

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MEGAN N BURK
Claimant

APPEAL NO. 10A-UI-15762-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SAC & FOX TRIBE
Employer

**OC: 10/10/10
Claimant: Appellant (5)**

Section 96.5-1 – Voluntary Quit
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated November 5, 2010, reference 03, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 27, 2010. Claimant participated. Employer participated by Samuel Gutierrez, Human Resources Director, and Wendy Carter, Restaurant/Banquet Manager. The record consists of the testimony of Megan Burk; the testimony of Samuel Gutierrez; the testimony of Wendy Carter; and Employer's Exhibits 1-13.

ISSUES:

Whether the claimant voluntarily left for good cause attributable to the employer; and

Whether the claimant was able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was hired on July 21, 2010, as a full-time restaurant/banquet supervisor. Her last day of actual work was October 7, 2010. The claimant did not return from a voluntary leave of absence, which ended on November 30, 2010. The employer considered the claimant to have abandoned her job and processed her as a voluntary quit on December 5, 2010.

The claimant was pregnant and developed complications associated with her pregnancy. She left work early on October 7, 2010. She did not return to work and she did not call nor did she return messages from her employer. On October 11, 2010, the employer received information from the claimant's physician that she was having complications with her pregnancy and he recommended that she work only four hours per day. On October 12, 2010, the claimant and Wendy Carter, the claimant's supervisor, spoke about the situation. Ms. Carter informed the claimant that the employer was willing to work with these restrictions. The claimant then told

Ms. Carter that her situation had changed and she was now unable to work at all due to the possibility of going into premature labor.

The claimant did not qualify for Family Medical Leave Act (FMLA) leave because she had only been employed since July 21, 2010. The employer offered the claimant unpaid administrative leave. This leave began on October 19, 2010, and ended on November 30, 2010. The claimant was not terminated by the employer. The claimant moved to Chariton, Iowa, and never returned to work after her leave ended. The employer left messages for the claimant about returning to work. The claimant never got in touch with the employer about returning to work. The claimant does not have a release to return to work from her physician and she only began looking for work approximately one week ago.

REASONING AND CONCLUSIONS OF LAW:

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 24.22(2)j(1)(2) 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.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

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.

871 IAC 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.

The claimant initially applied for unemployment insurance benefits on October 10, 2010. At that time, she was still employed by the employer. She had left work early on October 7, 2010, and was under a physician's care for complications related to her pregnancy. The claimant informed her supervisor, Wendy Carter, that she was not able to work. She testified that she was put on complete bed rest to avoid premature labor. The claimant was clearly not physically able to work at the time she initially applied for unemployment benefits.

The claimant did not qualify for FMLA leave and her employer granted her administrative leave, that is, an unpaid voluntary leave of absence. The leave of absence was from October 19, 2010 through November 30, 2010. The claimant was not able and available for work during this time. If an employee is on a voluntary leave of absence, she is disqualified from receiving unemployment insurance benefits.

The employer's witnesses testified that the claimant was expected back at work on December 1, 2010. The claimant did not return to work and she admitted that she did not contact her employer about returning to work. She had moved to Chariton, Iowa. The greater weight of the evidence is that the claimant could have returned to work and that she made the decision not to come back after her leave of absence expired. The claimant denied receiving any calls about returning to work. She had changed her phone number. She admitted that she did not notify her employer about her new number. The claimant initiated the separation of employment by failing to return to work after her leave of absence expired. As of December 1, 2010, benefits are denied due to claimant voluntarily leaving her job without good cause attributable to the employer.

DECISION:

The decision of the representative dated November 5, 2010, reference 03, is modified without effect. The claimant is not eligible for unemployment insurance benefits from October 10, 2010 through November 30, 2010, as she was not able and available for work. As of December 1, 2010, unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css