

**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**

**TODD B DEGROOT
2923 – 200TH ST
ROSE HILL IA 52586**

**MILLARD REGRIGERATED SERVICES INC
C/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 05A-UI-05935-RT
OC: 09/26/04 R: 03
Claimant: Respondent (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 96.5-1 – Voluntary Quitting
Section 96.4-3 – Required Findings (Able and Available for Work)
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Millard Refrigerated Services, Inc., filed a timely appeal from an unemployment insurance decision dated May 24, 2005, reference 04, allowing unemployment insurance benefits to the claimant, Todd B. DeGroot. After due notice was issued, a telephone hearing was held on June 20, 2005, with the claimant participating. Kevin Van Asten, Plant Manager of the employer's plant in Ottumwa, Iowa, where the claimant was employed, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time sorter from February 7, 2005, until he voluntarily quit effective April 29, 2005. The claimant voluntarily quit when he failed to return after a two-week leave of absence for alleged back problems. The claimant last worked on April 12, 2005. At the time, he complained about his back to Chris Brown. At that time, the claimant was offered to be taken to the employer's physician, but the claimant declined. The claimant was then absent on April 13 and 14, 2005. On April 15, 2005, the claimant brought in a doctor's statement excusing the claimant from work from April 13, 2005 to April 18, 2005, because of back problems. The claimant also picked up his check at that time. The claimant met with the employer's witness, Kevin Van Asten, Plant Manager. At that time, the claimant informed Mr. Van Asten that he had ongoing back problems prior to his employment with the employer herein. At that time, the claimant had not worked long enough for the employer to be subject to Family and Medical Leave (FML). Mr. Van Asten informed the claimant that he could have a two-week leave of absence beginning on April 18, 2005, through April 28, 2005, with an anticipated return date of April 29, 2005. The claimant agreed to this. On April 19, 2005, the claimant brought in a note from his physician with restrictions of lifting no more than five pounds and no bending or twisting. The employer could not meet those restrictions and so informed the claimant. The claimant has never returned to the employer and offered to go back to work. The claimant did not return to the employer on April 29, 2005. On April 27, 2005, the employer attempted to call the claimant at several different numbers, but was unable to reach the claimant. The employer left messages for the claimant to call, but the claimant never did so. The employer then wrote the claimant a letter informing him that he was treated as a voluntary quit.

The claimant is still under a doctor's care and still is under the same restrictions, lifting no more than five pounds, no bending, and no twisting. The claimant has placed no other restrictions on his availability for work and is seeking work by making two in-person job contacts each week, but only for fast food stores or restaurants because the claimant believes that that is the only work he can do.

Pursuant to his claim for unemployment insurance benefits filed effective September 26, 2004, and reopened effective May 1, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,743.00 since separating from the employer herein and reopening his claim for benefits as follows: \$249.00 per week for seven weeks from benefit week ending May 7, 2005 to benefit week ending June 18, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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 24.22(2)j(1)(2)(3) provides:

Benefit 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.

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.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

871 IAC 24.26(6)a-b 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:

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

a. 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.

b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to

the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when he failed to return after a two-week leave of absence. The claimant initially maintained that he was not separated from his employment but remained employed. The claimant's testimony throughout the hearing was not credible for reasons discussed below. The employer's witness, Kevin Van Asten, Plant Manager of the employer's plant in Ottumwa, Iowa, where the claimant was employed, credibly testified that the claimant was on a leave of absence for a back condition unrelated to his employment from April 14, 2005, to April 28, 2005, with a return date of April 29, 2005, but the claimant never returned from said leave of absence. The claimant agrees that he was on a leave of absence and agrees that he did not return from the leave of absence, but claims that he brought in a note indicating that he had restrictions such that the employer could not meet. The administrative law judge concludes that the claimant is considered to have left his employment voluntarily when he failed to return to work at the end of a leave of absence and became unemployed thereafter. The claimant and the employer agreed to the leave of absence, but the claimant failed to return to work or at least failed to return to work able to do the work that he had been doing. There is really no evidence that the claimant was unable to do the work he had been doing, or that that inability was related to or due to his employment with the employer herein. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily.

The issue then becomes whether the claimant left his employment without good cause attributable the employer. The administrative law judge concludes that the claimant has the burden to prove that he has left his employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The claimant seemed to maintain that he is still employed by the employer but unable to work because of a job-related injury. The claimant's entire testimony is not credible. The claimant testified that he was injured on April 13, 2005, while at work, and informed the employer. However, Mr. Van Asten credibly testified that the claimant's last day of work was April 12, 2005, and that the claimant was absent on April 13, 2005, and thereafter. Mr. Van Asten credibly testified that the claimant complained of a back injury on April 12, 2005, but did not state at that time that it was related to his employment. Further, although the employer offered to have the claimant seen by the employer's physician, the claimant declined. The claimant has never done any workers compensation reports on his alleged injury. Mr. Van Asten also testified that, when he met with the claimant on April 15, 2005, that the claimant stated that he had an ongoing back problem prior to his employment. The claimant attempted to deny an ongoing back problem, but finally conceded that he did have an ongoing back problem from previous employment. The claimant testified that he was still employed by the employer, but also testified that he was earnestly and actively seeking work by making two in-person job contacts each week. The claimant could provide no reason why he was conducting a work search if he was still employed the employer. The claimant also conceded that his physician did not say his injury was work-related. The claimant has provided no competent evidence showing adequate health reasons to justify his termination or showing any health conditions reasons that are attributable to his employer. The claimant alleges that he was injured at work on April 13, 2005, but the evidence establishes that the claimant did not even work that day. The claimant also conceded to an ongoing back problem. The claimant

conceded he never filed a workers compensation claim because his back injury was not that bad. There is no evidence that the claimant ever informed the employer of any work-related health problem or informed the employer that he intended to quit unless the problem was correct and reasonably accommodated. Under these circumstances, the administrative law judge is constrained to conclude that any back condition that the claimant may have had was not related to, or aggravated by, his present employment, and the employer was not under any obligation to give the claimant any reasonable accommodation. The claimant testified that he is still under a doctor's care with restrictions and has not recovered from any back condition that he has and has not returned to the employer and offered to go back to work, or at least go back to work for the position and work he was doing prior to his separation. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant left his employment voluntarily with good cause attributable to the employer either for an employment-related illness or injury separation or a non-employment-related illness or injury separation. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily without good cause attributable to the employer and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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.

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he is either temporarily unemployed or partially employed as defined at Iowa Code section 96.19(38)(b)(c) so as to excuse the claimant from the requirements that he be able, available, and earnestly and actively seeking work. The administrative law judge further concludes that the claimant has not demonstrated by a preponderance of the evidence that he is able and available for work. The claimant repeatedly testified at the hearing that he was under a doctor's care and still under the same restrictions he always had been, namely, lifting no more than five pounds, and no bending and no twisting. 871 IAC 24.23(1) and (6) provide that an individual who is ill (or injured) and not able to perform work due to illness (or injury), and an individual who has a medical report on file submitted by a physician stating that such individual is not presently able to work, are reasons for one being disqualified to receive unemployment insurance benefits for being unavailable for work. The administrative law judge concludes that these apply here. The claimant testified that he has a statement from his physician that releases him to work but with restrictions as noted above. The administrative law judge does not believe that these restrictions allow the claimant to be available for work. The administrative law judge believes that these restrictions unduly impede and restrict the claimant's opportunities for employment. Further, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant is able to work. The administrative law judge concludes that, because of the restrictions previously noted, the claimant is not able to work because the restrictions unreasonably impede his opportunities for employment. It is true that the claimant does not have to be able to work in his customary occupation, but in some gainful employment. The claimant testified that he was only seeking work at fast food restaurants, but the administrative law judge is not convinced that the claimant can perform even those tasks because he cannot bend or twist and cannot lift over five pounds, and the claimant apparently has not been able to find any employment in fast food restaurants. Accordingly, the administrative law judge concludes that the claimant is not able and available for work and, as a consequence, he is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits and further demonstrates that he is able, available, and earnestly and actively seeking work and is otherwise entitled to benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,743.00 since separating from the employer herein on or about April 29, 2005, and reopening his claim for unemployment insurance benefits effective May 1, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 24, 2005, reference 04, is reversed. The claimant, Todd B. DeGroot, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits and demonstrates that he is able, available, and earnestly and actively seeking work, because the claimant has left his employment voluntarily without good cause attributable the employer and is not able and available for work. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,743.00

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