv