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

DARLENE O IRVING
731 W 4TH ST
MICHIGAN CITY IN 46360-3801

KELLY SERVICES INC
999 W BIG BEAVER RD
TROY MI 48084-4716

Appeal Number: 06A-UI-04905-RT
OC: 04/09/06 R: 12
Claimant: Appellant (1)

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)

STATEMENT OF THE CASE:

The claimant, Darlene O. Irving, filed a timely appeal from an unemployment insurance decision dated April 28, 2006, reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on May 23, 2006, with the claimant participating. Rene Villeneuve, Supervisor in the employer's branch in Michigan City, Indiana, participated in the hearing for the employer. Claimant's Exhibits A and B were admitted into evidence. 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, including Claimant's Exhibits A and B, the administrative law judge finds: The employer is a temporary employment agency. The most recent assignment given to the claimant began on January 24, 2006 at Nash-Finch in Westville, Indiana. That assignment was a long-term indefinite, temp-to-hire assignment. The claimant did not satisfactorily complete that assignment. After working on January 24, 2006, the claimant called the employer on January 25, 2006 and informed the employer that she would not be able to work that day. The claimant was having a problem pregnancy and had been light headed and blacked out earlier on January 16, 2006 as shown at Claimant's Exhibit A. The exact reasons given to the employer on January 25, 2006 for not going to work that day are uncertain. Later that day the claimant again talked to the employer and told the employer that she was removing herself from the assignment. The exact reason for this is also uncertain. In any event, the claimant did not return to the employer until, at the very earliest, at the end of February of 2006. The claimant was still having a problem pregnancy and had difficulty lifting and doing other things. The claimant delivered her child on April 29, 2006 but remained in the hospital until May 1, 2006. Thereafter, the claimant has not seen her doctor and has not filed for unemployment insurance benefits. The claimant was offered another assignment by the employer on April 27, 2006 which was a long-term assignment but the claimant refused that assignment. The exact reason for the claimant's refusal is uncertain but the claimant had some kind of babysitting difficulties at least on that day. The employer has offered the claimant no other assignment. The claimant has placed no other physical or training restrictions on her ability to work other than those that arose as a result of her pregnancy. The claimant has placed some time, day and location restrictions on her availability for work for day-shift employment and a ten mile commute. The claimant has not been earnestly and actively seeking work since delivering her child on April 29, 2006. The claimant has not worked for any employer since January 25, 2006. The claimant filed a claim for unemployment insurance benefits effective April 9, 2006. The claimant has only made three weekly claims for the benefit weeks ending April 15, 22 and 29, 2006.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant has separated from her employment, and if so, whether that separation is a disqualifying event. The administrative law judge concludes that the claimant did separate from her employment on January 25, 2006 and that separation was a disqualifying event.

2. Whether the claimant is ineligible to receive unemployment insurance benefits, because, at relevant times, she is and was not able, available, and earnestly and actively seeking work and was not excused from those requirements. The claimant is ineligible to receive unemployment insurance benefits for those reasons.

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 24.25(17)(20)(21)(23) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (17) The claimant left because of lack of child care.
>
> (20) The claimant left for compelling personal reasons; however, the period of absence exceeded ten working days.
>
> (21) The claimant left because of dissatisfaction with the work environment.
>
> (23) The claimant left voluntarily due to family responsibilities or serious family needs.

871 IAC 24.26(6)a 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.

The first issue to be resolved is whether the claimant has permanently separated from her employment and, if so, the character of that separation. The administrative law judge concludes that the claimant has separated from employment with the employer herein. The employer is a temporary employment agency and provides assignments to its employees. The claimant was given an assignment to Nash-Finch which assignment was a long-term indefinite temp-to-hire assignment. The claimant was given this assignment on January 24, 2006 but only worked one day. The administrative law judge concludes that each assignment from the temporary employment agency is considered as one job and if that assignment is not completed it is considered a separation of employment until the claimant is given another assignment which she accepts and for which she performs services. The evidence establishes that after working the first day the claimant called the employer twice on January 25, 2006 and indicated to the employer in some fashion that she was not going to be able to continue that assignment or that she was removing herself from that assignment. Accordingly, the administrative law judge concludes that this was a voluntary quit effective January 25, 2006. Work remained for the claimant had she not removed herself from her assignment. The issue

then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her 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 her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. At the outset, the administrative law judge notes that neither witness was particularly credible. Nevertheless, the employer's witness, Rene Villeneuve, Supervisor of the employer's branch in Michigan City, Indiana, testified that the claimant removed herself from the assignment with Nash-Finch on January 25, 2006 because of transportation and other issues and that she did not think the assignment was for her and wanted to wait until she had had time to adjust to her mood. Leaving work voluntarily because of transportation is not good cause attributable to the employer. Also leaving work voluntarily because of dissatisfaction with the work environment is not good cause attributable to the employer. Later in the hearing there was some evidence that the claimant gave birth to a second child and that she had some babysitting difficulties. However, leaving work voluntarily because of a lack of childcare or because of compelling personal reasons when the period of absence exceeds ten working days as it does here, are not good cause attributable to the employer. Also, leaving work voluntarily due to family responsibilities or serious family needs is also not good cause attributable to the employer. There is not a preponderance of the evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental or that she was subjected to a substantial change in her contract of hire.

The claimant testified that she was unable to continue her assignment because of her pregnancy condition. The claimant testified that she was light headed and almost blacked out while on the way to work and later testified that she was waiting to have a prenatal doctor's appointment and wanted to wait to return to work. Claimant's Exhibit A indicates that the claimant was not able to work at least from the period from January 25, 2006 to February 6, 2006. The claimant testified then that she contacted the employer at the end of February and was ready to return to work but Ms. Villeneuve testified that the claimant did not report to the employer that she was ready to return to work until April 19, 2006. The administrative law judge concludes that at neither time was the claimant really able to work nor was she certified as such by a licensed and practicing physician. Claimant's Exhibit B purports to be a release to return to work on February 6, 2006 but it was not dated until May 22, 2006 after the claimant had delivered her baby. Even the claimant testified that she had difficulty lifting and doing other things during her pregnancy and since has delivered she has not sought work. The administrative law judge is constrained to conclude that the claimant left her employment because of her pregnancy and that she has not recovered or her recovery has not been certified by a licensed and practicing physician and the claimant has not returned to the employer and offered to perform services to the employer after recovering and documented her recovery. There is no evidence that the claimant's condition was related to her employment. It is true that there is no direct evidence that the claimant left her employment upon the advise of a licensed and practicing physician but the import of Claimant's Exhibit B merely indicates that. Accordingly, the administrative law judge concludes that the claimant left her employment because of a non-employment-related pregnancy or illness and she has not demonstrated by a preponderance of the evidence that she is entitled now to receive unemployment insurance benefits.

In summary, the administrative law judge concludes that the claimant left her employment voluntarily on January 25, 2006 without good cause attributable to the employer and has not demonstrated that she is otherwise entitled to these benefits and, therefore, the claimant is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, she requalifies for such benefits or demonstrates that she has recovered from her pregnancy and the conditions related thereto which recovery is certified by a licensed and practicing physician and the claimant returns to the employer specifically and offers to go back to the employer and no suitable comparable work is available and the claimant is otherwise able, available, and earnestly and actively seeking work.

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".

The administrative law judge concludes that the claimant has the burden of proof to show that she 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 first that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence either that she is temporarily unemployed or partially unemployed as defined by Iowa Code section 96.19(38)(b) and (c) so as to excuse her from the requirements that she be available for work 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 she has been approved for Department (Director) Approved Training and is attending such training so as to be excused from the provisions that require her to be available for work and earnestly and actively seeking work. See Iowa Code section 96.4(6). The administrative law judge further concludes that the claimant has not demonstrated by a preponderance of the evidence that she is able, available, and earnestly and actively seeking work. The administrative law judge first concludes that the claimant is not able to work. Although the claimant seemed to testify otherwise, the claimant was clearly not able to work from January 25, 2006 to February 6, 2006 as shown at Claimant's Exhibit B. The claimant then testified that she was not able to work or do other things. The administrative law judge concludes that she was still not able to work. Claimant's Exhibit B does not state that the claimant was able to work on February 16, 2006 but merely states that the claimant is now able to work which is dated May 22, 2006. However, even that is questionable because the claimant testified that she has not sought work since delivering her child on April 29, 2006 because she has not seen her doctor. Clearly when the claimant neared the time for delivery and then during the time that she did deliver and was in the hospital she was not able to work. Accordingly, the administrative law judge concludes that the claimant is and has not been able to work since January 25, 2006. The administrative law judge is also constrained to conclude that the claimant is not available for work. The claimant testified that she is restricting her availability to work for the first shift and a ten mile commute. The

administrative law judge did not find that these restrictions unduly impede the claimant's opportunity for employment. However, there is sufficient evidence in the record to indicate that the claimant also has transportation problems and childcare problems which do unreasonably restrict her availability for work. The claimant did not provide any evidence as to how she might be able to work with two small children. Finally, concerning availability for work, as noted above, the claimant has placed restrictions on her ability to work and this also affects her availability for work. The claimant testified that she has not sought work because she has not seen her doctor yet. This certainly implies some kind of a restriction from her physician. Concerning the claimant's seeking work, the administrative law judge concludes that the claimant is not earnestly and actively seeking work. Even the claimant testified that since she delivered her child on April 29, 2006, she has not sought work because she has not seen her doctor. The administrative law judge also does not believe that the claimant was earnestly and actively seeking work prior to that time because she was having a problem pregnancy and delivered her child and was in the hospital for at least some period of time.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant is not able, available, and earnestly and actively seeking work and is not excused from those provisions and therefore the claimant is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, she demonstrates that she is able, available, and earnestly and actively seeking work or is excused from those requirements and further that she has requalified to receive unemployment insurance benefits or has recovered from one of her medical conditions that she had related to her pregnancy and any other conditions and has certified that by a licensed and practicing physician and returned to the employer and no comparable suitable work was available.

DECISION:

The representative's decision of April 28, 2006, reference 02, is affirmed. The claimant, Darlene O. Irving, is not entitled to receive unemployment insurance benefits, until, or unless, she requalifies for such benefits, or demonstrates that she has recovered from any and all medical illnesses or conditions which may have caused her quit and has her recovery certified by a licensed and practicing physician and reports back to the employer and no suitable comparable work is available, because the claimant left her employment voluntarily without good cause attributable to the employer and perhaps for some medical condition. The claimant is also ineligible to receive unemployment insurance benefits because she is, and was, at relevant times, not able, available, and earnestly and actively seeking work.

cs/pjs