BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
eab.iowa.gov

ELIZABETH R TURNER

Claimant

and

HY-VEE INC

Employer

APPEAL NUMBER: 23B-UI-02846
ALJ HEARING NUMBER: 23A-UI-02846

EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 24.23-10, 96.4-3

D E C I S I O N

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Board adds the following discussion to the Reasoning and Conclusions of Law:

Analysis of Voluntary Leaving:

The Board writes further to address the issue of voluntary leaving. In the Claimant's view, a worker with a non-work related condition can present restrictions preventing the performance of usual work duties, insist the worker is not quitting, and when the Employer does the only thing it can, code the Claimant's employment as terminated, then the Claimant will *ipso facto* get unemployment benefits. This is not the way unemployment benefits work.

The statute uses the phrase "voluntarily left work" not "quit." Clearly a worker's voluntary choice to permanently sever the employment relationship, *aka* a "quit," is a form of voluntary leaving of work. But it does not exhaust the category. We can tell this simply by reading the statute. Code subsection 96.5(1) has ten paragraphs lettered (a) through (j). These all appear following the phrase "But the individual shall not be

disqualified if the department finds that:…" Iowa Code §96.5(1)(first unlettered paragraph). These paragraphs are thus stated as exceptions to disqualification, meaning that failure to satisfy the exception would mean disqualification. In particular temporarily leaving for a sick family member is disqualifying but only so long as the worker stays away from work. Iowa Code §96.5(1)(c). Also temporarily leaving for your own non-work illness is disqualifying but only so long as the worker stays away from work. Iowa Code §96.5(1)(d). Temporarily leaving to take a family member to another climate for health reasons is disqualifying but only so long as the worker stays away from the job. Iowa Code §96.5(1)(e). And finally leaving work for a period of no more than 10 days because of compelling personal reasons is disqualifying, but only for those ten days, after which benefits are allowed if the worker is not returned to work. Iowa Code §96.5(1)(f). This last is instructive. The situation described by the *Code* is a period lasting ten working days. If the worker leaves for compelling reasons, and stays gone for no more than 10 working days, and then the Employer does not allow the worker to return to duty, then the worker will thereafter be allowed benefits. Consider if the worker stayed away for 11 working days, and never intended to leave for longer than 11 working days. This would not be a quit, in the sense of permanent separation. Yet clearly the 11-day worker would *not* be allowed benefits else why specify 10 days in the Code? Thus even a temporary voluntary leaving of employment can be disqualifying. *Gilmore v. EAB,* No. 03-2099 (Iowa App. 11/15/2004). In this context we assess the nature of the leaving here.

In *White v. Employment Appeal Board*, 487 N.W.2d 342 (Iowa 1992) the claimant was off work as an over-the-road truck driver for eight months due to a heart condition. When he returned to the employer he indicated that he would not be able to drive. The employer told him there was no work available, and Mr. White was separated. There being a separation the Board found this to be a voluntary leaving work, the claimant appealed, and the Supreme Court affirmed (but remanded on the issue of work-relatedness). The Court found that a truck driver's separation from employment due to a non-work related heart condition would be a voluntary separation. The court even remanded to determine whether the condition was work-related – which is not an issue in discharge cases. *White* at 345-46. The Court clearly treated this fact pattern as a leaving work, and needed to know whether the leaving was work-related in order to address whether the voluntary leaving could be for good cause attributable to the employment. The Court rejected the argument that the leaving was not *voluntary*. *White* at 345.

In *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985) Ms. Hedges was a nursing assistant at the VA. She suffered a non-work injury, was placed on extended leave, and then returned with restrictions. "Ms. Hedges returned to work, but the V.A. refused to reinstate her because her physician had released her return to work upon a restriction that she avoid lifting anything in excess of thirty pounds. Ms. Hedges appeared willing to violate her physician's orders, but the V.A. refused to allow her return, stating that no comparable work was available in view of her restriction." *Hedges,* 368 N.W.2d at 865. The agency found a voluntary leaving and Ms. Hedges appealed arguing "that she falls within [Iowa Code §96.5(1)(d)] because she was certified by her physician as recovered subject to a lifting restriction, she was eligible to return to work and offered her services, and the V.A. refused her offer because no comparable work could be found." *Id.* at 866. The Court of Appeals found that Ms. Hedges had to be *fully released* to avoid disqualification in this fact pattern. The full release requirement is now codified in the regulations of Iowa Workforce. 871 IAC 24.26(6)(a)("Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.") Because Ms. Hedges had gone on a leave of absence, returned at the end, but had not been *fully* released at the end the Court of Appeals found "that there was substantial evidence to show that Ms. Hedges' separation from the V.A. was voluntary and without good cause attributable to her employer…" *Id.* at 868.

In *Gilmore v. EAB,* No. 03-2099 (Iowa App. 11/15/2004). Mr. Gilmore received medical restrictions preventing him from driving, which was his job. He was placed on leave. The Administrative Law Judge found Mr. Gilmore not able and available until he was fully released, and also found that Gilmore had temporarily left his work. The Court of Appeals affirmed on the voluntary leaving theory. Even though Mr. Gilmore was on a leave of absence, and was eventually fully released and returned to work, still the Court of Appeals applied the fully released standard for voluntary leaving for the period before the full release. The Court found "the evidence clearly shows Gilmore was not fully recovered from his injury until March 6, 2003. Gilmore is unable to show that he comes within the exception of section 96.5(1)(d). Therefore, because his injury was not connected to his employment, he is considered to have voluntarily left work without good cause attributable to the employer, and is not entitled to unemployment benefits" until he had completely recovered and returned to present his full release. *Gilmore*, slip op. at 4-5.

The case at bar falls under the rule of *White*, *Hedges* and *Gilmore*. When a claimant with a non-work-related health condition reaches the end of an approved leave of absence (or never requests leave), and then presents the Employer with restrictions that prevent the performance of *essential* prior job duties, then this is a voluntary leaving of work without good cause *attributable to the employer*. We note this is not a case where the Claimant is terminated while still on the leave of absence. Such cases, where the Claimant was <u>not</u> given the agreed period to heal up, there may indeed be a discharge, and benefits may be allowed *after the discharge and once the Claimant is available to work*. But if we allowed benefits at the end of the leave merely because the Claimant wants to come back we would seriously undermine the entire statutory scheme of Iowa Code §96.5(1)(d). A truck driver who is in traction from a skiing accident, could call the Employer from the hospital bed, say "I'm ready to work by phone!" and if the Employer doesn't bring him back in some capacity then it's a "discharge" and benefits are allowed. The whole notion of a full release, required by regulation and court precedent, is voided. And a kind of game of chicken is created: everyone knows the Claimant can't do his usual job, but whoever is the first to mention a leave, or separation, loses. This is no way to administer the law.

In this case, the Claimant did indeed voluntarily leave work in the sense that that word is used in the statute, and the Claimant needs to satisfy the requirements of §96.5(1)(d) in order to obtain benefits. *See e.g. Moulton v. Iowa Emp't Sec. Comm'n,* 239 Iowa 1161, 34 N.W.2d 211 (Iowa, 1948); *Wolf's v. Iowa Employment Sec. Commission,* 59 N.W.2d 216, 244 Iowa 999 (Iowa, 1953); *White v. Employment Appeal Board,* 487 N.W.2d 342, 345 (Iowa 1992).

We are sympathetic to the idea that the Claimant did not choose to have medical issues. But the sense that the statute uses voluntary is that the leaving of work was initiated by the Claimant's situation, and not by anything the Employer initiated. Thus when the Employment Security Law speaks of grating benefits to those who lost work through no fault of their own, "[t]he word 'fault,' as used in this context, is not limited to something worthy of censure but must be construed as meaning failure of volition." *Amana Refrigeration v. IDJS,* 334 N.W.2d 316, 319 (Iowa App. 1983)(*citing Moulton v. Iowa Employment Security Commission,* 239 Iowa 1161, 1172-73, 34 N.W.2d 211, 217 (1948)); *accord Wolf's v. IESC,* 59 N.W.2d 216, 220 (Iowa 1953). And in *White*, precedent we are bound to follow, the Court specifically rejected the idea that being forced to leave by his health renders the leaving "involuntary." *White* at 345. We are further cognizant that "a liberal construction does not allow us to ignore the ordinary meaning of words in a statute and to expand or contract their meaning to favor one side in a dispute over another…On the contrary, we best carry out a statute's purposes by giving a fair interpretation to the language the legislature chose; nothing more, nothing less." *Dornath v. EAB,* ___ N.W2d ___, ___ slip op at. 9 (Iowa 3/31/2023) (*quoting Vroegh v. Iowa Dep't of Corr.*, 972 N.W.2d 686, 702 (Iowa 2022)).

We note that the Claimant's employment with Hy Vee, while part-time, did not meet the concept of "supplemental" part-time employment, as so disqualification for voluntary leaving applies as usual. Iowa Code §96.5. In a §96.5(1)(d) case, the disqualification can be lifted if the Claimant is fully released, and immediately returns to offer services. 871 IAC 24.26(6)(a)(" Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment."); *Hedges v. Iowa Dep't of Job Serv*., 368 N.W.2d 862, 868 (Iowa Ct. App. 1985). That has happened here, and the Claimant's disqualification under Code §96.5(1)(d) is identical to the period identified by the Administrative Law Judge: from filing of the initial claim to March 27, 2023 when the Claimant was once again released to work.

Availability Issue

The able and available requirements are fundamental to the unemployment system. Under section 303(a)(12) of the Social Security Act federal funds will not be released to a state unless that state's law requires that an individual is able to work, available to work, and actively seeking work as a condition of eligibility for regular UC for any week. 42 U.S.C. 503(a)(12)("A requirement that, as a condition of eligibility for regular compensation for any week, a claimant must be able to work, available to work, and actively seeking work."). Iowa's law has had such a provision since 1936. 47 GA ch. 102, §4(c). The requirement is an indispensable and defining part of the unemployment system. Without this requirement the unemployment benefit system becomes a form of disability insurance. This it is not designed to do. *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223, 226 (1991) ("unemployment compensation under this chapter is not disability insurance and simply does not cover physically disabled persons during the periods when they are unemployable."); *White v. Employment Appeal Board*, 487 N.W.2d 342, 345 (Iowa 1992) ("the Employment Security Law is not designed to provide health and disability insurance"); *Butts v. Iowa Dep't of Job Serv*., 328 N.W.2d 515, 517 (Iowa 1983) ("the legislature has merely determined not to provide maternity leaves"); *Amana Refrigeration v. Iowa Dept. of Job Service*, 334 NW 2d 316, 318 (Iowa App. 1983) ("We do not think the legislature intended to make unemployment benefits available for claimants who were not even 'available for work' with their own employers.").

The Claimant argues that she can be available for work by making herself available to *this* employer for a greeter job it no longer has. She had a broken arm. She had the burden of proving she was available for work, and she was represented at hearing. She did not present proof sufficient for us to conclude that the Claimant was genuinely attached to the labor market. Given her proven experience, abilities, and training, she has not shown she was reasonably available to work during the period of her incapacity. "[T]he labor market must be described in terms of the individual," and we find that this Claimant was not genuinely attached to the labor market during the period identified by the Administrative Law Judge. 871 IAC 24.22(2).

As far as accommodation, we assume for the purposes of this case that people with temporary impairments from broken bones may enjoy disability protection. Yet the laws requiring accommodation of disabilities have never required elimination of essential job functions. Here the Claimant has failed to prove that the Employer had an open position that the Claimant could perform and was eligible to transfer her to. Clearly she could not perform the essential functions of her usual job. And as far as other employers it was the Claimant's burden to tell us about jobs she could perform the *essential functions of* with or without accommodation. This she did not do, limiting her testimony to a list a few jobs at this employer, that she could physically perform. She never addressed her experience, training, and abilities to perform such jobs.

She essentially claims that she is available to work because she can perform unskilled one-armed labor, but we do not have a record demonstrative that this is a genuine attachment to the labor market. The disability discrimination laws are extraordinarily complex, and a Claimant cannot simply throw out the words "disability" and "accommodation" without proof in order to get unemployment benefits.

Notably, the arguments made by the Claimant here would convert the unemployment law into a sort of medical insurance system. An injured claimant, unable to do their own work, could get benefits by insisting that the employer bring her back anyway. Yet in *Geiken v. Lutheran Home for the Aged,* 468 N.W.2d 223 (1991) a secretary broke her arm, went on a leave of absence, and offered to return when she was just 70% of capacity. The Court affirmed the finding that she was not able to work and went on to explain "unemployment compensation under this chapter is not disability insurance and simply does not cover physically disabled persons during the periods when they are unemployable." *Geiken* at 226. The next year the Court was faced with a truck driver who sought to obtain benefits even though he left work because of his heart condition on the advice of a physician. In rejecting the claim that such leaving should not disqualify the Court reiterated that "the Employment Security Law is not designed to provide health and disability insurance…" *White v. Employment Appeal Board,* 487 N.W.2d 342, 345 (Iowa 1992). More generally the Iowa Supreme Court has emphasized that "the unemployment benefits system created under chapter 96" is not "a catchall compensation source." *Dornath v. Employment Appeal Board,* No. 21-1948, ___ N.W.2d ___, ___ slip op at 13 (Iowa 3/31/2023), *see also Butts v. Iowa Dep't of Job Serv*., 328 N.W.2d 515, 517 (Iowa 1983)("the legislature has merely determined not to provide maternity leaves"). The Claimant's argument runs afoul of these fundamental limits on the use of the money from the tax-support unemployment benefit account.

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Myron R. Linn

RRA/fnv