

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**REBBECA L THILL
4844 HWY 61 S
POTOTSI WI 53820**

**FINLEY HOSPITAL
c/o HUMAN RESOURCES
350 N GRANDVIEW
DUBUQUE IA 52001**

**Appeal Number: 06A-UI-05826-H2T
OC: 05-17-06 R: 12
Claimant: Appellant (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4-3 - Able and Available
Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the May 26, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on June 22, 2006. The claimant did participate. The employer did participate through Connie Myers, Benefits Coordinator; (representative) Shelly Stickfort, Business Partner; and Kathy Hickson, SPD Coordinator. Claimant's Exhibit A was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a sterilization technician full time beginning January 5, 2004 through June 1, 2006, when she was discharged. In a letter dated April 27, 2006, the claimant was told

to resign her position. She did resign because she believed if she did not she would be discharged.

The claimant last worked on November 28, 2005. On November 29, 2005, the claimant's physician imposed a fifteen-pound lifting restriction on her due to complications surrounding her pregnancy. The claimant informed the employer of her fifteen-pound lifting restriction and was told that the employer could not accommodate her lifting restriction. The claimant was then off work. The claimant gave birth on March 24, 2006 and was released to return to work on May 6, 2006 without restrictions. By the time the claimant was released to return to work on May 6, the employer had filled her job. The claimant was then sent a letter from the employer telling her to either voluntarily resign or provide evidence that she needed to extend her leave of absence.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work from November 29, 2005 through May 6, 2006.

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 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.

871 IAC 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.

Inasmuch as the pregnancy was not work-related and the treating physician did not release the claimant to return to work without work restrictions until May 6, 2006, the claimant was not available for work. The claimant was released to return to work on May 6, 2006 without restrictions. The claimant is able to and available for work on May 6, 2006.

When the claimant was able to return to work, she learned that her employer had filled her job and that no work was available for her. At that point the employer offered her only two options, either resign or ask to have her leave extended. The claimant had no medical reason to have her leave extended at that point as she had been released to return to work by her doctor. Her testimony that she did not want to quit, but felt she had no other option is credible.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

The administrative law judge concludes that the claimant's leaving was not a voluntary quit. After the employer told her to either go on extended leave or quit, it cannot be found that she left work of her own volition.

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.26(6)a provides:

(6) Separation because of illness, injury, or pregnancy.

b. Nonemployment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was

available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.

Thus, the administrative law judge concludes that the claimant offered to return to work after her recovery and the employer had no work for her. Under these circumstances the claimant's leaving is a discharge.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

No misconduct has been established by the employer. It is not misconduct for an employee to be off work for a pregnancy leave. The claimant's employment ended because the employer forced her into a quit. Her employment separation was a discharge without any misconduct on the part of the claimant. Benefits are allowed from the date the claimant became able to and available for work, May 6, 2006.

DECISION:

The representative's decision dated May 26, 2006, reference 01, is reversed. The claimant is not able to work and available for work effective from November 28, 2005 until May 6, 2006. Thereafter, the claimant is able to and available for work and benefits are allowed, provided the claimant is otherwise eligible.

tkh\kkf