

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDA L MCNALLY
Claimant

APPEAL NO. 09A-UI-09126-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

**Original Claim: 05/03/09
Claimant: Respondent (2-R)**

871 IAC 24.22(2)j(1) & (2) – Leave of Absence

STATEMENT OF THE CASE:

Wells Fargo Bank, NA filed a timely appeal from a representative's decision dated June 15, 2009, reference 01, which held the claimant eligible to receive unemployment insurance benefits, finding that the claimant left work on January 14, 2009, because of an illness or injury but no work was available after the claimant had recovered and offered to return to work. After due notice was issued, a telephone conference hearing was scheduled for and held on July 13, 2009. The claimant participated personally. The employer participated by Peggy Hargis, customer service supervisor.

ISSUE:

The issue is whether the claimant voluntarily quit her employment with good cause attributable to the employer or whether the claimant was on an approved leave of absence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having reviewed the evidence in the record, finds: The claimant was employed by Wells Fargo Bank beginning on October 13, 2003. Ms. McNally works as a full-time Customer Service Representative II and is paid by the hour. Her immediate supervisor is Peggy Hargis.

On January 18, 2009, the claimant was injured in non-work-related accident. Wells Fargo Bank and Ms. McNally agreed that the bank would hold the claimant's job or a similar position for her until she was released by her physician and was able to return to work. On June 8, 2009, the claimant temporarily returned to work but experienced difficulty in walking. Ms. McNally and her employer renewed the leave of absence, allowing the claimant to be off work to obtain surgery. The claimant is expected to return to work when released by her physician.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes that the claimant was on an approved leave of absence. It does.

A leave of absence negotiated with the consent of both parties, the employer and the employee, is deemed a period of voluntary unemployment for the employee-individual and that individual is considered ineligible for benefits for that period. 871 IAC 24.22(2)j. If at the end of a period of a negotiated leave of absence the employer fails to re-employ the employee-individual, the individual is considered laid off and eligible for benefits. On the other hand, if the employee-individual fails to return at the end of a leave of absence and subsequently becomes unemployed, the individual is considered as having voluntarily quit and therefore is ineligible for benefits. The evidence in the record establishes that Ms. McNally has been on an approved leave of absence since January 19, 2009, and was on a leave of absence at the time of hearing. As such, the claimant is not able and available for work and is ineligible to receive unemployment insurance benefits.

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.

For the reasons stated herein, the administrative law judge concludes the claimant is on an approved leave of absence and is ineligible to receive unemployment insurance benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated June 15, 2009, reference 01, is reversed. The claimant is on an approved leave of absence and is voluntarily unemployed and is ineligible to receive unemployment insurance benefits. The issue of whether the claimant must repay the unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw