

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JULIE A DIEHL
Claimant

APPEAL NO. 11A-UI-10199-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EXCEPTIONAL PERSONS INC
Employer

**OC: 06/19/11
Claimant: Respondent (4)**

Iowa Code Section 96.5(2)(a) – Discharge
Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 25, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 29, 2011. Claimant Julie Diehl participated. Emily Hodgkin, Human Resources Generalist, represented the employer. Exhibits One through Four were received into evidence.

ISSUES:

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Julie Diehl was employed by Exceptional Persons, Inc., as a full-time supported living staff. Ms. Diehl's regular duties involved providing supervision and support to two adults with mental and physical disability in a home setting. In December 2007, Ms. Diehl suffered a workplace injury to her right shoulder in the course of defending herself from being assaulted by a client. Ms. Diehl is right-handed. Ms. Diehl underwent surgery on her shoulder in June 2008. Ms. Diehl returned to work on light-duty status and performed office work. Ms. Diehl participated in physical therapy. The condition of Ms. Diehl's shoulder did not improve, but instead got worse. The treating physician had misdiagnosed the issue as an impingement and small tear.

Ms. Diehl was again scheduled to undergo surgery in April 2010, this time with a different surgeon. The surgeon started the surgery, but then stopped the surgery after concluding the problem was worse than anticipated. Ms. Diehl returned to work on light-duty status and performed office work.

Ms. Diehl was then scheduled to undergo surgery on January 20, 2011. Ms. Diehl continued to perform her light-duty office work until January 18 or 19, 2011, when she went off work to undergo and recover from this third surgery for the work-related injury. The time off was approved by the employer and occurred in the context of a worker's compensation claim.

Six weeks after her surgery, Ms. Diehl was released to return to work on light-duty status. The surgeon restricted Ms. Diehl to lifting no more than her two pounds with her right hand. At that time, the employer elected not to make further light-duty work available to Ms. Diehl, even though Ms. Diehl remained capable of performing the light-duty office work she had performed up until her surgery in January 2011. The office work had involved answering the telephone while wearing a telephone headset. The employer did not provide Ms. Diehl of an explanation of its decision. The employer compelled Ms. Diehl to commence a "leave of absence," which the employer characterized as a limited 12-week leave under the Family and Medical Leave Act. The employer deemed the purported FMLA leave to be expired in April 2011. The employer then extended the purported leave to June 13, 2011, at which time the employer formally discharged Ms. Diehl from the employment.

Ms. Diehl had had a follow up doctor appointment on May 31, 2011. In connection with that appointment, the surgeon indicated that Ms. Diehl could return to work, but imposed the following restriction: "Ms. Diehl may work with restrictions no repetitive reaching away from her body or above shoulder height, no lifting any weight with the arm away from her body or above shoulder height." Ms. Diehl otherwise retained use of her right hand and arm, along with use of the rest of her body.

Ms. Diehl established a claim for unemployment insurance benefits that was effective June 19, 2011. Ms. Diehl has not sought further employment and has not attempted to claim any weekly unemployment insurance benefits. Ms. Diehl has instead been attending physical therapy three times a week and has been focused on improving the condition of her shoulder, with a focus on her long-term recovery and health.

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 labor-saving 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.

At no point did Ms. Diehl indicate a desire to voluntarily separate from the employment. The evidence indicates instead that the employer elected to discharge Ms. Diehl from the employment based on medical restrictions that resulted from a workplace injury. The employer had an obligation, and the ability, to provide Ms. Diehl with reasonable accommodations that would allow her to continue in the work. See Sierra v. Employment Appeal Board, 508 N.W. 2d 719 (Iowa 1993). The employer had provided Ms. Diehl with such accommodations until mid-January 2011, but elected for financial reasons not to make the same accommodations available to Ms. Diehl thereafter. In the context of the work-related injury, the fact that Ms. Diehl could not perform the essential functions of her regular duties, is irrelevant when determining whether Ms. Diehl was discharged for a reason that would disqualify her for unemployment insurance purposes. At the time of the discharge, Ms. Diehl had not been performing those duties for more than a year.

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(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

Ms. Diehl's discharge was not based on any misconduct on her part. The decision was instead based on the employer's decision not to further accommodate an employee seriously injured in the course of the employment. The discharge would not disqualify Ms. Diehl for unemployment

insurance purposes. Instead, Ms. Diehl is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits paid to Ms. Diehl.

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(1)a and (2) provide:

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.

(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.

(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 indicates that Ms. Diehl has not engaged in a search for new employment and has not made herself available for new employment since she established her claim for unemployment insurance benefits. For these reasons, Ms. Diehl has not been eligible for unemployment insurance benefits since she established her claim for benefits. This ineligible status continued as of the August 29, 2011 appeal hearing. Ms. Diehl can re-establish her eligibility for benefits by (1) seeking new full-time employment, (2) making herself available

for work and work referrals, and (3) presenting medical documentation to Workforce Development indicating that she has been released to return to full-time employment of some sort. Ms. Diehl does *not* have to demonstrate ability to perform her former duties at Exceptional Persons, Inc., in order to demonstrate her ability to perform some work available in the labor market.

Because the claimant has not attempted to actually claim unemployment insurance benefits up to this point, there is no overpayment of benefits to address.

DECISION:

The Agency representative's July 25, 2011, reference 01, decision is modified as follows. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged. The claimant has not met the availability requirements of Iowa Code section 96.4(3) since she established her claim and, for that reason, has not been eligible for benefits. The claimant can re-establish her eligibility for benefits by meeting the conditions outlined above.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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