

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORIE L MCGREEVEY
Claimant

APPEAL NO. 17A-UI-05709-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 04/23/17
Claimant: Appellant (4)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

Lorie McGreevey filed a timely appeal from the May 25, 2017, reference 01, decision that denied benefits effective April 23, 2017, based on the claims deputy's conclusion that Ms. McGreevey was on a leave of absence that she had requested and the employer had approved. After due notice was issued, a hearing was commenced on June 15, 2017 and concluded on June 22, 2017. Ms. McGreevey participated. Judy Berry of Corporate Cost Control represented the employer and presented testimony through Randy Beimer. On June 15, 2017, the parties waived formal notice on the potential legal issues of whether the claimant was laid off, whether she was discharged for misconduct in connection with the employment, and whether she voluntarily quit without good cause attributable to the employer. Those additional issues were on the hearing notice for the June 22, 2017 proceeding, which notice was mailed to the parties on June 16, 2017. Exhibits B, D, E, I, K, L, M, O were received into evidence.

ISSUE:

Whether Ms. McGreevey has been able to work and available for work within the meaning of the law since she established the claim for unemployment insurance benefits that was effective April 23, 2017.

Whether, since the claim for benefits was established, Ms. McGreevey has been on a leave of absence that she requested and the employer approved.

Whether there has been a separation from the employment that disqualifies Ms. McGreevey for benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Lorie McGreevey began her full-time employment with Hy-Vee in October 2015 and last performed work for Hy-Vee on January 20, 2017. Ms. McGreevey began her employment as a pharmacy technician trainee at Hy-Vee's Muscatine store. Ms. McGreevey continued to work for Hy-Vee

as a pharmacy technician trainee until November 2016, when she took, but did not pass, the pharmacy technician licensing exam. At that point, Ms. McGreevey was required by Iowa law to cease functioning as a pharmacy technician trainee and Hy-Vee was required to cease employing Ms. McGreevey as a pharmacy technician-trainee. See Iowa Code section 155A.6A (regarding pharmacy technician registration) and Iowa Administrative Code Chapter 657, rules 3.5(1) and 3.9(2) (regarding the 12-month limit on pharmacy technician trainee registration). However, Ms. McGreevey's performance on the pharmacy technician certification exam did not preclude her from working as a pharmacy cashier. As a pharmacy cashier, Ms. McGreevey would be "limited to accessing finished, packaged prescription orders and processing payment for and delivering such orders to the patient or the patient's representative." Iowa Administrative Code rule 657-3.1. Ms. McGreevey applied for pharmacy cashier/clerk certification and obtained that certification. Hy-Vee had Ms. McGreevey work as a pharmacy cashier for about a week and a half. Ms. McGreevey did not pursue retaking the pharmacy technician exam.

In November 2016, Store Director Jim Simmons moved Ms. McGreevey to the position of Assistant Manager at the Hy-Vee Fuel Station adjacent to the grocery store. Ms. McGreevey had not requested the move, but acquiesced in the move. In her new position, Ms. McGreevey continued to work full-time, five days per week. Her work hours at the gas station were usually 10:00 a.m. to 6:00 p.m. or 2:15 p.m. to 10:15 p.m. The gas station's hours of operation were 5:00 a.m. to 10:00 p.m. Though Ms. McGreevey had the title of Assistant Manager, the employer did not have Ms. McGreevey perform any managerial duties. Instead, the employer had Ms. McGreevey perform the many duties of Fuel Station Clerk. The job duties included customer service, cashiering, cleaning and stocking. The written job description for Fuel Station Clerk included the following: "Must be able to physically perform medium work: exerting up to 50 pounds of force occasionally and 20 pounds of force frequently, and 10 pounds of force constantly to move objects." The written description also included the following: "Must be able to perform the following physical activities: Climbing, balancing, stooping, kneeling, reaching, standing, walking, pulling, lifting, grasping, feeling, talking, hearing and repetitive motions." Ms. McGreevey's supervisor at the Fuel Station was Fuel Station General Manager Terri Truitt.

On January 20, 2017, Ms. McGreevey commenced a medical leave of absence that she requested and the employer approved. Ms. McGreevey and the employer mutually understood at that time that Ms. McGreevey would need to be off work for an extended period while she underwent and recovered from two surgeries. Ms. McGreevey also applied for and the employer approved short-term disability benefits not to exceed 13 weeks.

On January 21, 2017, Ms. McGreevey underwent spinal fusion surgery. Ms. McGreevey maintained appropriate contact with the employer during her recovery from the surgery and provided the employer with medical documentation concerning the progress of her recovery.

On or about March 18, 2017, Ms. McGreevey requested and the employer approved a second leave period so that Ms. McGreevey could undergo and recover from right rotator cuff surgery and complete shoulder reconstruction. Ms. McGreevey is right-handed. Ms. McGreevey did not provide, and the employer did not require, an anticipated return-to-work date. Ms. McGreevey knew that the approved leave period would be limited to 60 days under Hy-Vee's leave policy. The surgeon who was to perform the shoulder surgery had told Ms. McGreevey that she could expect a healing period of 30 to 60 days. Ms. McGreevey had been released by back surgeon to undergo the shoulder surgery, but had not been released to return to work. Ms. McGreevey underwent the outpatient shoulder surgery on March 21, 2017.

On the same day as the surgery, the surgeon fitted Ms. McGreevey with an immobilizer. The immobilizer consisted of a shoulder harness, a big brace that fit around Ms. McGreevey's waist,

and a harness or sling that went from Ms. McGreevey's back to her stomach to immobilize her arm.

On March 28, Ms. McGreevey had a follow-up appointment with the surgeon who performed her shoulder surgery. Ms. McGreevey asked the doctor when she would be able to return to work. The surgeon advised Ms. McGreevey to speak with the employer about what her health status would need to be before she would be allowed to return to the employment. Ms. McGreevey then spoke with Fuel Station General Manager Terri Truitt, who told Ms. McGreevey to speak to the store director. When Ms. McGreevey spoke with Store Director Jim Simmons, he directed Ms. McGreevey to speak with Randy Beimer, Human Resources Manager at Muscatine store. Mr. Beimer had approved the two leave requests. Ms. McGreevey was wearing the immobilizer when she spoke with Ms. Truitt, Mr. Simmons and Mr. Beimer. Ms. McGreevey did not have and had not brought a medical release. When Ms. McGreevey spoke with Mr. Beimer on March 31 about the possibility for returning to work, Mr. Beimer told Ms. McGreevey that there was no way she could work in light of the immobilizer. Mr. Beimer told Ms. McGreevey to come back when she had been released by her doctor to return to work and to bring the release.

On April 11, 2017, Kathy Mitchell, Leave of Absence Administrator for Hy-Vee, Inc., sent Ms. McGreevey a letter stating that Ms. McGreevey's 13 weeks of short-term disability benefits would expire on April 30, 2017. Ms. Mitchell wrote that if Ms. McGreevey was unable to return to work at that time she would have to provide the Muscatine leave of absence coordinator with medical documentation to continue her medical leave. Ms. Mitchell also wrote that if Ms. McGreevey was unable to return to work, she would have to commence paying the premium for short-term disability insurance and life insurance.

Ms. McGreevey continued in the immobilizer until April 23, 2017. On April 28, 2017, Dr. Tuvi Mendel, M.D. of Orthopaedic Specialists, provided Ms. McGreevey with a medical release that stated as follows:

Patient may return to work with light duty restrictions. Limited use of right upper extremity. May lift up to 3 pounds from floor to waist level. No waist to overhead activities. No repetitive motions. Preferably office type work in a clean dry environment. Patient does not need to wear her immobilizer. Reevaluation in 8 weeks.

Ms. McGreevey had no medical restrictions on use of her left, non-dominant, hand and arm. On April 28, Ms. McGreevey took the medical release to the Hy-Vee store and left it for Mr. Beimer, who was away from the store at the moment. Mr. Beimer called Ms. McGreevey later that day. Mr. Beimer told Ms. McGreevey that she could not return to the employment until she was "100 percent recovered." Mr. Beimer said that was the best thing for Ms. McGreevey and Hy-Vee. Ms. McGreevey called Mr. Beimer later that day and asked whether her employment had been terminated. Ms. McGreevey told Mr. Beimer that she was "willing to do anything." Mr. Beimer told Ms. McGreevey that she was not terminated, but reiterated that she could return when she was "100 percent with no restrictions." In Ms. McGreevey's Assistant Manager position in the Fuel Station, the heaviest thing Ms. McGreevey would ordinarily need to lift would be a case of beer or soda.

On April 29, Ms. McGreevey telephoned Ms. Mitchell, the corporate Leave of Absence Administrator, and left a message requesting a return call. On May 1, Ms. Mitchell returned Ms. McGreevey's call. Ms. McGreevey asked Ms. Mitchell why the employer would not allow her to return to work when her doctor had released her to return to work. Ms. Mitchell told Ms. McGreevey that she would speak with Mr. Beimer and get back in touch with

Ms. McGreevey. When Ms. McGreevey did not hear back from Ms. Mitchell, she called Ms. Mitchell on May 3. At the time of that call, Ms. Mitchell stated that she did not recall the conversation from two days earlier why she needed to speak with Mr. Beimer. Ms. Mitchell called Ms. McGreevey on May 5. At that time, Ms. Mitchell told Ms. McGreevey that she could not return to work because she had not recovered "100 percent." Ms. McGreevey asserted that there were "lots of jobs available in the store" and that she was willing to work anywhere in the store. Ms. McGreevey asked Ms. Mitchell if Hy-Vee could provide her with a reasonable accommodation that would allow her to return to work. Ms. McGreevey had been monitoring the electronically-posted Muscatine job openings. The posted jobs included positions in the kitchen, in the floral department, fuel station clerk, baker positions, and display/product sampling. Ms. Mitchell told Ms. McGreevey that if, and only if, her injury had been a worker's compensation matter, Hy-Vee would have provided a workplace accommodation.

On or about May 12, 2017, Ms. McGreevey received a letter from Ms. Mitchell. The letter was dated May 9, 2017. The letter asserted that Ms. McGreevey had requested a leave of absence and that Hy-Vee had approved her for a leave of absence for the period of May 1, 2017 through June 30, 2017. Ms. McGreevey had not requested extension of the leave of absence. The letter included the following:

While on leave, please furnish your supervisor with a periodic report, as appropriate for your particular leave situation, to inform your work location of your status and intent to return to work. If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the front page of this letter, please notify your store at least two work days prior to the date you intend to report to work. You may be asked to produce a doctor's notice releasing you to work.

It is very important that you report to work when your doctor releases you. Failure to do so may result in termination of your employment with Hy-Vee, Inc.

On or about May 14, 2017, Ms. McGreevey received in the mail a blank leave of absence request form from the employer. Ms. McGreevey did not complete or return the form.

Mr. Beimer concedes that there were positions at Hy-Vee that Ms. McGreevey could have performed with the medical restrictions set forth in the April 28, 2017 medical release. These would have included clerking in the pharmacy and provide product samples to customers.

Ms. McGreevey established a claim for unemployment insurance benefits during the week of April 23-29, 2017. The claim was deemed effective April 23, 2017. Workforce Development set Ms. McGreevey's weekly benefit amount at \$343.00. Ms. McGreevey did not look for other employment during the week that April 29, 2017. During that week, Ms. McGreevey reported \$363.00 in short-term disability benefits for that week. Ms. McGreevey thereafter continued to monitor the Hy-Vee job postings. On May 1, 2017, Ms. McGreevey commenced her search for other employment.

During the week that ended May 6, Ms. McGreevey applied for a pharmacy clerk position at Wal-Mart and for a school cleaning position.

During the week that ended May 13, Ms. McGreevey applied for a cashiering and floral position at Menards. Ms. McGreevey also applied for a temporary janitorial position through Temp Associates. Ms. McGreevey also applied for positions at Mills Fleet and Farm that she knew she could likely not perform due to her medical restrictions.

During the week that ended May 20, Ms. McGreevey applied for a job coach position at Goodwill, but did not apply for any other positions.

During the week that ended May 27, Ms. McGreevey applied for a job stocking screws and bolts. She also applied for a sales associate/cashier position at Walgreens.

During the week that ended June 3, Ms. McGreevey did not apply for any jobs. Ms. McGreevey had an interview with Temp Associates for the job she had applied for during the week that ended May 13.

During the week that ended June 10, Ms. McGreevey did not apply for any jobs. Ms. McGreevey had an interview with Wal-Mart for the pharmacy clerk position she had applied for during the week that ended May 6.

During the week that ended June 17, Ms. McGreevey did not apply for any jobs. Workforce Development records indicate that Ms. McGreevey discontinued her claim for benefits after the week that ended June 17, 2017 and has not made any additional weekly claims.

REASONING AND CONCLUSIONS OF LAW:

The evidence indicates, and parties agree, that Ms. McGreevey was on an approved leave of absence from January 20, 2017 through April 28, 2017. The employer asserts there has been no separation from the employment and that Ms. McGreevey continues on an approved leave of absence. However, since April 28, the employer has taken the position that Ms. McGreevey can return when and only if she is released 100 percent released to return to work without restrictions. Ms. McGreevey asserts that she has been released to return to work, asserts that she could perform her regular duties, asserts that even if she could not perform 100 percent of her regular duties, the employer could and should provide her with a reasonable accommodation, and asserts that she has been involuntarily separated from the employment since April 28, 2017.

A leave of absence is deemed a period of voluntary unemployment. During a leave of absence that the claimant requested and the employer approved, a claimant cannot be deemed available for work, and is not eligible for unemployment insurance benefits. See Iowa Administrative Code rule 871-24.23(10). Ms. McGreevey was clearly on a leave of absence during the first week of her unemployment insurance claim and is not eligible for benefits for the week that ended April 29, 2017.

Iowa Admin. Code r. 871-24.22(2)(1)(2)(3) provides:

- 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.

Ms. McGreevey did not request an extension of her leave of absence beyond April 30, 2017, did not agree to an extension, and strongly asserts that she has not been on a leave of absences since April 30, 2017. Because Ms. McGreevey did not request an extension of the leave of absence, she cannot be deemed to be on a *voluntary* leave of absence beyond April 30, 2017. Accordingly, the administrative law judge concludes there has indeed been a separation from the employment. The question becomes what sort of separation?

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

In *Wills v. Employment Appeal Board*, the Supreme Court of Iowa held that an employee did not voluntarily separate from employment where the employee presented a limited medical release that restricted the employee from performing significant lifting, and the employer, as a matter of policy, precluded the employee from working so long as the medical restriction continued in place. See *Wills v. Employment Appeal Board*, 447 N.W.2d 137 (Iowa 1989). In *Wills*, the Court concluded that the employer's actions were tantamount to a discharge. Ms. Wills was pregnant Certified Nursing Assistant who provided the employer with a lifting restriction indicating she could not lift greater than 20 pounds. Her regular duties required that she be able to lift substantially more. Ms. Wills remained able to perform some, but not all of her regular job duties. The employer, like Hy-Vee, took the position that the employer would not provide a reasonable accommodation because the medical condition was not work related.

Ms. McGreevey did not voluntarily quit the employment. Rather, the evidence indicates that Ms. McGreevey had been trying to find a way to return to the employment at Hy-Vee since March 28, 2017. Prior to the April 23, 2017 Ms. McGreevey was in an immobilizer that prevented her from using her right hand or arm at all. Prior to April 28, 2017, Ms. McGreevey had not been released to return to the work. The employer had an obligation to provide Ms. McGreevey with reasonable accommodations that would allow her to continue in the work. See *Sierra v. Employment Appeal Board*, 508 N.W. 2d 719 (Iowa 1993). In this instance,

reasonable accommodation meant reasonable accommodation so that she could perform her regular duties, not assignment to another position in the store. The employer was not required to create a new job for Ms. McGreevey. Ms. McGreevey specifically requested reasonable accommodation. The employer refused to engage in dialogue with Ms. McGreevey regarding whether reasonable accommodations would make it possible for her to perform the essential functions of her Fuel Station Assistant Manager position reasonable accommodations. Reasonable accommodation in this instance would have included some time of cooperative, individualized assessment of Ms. McGreevey's ability to perform the essential functions. While Ms. McGreevey overstates her abilities, the weight of the evidence indicates that she could have performed many of the essential functions of the Fuel Station Assistant manager position. The employer's decision to adopt a 100 percent released or nothing approach amounted to a discharge from the employment. Because the involuntary separation was not based on misconduct, the separation did not disqualify Ms. McGreevey for unemployment insurance benefits. See Iowa Code section 96.5(2)(a) (regarding discharge for misconduct in connection with the employment). Based on the separation, Ms. McGreevey would be eligible for benefits provided she meets all other eligibility requirements.

The remaining question is whether Ms. McGreevey has been able to work and available for work within the meaning of law since April 30, 2017.

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(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.

Iowa Admin. Code r. 871-24.22(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.

Ms. McGreevey's medical restrictions did not prevent her from performing any and all work in the Muscatine area. There were indeed many types of work that Ms. McGreevey was able to perform. Ms. McGreevey was particularly suited to clerking in a pharmacy. However, the evidence establishes that Ms. McGreevey's work search has sometimes been less than an active and earnest search for work. During the week that ended May 6, Ms. McGreevey applied for a pharmacy clerk position at Wal-Mart and for a school cleaning position. While the clerk position would have been within her medical restrictions, a reasonable person would conclude that the cleaning position was not. Ms. McGreevey is not eligible for benefits for the week that ended May 6, 2017.

Regarding Ms. McGreevey's work search for the week that ended May 13, 2017, the cashiering position was likely within her medical restrictions, but a reasonable person would conclude that the janitorial position and the Fleet and Farm position were not. Ms. McGreevey is not eligible for benefits for the week that ended May 13, 2017.

During the week that ended May 20, Ms. McGreevey applied for just one job. Ms. McGreevey is not eligible for benefits for the week that ended May 20, 2017.

During the week that ended May 27, Ms. McGreevey applied for a job stocking screws and bolts. She also applied for a sales associate/cashier position at Walgreens. Both positions were likely within her medical restrictions. Ms. McGreevey met the able, available, and work search requirements for the week that ended May 27, 2017 and is eligible for benefits for that week, provided she meets all other eligibility requirements.

During the weeks that ended June 3, 10 and 17, 2017, Ms. McGreevey did not apply for any jobs. Ms. McGreevey is not eligible for benefits for those weeks.

DECISION:

The May 25, 2017, reference 01, decision is modified as follows. The claimant was discharged effective April 28, 2017 for no disqualifying reason. The discharge did not disqualify the claimant for benefits. Based on the separation, the claimant is eligible for benefits, provided she meets all the eligibility requirements. The employer's account may be charged.

During the week that ended April 29, 2017, the claimant was on an approved leave of absence and, therefore, is not eligible for benefits for that week. During the weeks that ended May 6, May 13, May 20, June 3, June 10 and June 17, 2017, the claimant did not demonstrate an active and earnest search for work and did not meet the availability requirement. During the week that ended May 27, 2017, the claimant was able to work, available for work, and engaged in an active and earnest search for work. The claimant is eligible for benefits for that week provided she meets all other eligibility requirements.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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