

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARY J WILSON
Claimant

WESLEYLIFE
Employer

APPEAL 17A-UI-07411-JP-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/25/17
Claimant: Appellant (4)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 21, 2017, (reference 03) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 8, 2017. Claimant participated. Employer participated through hearing representative Alyce Smolsky and director of people and culture Jaymie Banks-Westfield. Claimant Exhibit A was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history and claimant's weekly continued claim filing history, with no objection.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?

Is the claimant able to work and available for work effective June 25, 2017?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant is employed full-time as a CNA (certified nursing assistant). Claimant started with the employer on October 10, 2016, and was placed on an approved leave of absence on June 23, 2017. Prior to June 23, 2017, claimant requested and was granted a leave of absence due to a non-work related injury. Claimant Exhibit A. Claimant informed the employer she would be off of work for approximately six weeks. Claimant has kept in contact with the employer's scheduler while she has been on her leave of absence.

On June 23, 2017, claimant had surgery on her left shoulder. After claimant's shoulder surgery she was unable to return to work. On July 11, 2017, claimant informed the employer's scheduler she could perform light duty (desk work), but no lifting or pulling. Claimant testified she was not to put any strain on her shoulder. A majority of claimant's normal duties places some strain on her shoulder. The employer was not able to accommodate claimant's request (restrictions). Claimant did not provide a doctor's note to the employer with a release to return to work under light duty restrictions.

On July 28, 2017, claimant received a patient status report from her doctor that stated she “[s]hould be off work until cleared from surgery[.]” Claimant Exhibit A. Claimant’s patient status report did not indicate claimant can return to work under restrictions and did not provide any restrictions for claimant. Claimant Exhibit A. The July 28, 2017, patient status report was the last update claimant has received from her doctor.

Claimant has a follow up doctor’s appointment on August 15, 2017. Claimant is not sure when her doctor will release her to return to work without restrictions. The employer will allow claimant to return to work once she is released with no restrictions. Claimant has to provide a doctor’s note releasing her to return to work without restrictions and then the employer will place her on the schedule.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that claimant is not able to work and available for work effective June 25, 2017.

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".

Iowa Admin. Code r. 871-24.22(1)a 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.

(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.

Iowa Admin. Code r. 871-24.23(35) provides:

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

(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.

Iowa Admin. Code r. 871-24.22(2)j(1), (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.

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.

Iowa Admin. Code r. 871-24.23(10) provides:

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.

Both parties agree that claimant is still employed by the employer and has not been separated from employment. Prior to June 23, 2017, claimant requested and was given an approximately six week leave of absence to have surgery on her shoulder for the period starting June 23, 2017. Accordingly, benefits are denied effective June 25, 2017. Iowa Admin. Code r. 871-24.23(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.).

Furthermore, to be able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "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* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

Subsection d of Iowa Code § 96.5(1) provides an exception where:

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.

The statute specifically requires that the employee has recovered from the illness or injury, and this recovery has been certified by a physician. The exception in section 96.5(1)(d) only applies when an employee is *fully* recovered and the employer has not held open the employee's position. *White*, 487 N.W.2d at 346; *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985); see also *Geiken v. Lutheran Home for the Aged Ass'n.*, 468 N.W.2d 223, 226 (Iowa 1991) (noting the full recovery standard of section 96.5(1)(d)).

Claimant was granted a leave of absence starting June 23, 2017 due to a non-work related injury. Claimant's most recent update regarding her medical condition from her doctor on July 28, 2017 stated she "[s]hould be off work until cleared from surgery[.]" Claimant Exhibit A. Thus, according to the medical documentation provided by claimant, she has not yet been released to return to work.

Inasmuch as claimant's medical condition is not work-related and the treating physician has not released the claimant to return to work with or without restriction, she has not established her ability to work while still an employee of WESLEYLIFE effective June 25, 2017. While claimant may be able to perform light work duties, the employer is not obligated to accommodate a non-work related medical condition, and since she has not been released to perform her full work duties, she is not considered able to or available for work. It is also noted that claimant's most recent patient status report indicates claimant has not been released to return to work. Claimant Exhibit A ("Should be off work until cleared form surgery").

The employer is not obligated to accommodate a non-work related medical condition. Benefits are withheld effective June 25, 2017 until such time as claimant obtains a full medical release to return to work.

DECISION:

The July 21, 2017, (reference 03) unemployment insurance decision is modified in favor of the appellant. Claimant is not able to work and available for work effective June 25, 2017. Benefits are withheld until such time as claimant obtains a full medical release to return to work, offers her services to the employer, and no suitable, comparable work is available considering reasonable accommodation; or if she is involuntarily separated before that time.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs