

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERIN N TULLIS

Claimant

APPEAL NO. 16A-UI-12871-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FERRARA CANDY COMPANY

Employer

OC: 11/06/16

Claimant: Appellant (4)

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Erin Tullis filed a timely appeal from the November 28, 2016, reference 03, decision that denied benefits effective November 6, 2016, based on an agency conclusion that she was not able and available for work. After due notice was issued, a hearing was held on December 20, 2016. Ms. Tullis participated. Tyler Walker represented the employer. The hearing in this matter was consolidated with the appeal hearing in Appeal Number 16A-UI-12889-JTT. Exhibits A through F were received into evidence. The administrative law judge took official notice of the agency's administrative record of Ms. Tullis' weekly claims (KCCO).

ISSUE:

Whether the claimant has been able to work and available for work since she established the claim for benefits that was effective November 6, 2016.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Erin Tullis was employed by Ferrara Candy Company as full-time palletizer from 2014 until September 9, 2016, when the employer ended the employment. On the morning of Saturday, November 5, 2016, Ms. Tullis passed out at work. Ms. Tullis had been experiencing severe stomach cramps for a couple days and this contributed to her passing out at work. Later that day, Ms. Tullis sought evaluation at an emergency room. The emergency room physician erroneously concluded that Ms. Tullis did not require additional evaluation or treatment. The emergency room physician released Ms. Tullis to home with a note that indicated she should remain off work until November 7, 2016. On November 7, the employer suspended Ms. Tullis from the employment. On November 9, 2016, the employer terminated the employment and notified Ms. Tullis that she was ineligible for rehire.

In response to being discharged from the employment, Ms. Tullis established a claim for unemployment insurance benefits that was deemed effective November 6, 2016, the Sunday that started the week during which she applied for benefits. During the week that ended November 12, 2016, Ms. Tullis applied for a housekeeping job and a cashiering job. However, the stomach cramping issues that had taken her off work on November 5, 2016 continued. On

November 14, 2016, Ms. Tullis was evaluated by a medical specialist. At the time of the appointment, the physician released Ms. Tullis to return to work so long as she did not lift greater than 10 pounds and did not use stairs. However, shortly thereafter, the physician diagnosed Ms. Tullis with ovarian cysts and ectopic pregnancy. On November 17, the physician's notified Ms. Tullis that she needed to undergo emergency surgery on November 18. Ms. Tullis delayed the procedure until November 21, 2016. On November 21, Ms. Tullis underwent surgery. Ms. Tullis' doctor took her off work until a follow-up appointment on November 28, 2016. On November 28, 2016, Ms. Tullis returned for a follow up medical appointment and was at that time released to return to work without restrictions.

Ms. Tullis has made additional weekly claims since she established her claim for benefits. Though Ms. Tullis made a claim for the week that ended November 19, 2016 and reported at that time that she had made two employer contacts, Ms. Tullis cannot recall where she applied that week. When Ms. Tullis made her weekly claim for the week that ended November 26, 2016, she reported two employer job contacts, but also reported that she was not able and available for work. Though Ms. Tullis made weekly claims for the weeks that ended December 3 and 10, 2016 and reported that she had made two employer contacts each week, Ms. Tullis cannot recall where she applied those weeks. During the week that ended December 17, 2016, Ms. Tullis applied for work at Casey's and attempted to apply for work at Bunn. Bunn referred Ms. Tullis for testing through Iowa Workforce Development and Ms. Tullis participated in the testing.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.23(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.

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 physician and has not been released as being able to work.

The weight of the evidence establishes that Ms. Tullis was able to work, available for work, and engaged in an active and earnest search for new employment during the week that ended November 12, 2016. Accordingly, Ms. Tullis is eligible for benefits for that week, provided she meets all other eligibility requirements. The weight of the evidence indicates that Ms. Tullis was not in fact able to work or available for work during the weeks that ended November 19 and 26, 2016, while she was undergoing further evaluation, undergoing surgery, and recovering from surgery. The weight of the evidence establishes that Ms. Tullis was able to work within the meaning of the law for the majority of the week that ended December 3, 2016, but the evidence fails to establish that Ms. Tullis actually sought work during that week. Accordingly, she did not meet the availability requirement for the week that ended December 3, 2016 and is not eligible for benefits for that week. The same holds true for the week that ended December 10, 2016. The weight of the evidence establishes that Ms. Tullis was able to work, available for work, and engaged in an active and earnest search for new employment during the week that ended December 17, 2016. Ms. Tullis eligible for benefits for that week, provided she meets all other eligibility requirements. Ms. Tullis must continue to meet the able and available requirement each benefit claim week.

DECISION:

The November 28, 2016, reference 03, decision is modified as follows. The claimant was able to work, available for work, and engaged in an active and earnest search for new employment during the week that ended November 12, 2016. Accordingly, the claimant is eligible for benefits for that week, provided she meets all other eligibility requirements. The claimant was not able to work or available for work during the weeks that ended November 19 and 26, 2016, and is not eligible for benefits for those weeks. The claimant was able to work during the weeks that ended December 3 and 10, 2016, but did not meet the availability requirement for those weeks and is not eligible for benefits for those weeks. The claimant was able to work, available for work, and engaged in an active and earnest search for new employment during the week that ended December 17, 2016. The claimant is eligible for benefits for that week, provided she

meets all other eligibility requirements. The claimant must continue to meet the able and available requirement each benefit claim week.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs