

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MICHAEL J PHELPS
Claimant

HY-VEE INC
Employer

APPEAL 16A-UI-07231-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/05/16
Claimant: Appellant (1)

Iowa Code § 96.4(3) – Able and Available
Iowa Admin. Code r. 871-24.22(2)j – Benefit Eligibility Conditions – Leave of Absence
Iowa Admin. Code r. 871-24.23(10) – Availability Disqualifications – Leave of Absence

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 27, 2016, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 19, 2016. The claimant participated personally and with fiancé/witness, Louise Varnadoe. The employer participated through Bruce Burgess, hearings representative with Corporate Cost Control. Employer witnesses included Kay Kress, store manager, and Staci Wahl, human resources director. Claimant exhibit A was admitted into evidence. The administrative law judge took official notice of the administrative record including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the claimant on an approved leave of absence? Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a cashier and last performed work on May 23, 2016. The claimant has had ongoing pain and complications from a back injury suffered as a child and leading up to May 23, 2016, the claimant had ongoing pain, which would allow him to work for a few days and then visit a doctor for pain, resulting in a few days off of work. The employer reported the claimant called off 34% of his shifts from January until May for his back and other reasons. The last doctor's note furnished to the employer was May 23, 2016 and reflected the claimant could return to work.

The claimant called Ms. Wahl to report his absence on May 25, 2016. The evidence is disputed as to whether the claimant referenced the reason for his call off was due to a respiratory

infection or if it was implied the absence was due to his back, but the undisputed evidence is that during the conversation, the issue of the claimant discontinuing work was addressed, to which the claimant agreed he could not perform his shifts, and would be removed from the schedule until he presented Ms. Wahl medical documentation supporting his return. On July 7, 2016, the claimant saw Ms. Wahl in the store and notified her that he was visiting a doctor this month. The claimant has a scheduled consultation with a neurologist this week, and has been diagnosed with herniated discs. He expects to undergo surgery for the condition following the consult. At this time, the claimant is unable to return to work to perform his job duties, without having to call off subsequent days to recover from back pain he would incur. The employer has work available to the claimant when he is able to return.

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.

Iowa Code § 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".

Iowa Admin. Code r. 871-24.22(2)(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.

Iowa Admin. Code r. 871-24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant initiated the leave of absence by being unable to perform work due to his ongoing medical condition, and agreeing that he would be removed from the schedule until he was healed. The claimant has been on a leave of absence since May 23, 2016 and is unable to return to work at this time. Therefore, he does not meet the eligibility requirements of being able to and available for work, and, benefits are denied.

DECISION:

The June 27, 2016, (reference 01) decision is affirmed. The claimant is not able to work and available for work effective June 5, 2016. Benefits are withheld until such time as the claimant makes himself available for work to the extent he was available during the base period history.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/pjs