

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LISA L THEN
Claimant

APPEAL NO. 10A-UI-15867-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUBUQUE COUNTY
Employer

OC: 08/29/10
Claimant: Appellant (2)

Section 96.4-3 – Able to and Available for Work
Section 96.5-2-a – Non-disqualifying Separation from Work

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated November 8, 2010, reference 01, that concluded she requested and was granted a leave of absence. A telephone hearing was held on January 5, 2011. The parties were properly notified about the hearing. The claimant participated in the hearing. Cathy Hedley participated in the hearing on behalf of the employer with a witness, Joyce Kirby. Exhibit A was admitted into evidence at the hearing.

ISSUES:

Was the claimant able to and available for work?

Was the claimant's separation from employment under disqualifying conditions?

FINDINGS OF FACT:

The claimant worked full time as a license practical nurse for the employer from February 20, 2009, to August 4, 2010. The job description states that her job involves regular lifting of up to 50 pounds.

The claimant was scheduled for carpal tunnel surgery on her right wrist for August 6, 2010. She informed her supervisor about the surgery and that she would have restrictions for a period following the surgery. She was informed by her supervisor that she would be required to complete the paperwork for leave under the Family and Medical Leave Act (FMLA) to keep her employment.

The claimant completed the FMLA leave documents and submitted a medical certification from her doctor at the end of July 2010. The doctor certified that the claimant would be unable to work from August 6 to 8 but could return to work with restrictions on August 9.

The claimant offered to return to work on August 9 but had restrictions on the use of her right hand. She was informed that she could not return to work until she was released to return to

work without restrictions. She told to contact the employer after her next doctor's appointment to see if there was work available.

The claimant presented a work release after her doctor's appointments on August 19, September 2, and September 30 but still had lifting restrictions on her right hand. She was prepared to work and willing to return to work but was told each time that she would have to wait until she was released without restrictions.

The claimant filed a new claim for unemployment insurance benefits with an effective date of August 29, 2010, because the employer would not allow her to return to work. She was released to return to work without restrictions and returned to work on November 2, 2010.

During the period from August 29 through November 2, 2010, the claimant had not voluntarily quit employment and has not been discharged by the employer. She was ready and willing to return to work if the employer allows her to work.

During the period from August 29 through November 2, 2010, there were jobs the claimant could perform despite her one-handed work restrictions; for example, she could provide patient care, do charting, use lifting equipment to move patients, and any daily work that did not require both arms. The claimant is ambidextrous and can write with both hands.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant voluntarily quit employment without good cause attributable to the employer or was discharged for work-connected misconduct. The unemployment insurance law provides for a disqualification for claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5-1 and 96.5-2-a.

There is no evidence the claimant quit her job or was discharged for work-connected misconduct. I recognize that Iowa Code § 96.5-1 provides a disqualification for individuals who voluntarily quit employment and Iowa Code § 96.5-1-d operates as an exception to that rule for individuals who voluntarily leave employment due to injury or illness under certain circumstances. To voluntarily quit, however, means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship and chooses to leave employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989); Peck v. Employment Appeal Board, 492 N.W.2d 438, 440 (Iowa App. 1992). In this case, the claimant never quit employment or intended to leave her job. She desired to continue to work but the employer would not allow her to work.

This is like Wills v. Employment Appeal Board, 447 N.W.2d 137 (Iowa 1989), in which the Supreme Court considered the case of a pregnant CNA who went to her employer with a physician's release that limited her to lifting no more than 25 pounds. Wills filed a claim for benefits after the employer did not let her return to work because of its policy of never providing light-duty work. The Supreme Court ruled that Wills became unemployed involuntarily and was able to work because the weight restriction did not preclude her from performing other jobs available in the labor market.

The next issue is whether the claimant was able to and available for work as required by Iowa Code § 96-4-3. The unemployment insurance rules provide that a person must be physically able to work, not necessarily in the individual's customary occupation, but in some reasonably

suitable, comparable, gainful, full-time endeavor that is generally available in the labor market. 871 IAC 24.22(1)b. The evidence establishes that the claimant was able to perform gainful work, just not work that requires lifting with both hands. There is unquestionably work available in the labor market meeting such restrictions, and the claimant has shown she was available for work.

The rules further provide that a claimant is considered unavailable for work if the claimant requested and was granted a leave of absence, since the period is deemed a period of voluntary unemployment. 871 IAC 23(10). In this case, however, the claimant was required to complete FMLA paperwork. The doctor certified that the claimant would be unable to work from August 6 to 8 but could return to work with restrictions on August 9. The claimant attempted to return to work on August 9 and following each time she saw to the doctor afterward, but the employer would not allow her to return. This can hardly be considered a period of voluntary unemployment. The claimant is qualified to receive benefits effective August 29, and afterward.

DECISION:

The unemployment insurance decision dated November 8, 2010, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css