

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GAIL J ROSS**  
Claimant

**APPEAL NO. 12A-UI-07079-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EZ WAY INC**  
Employer

**OC: 05-06-12**  
**Claimant: Appellant (1)**

Iowa Code § 96.4(3) – Able and Available  
Iowa Code §96.5(2)a – Discharge/Misconduct  
871 IAC 24.32(7) – Absenteeism

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the June 5, 2012, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on July 10, 2012. The claimant did participate. The employer did participate through Bob Webb, Human Resources Manager and John William Production Supervisor.

**ISSUES:**

Is the claimant able to and available for work?

Was the claimant discharged due to job connected misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a seamstress and inspector full time beginning in April 10, 2006 through May 6, 2012 when she was discharged. The claimant last worked on February 18, 2012. She was taken off work by her treating physician due to migraine headaches and an unspecified nerve condition. The claimant had limited ability at the time of the hearing to return to work. She never worked part-time for this employer but is currently only allowed to “try” part-time work by her treating physician. The claimant was required to drive 18 miles one way to the employer’s place of business but is now prohibited by her physician and her medical condition from driving that far for work. At the time of the hearing the claimant could not have returned to this employer because she was only allowed to “try” part-time work but could not have driven there. The medication she is currently taking makes her dizzy also preventing her from driving and working.

The claimant did not return to work by May 4 and the employer had not heard from her about when or if ever she would return to work. The claimant could have applied for leave under the family medical act (FMLA) but did not do so. When the employer had no notification from the claimant’s physician indicating she could not work, the employer discharged her. The handbook

that was given to the claimant clearly indicated that the claimant had to provide a doctor's note to cover her absence and protect her job but did not do so.

The claimant applied for and received short term disability. She is currently eligible for additional disability and has represented to her insurance company that she is still attempting to obtain short term disability benefits.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work.

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".

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.

(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.

871 IAC 24.23(1) provides:

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

(1) An individual who is ill and presently not able to perform work due to illness.

The claimant at most could work part time according to information given to her by her physician. She is not able to drive to get herself to and from work and by her own admission would not be able to work consistently because she has good days and bad days. She is still seeking additional short term disability benefits. Under such circumstances the Administrative Law Judge cannot find that the claimant is able to and available for work. Accordingly, benefits are denied.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Because the final absence for which she was discharged was related to properly reported illness or injury, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

**DECISION:**

The June 5, 2012 (reference 02) decision is affirmed. The claimant was discharged from employment for no disqualifying reason, however, the claimant is not able to work and available for work effective May 6, 2012. Benefits are denied.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/pjs