

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY K STEWART
Claimant

APPEAL NO. 11A-UI-04457-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 02/20/11
Claimant: Appellant (3)

Section 96.4-3 – Able and Available for Work
Section 96.4-3 – Leave of Absence

STATEMENT OF THE CASE:

Kimberly Stewart filed a timely appeal from a representative's decision dated April 4, 2011, reference 01, which held claimant not eligible to receive unemployment insurance benefits as of September 24, 2010 upon a finding the claimant requested and was granted a leave of absence and was, therefore, not available for work. After due notice, a telephone hearing was held on April 28, 2011. Claimant participated personally. The employer participated by Ms. Alice Rose Thach, Hearing Representative and witness, Mr. Kevin Booy, Manager Store Operations.

ISSUE:

The issue is whether the evidence in the record establishes that the claimant is able and available for work.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds Kimberly Stewart began her employment with Hy-Vee, Inc. in February 2009 and worked as a part-time cashier and truck unloader. Ms. Stewart worked approximately five hours per week working Friday nights. On September 24, 2010, the claimant requested and was approved for a leave of absence from her part-time work because of the claimant's work obligations at her full-time employment with the Pella Corporation. Ms. Stewart desired, at that time, not to work for Hy-Vee part time. The claimant wished to return and, therefore, requested permission to be taken off the schedule without being removed from the company's employment rolls.

Ms. Stewart retired from her full-time employment with the Pella Corporation on November 30, 2010. During that time the claimant informed the store manager at Hy-Vee that she was not ready to return because she wanted to "enjoy her retirement from Pella." Based upon the claimant's statements, Hy-Vee continued to keep the claimant in a leave of absence category. Ms. Stewart desires to work for Hy-Vee on Fridays, Saturdays or Sundays although her previous employment with the Pella Corporation came to an end on November 30, 2010. Hy-Vee has work assignments potentially available to the claimant Tuesday through Fridays.

The claimant has not been scheduled to return to work based upon her previous statement to the employer about not wanting to return and because of the limited number of hours and/or the days the claimant is willing to work. The claimant has relied primarily upon her daughter who is employed at Hy-Vee to keep the claimant informed of whether the claimant has been scheduled and other factors of the claimant's employment with Hy-Vee.

It is the claimant's position that she informed the store director in the second week of December 2010 of her desire to return to work and that although the store director indicated there would be "no problem" the claimant has not been scheduled to return to work at the time of hearing.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the claimant entered into a leave of absence with Hy-Vee Corporation and, therefore, became voluntarily unemployed and unavailable for work for a period of time. The evidence does establish that.

Iowa Code § 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)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.

The evidence in the record show that Ms. Stewart requested and was granted a leave of absence from Hy-Vee Corporation from her part-time employment beginning September 24, 2010. The evidence further establishes that Ms. Stewart later made statements to Hy-Vee indicating that she wished to continue the leave of absence as she wished to “enjoy her retirement from Pella.” As the claimant was on an approved leave of absence, she was not available for work within the meaning of the Employment Security Law during this period.

The evidence further establishes, however, that during the second week in December 2010, Ms. Stewart made statements to the manager of store operations that she desired to return to work. The evidence, however, does not establish that the claimant followed a reasonable course of action by following up and reporting regularly in person to the Hy-Vee facility to insure the personnel department was aware that the claimant desired to end her leave of absence and return to employment.

It appears, however, based upon the totality of the evidence in the record that the claimant was generally available for work as of December 12, 2010. Claimant is therefore potentially eligible to receive unemployment insurance benefits provided that she has met all other eligibility requirements of Iowa law.

DECISION:

The representative’s decision dated April 4, 2011, reference 01, is affirmed as modified. The portion of the determination disqualifying the claimant from receiving benefits because she was not available for work is affirmed as modified. The claimant is held to be potentially eligible for benefits effective December 12, 2010, providing that she has met all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs