

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VERONIKA K FAIDLEY
Claimant

APPEAL NO. 11A-UI-15718-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FT MADISON HEALTH CENTER INC
Employer

**OC: 09/11/11
Claimant: Respondent (2)**

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 7, 2011, reference 02, decision that allowed benefits effective September 11, 2011 based on an Agency conclusion that the claimant was available for work and medically able to work. After due notice was issued, a hearing was held on January 13, 2012. Claimant Veronika Faidley participated. Phil Maxey, Administrator, represented the employer. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant. The administrative law judge took official notice of the administrative law judge decision in Appeal Number 11A-UI-13279-VST regarding the claimant's separation from the employment.

ISSUES:

Whether the claimant has been able to work and available for work since establishing her claim for benefits.

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a skilled nursing facility located in Fort Madison. Veronika Faidley was hired in 2008 as a *full-time* certified nursing assistant. Ms. Faidley last performed work for the employer on June 9, 2011. Ms. Faidley went on Family and Medical Leave Act (FMLA) leave on June 15, 2011, due to complications related to a high-risk pregnancy. In July 2011, Ms. Faidley's obstetrician referred Ms. Faidley to the University of Iowa Hospitals and Clinics (UIHC) for further prenatal care, due to the high risk nature of the pregnancy. While the baby was in utero, Ms. Faidley learned that there were problems with the baby's esophagus that would require surgery once the baby was born. Ms. Faidley's FMLA leave expired on September 7, 2011. Ms. Faidley had not yet delivered her baby and was unable to return to work at that time. The employer discharged Ms. Faidley from the employment when she was unable to return to work at the end of the FMLA leave.

Ms. Faidley's baby was delivered seven weeks early by caesarian section on November 30, 2011. The baby weighed four pounds 12 ounces. At the time of the January 13, 2012 appeal hearing, the baby had not yet undergone the esophagus surgery, but Ms. Faidley expected the surgery to occur within a couple weeks. From November 30, 2011 to the present, the baby has been hospitalized at the Neonatal Intensive Care Unit (NICU) at the University of Iowa Hospitals and Clinics (UIHC) in Iowa City. Ms. Faidley was hospitalized from November 30 to December 3, 2011 and then was discharged to home. Ms. Faidley has three other minor children, aged eight, five, and two years old. Since her discharge from the hospital, Ms. Faidley has divided her time between her home in Burlington and the UIHC NICU in Iowa City. Ms. Faidley leaves for Iowa City on Wednesday morning and arrives back home in Burlington on Thursday afternoons. Ms. Faidley leaves for Iowa City on Friday nights and arrives back home in Burlington on Sunday afternoons. When Ms. Faidley is not at the NICU she receives updates on the status of her baby four times a day.

Ms. Faidley established a claim for unemployment insurance benefits that was effective September 11, 2011. Ms. Faidley had not yet given birth to her baby and had a 15-pound lifting restriction. During the week that ended September 17, 2011, Ms. Faidley applied for a full-time production position at the Scott's fertilizer plant in Fort Madison. While Ms. Faidley believed she could do the work, she disclosed that she was in the midst of a high risk pregnancy and was not hired. During the same week, Mr. Faidley applied for work at the Great River Medical Center in Burlington. Ms. Faidley believed that agency had a dietary position open, but was interested in anything they might have. During the week that ended September 24, 2011, Ms. Faidley applied for work at the Henry County Hospital. Ms. Faidley cannot recall any additional applications for employment until January 10, 2012, when she contacted Fort Madison Health Center, the employer of interest in this matter, about further employment. While Ms. Faidley asserts she has been released to return to work without restrictions as of Wednesday, January 11, 2012, Ms. Faidley had provided no medical documentation to support that assertion.

Ms. Faidley has received \$4,788.00 in unemployment insurance benefits for the period of September 11, 2011 through January 15, 2012.

REASONING AND CONCLUSIONS OF LAW:

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".

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) 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.

While Ms. Faidley's 15-pound lifting restriction might prevent her from being able to perform her former nursing assistant duties, that is not the test of whether she meets the work ability requirement to be eligible for unemployment insurance benefits. Instead, Ms. Faidley need only demonstrate ability to perform some type of work that others in the labor market perform. Ms. Faidley's high risk pregnancy is another matter. The weight of the evidence establishes that, due to the high risk pregnancy, Ms. Faidley was not able to work and/or available for work from the time she established her claim for benefits. Ms. Faidley appears to have acknowledged this fact early in her claim, when she ceased keeping track of job contacts. Ms. Faidley's high risk pregnancy continued to make her unavailable for full-time work until she gave birth to her child on November 30, 2011. While Ms. Faidley may have recovered from giving birth within a short period, her extraordinary parental responsibilities had prevented her from being available to conduct an active and earnest search for full-time employment and have prevented her from being available for full-time employment. Benefits are denied effective September 11, 2011. This disqualification continued through the week that ended January 14, 2012.

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.

Because the administrative law judge has concluded that Ms. Faidley was not eligible for benefits during the period when she was claiming benefits, the benefits Ms. Faidley received constitute an overpayment of benefits that Ms. Faidley must repay to Iowa Workforce Development. Ms. Faidley is overpaid \$4,788.00 in unemployment insurance benefits for the period of September 11, 2011 through January 15, 2012.

DECISION:

The Agency representative's December 7, 2011, reference 02 is reversed. The claimant has not been able and available for work since establishing her claim for benefits. Accordingly, the claimant is not eligible for benefits. The claimant is overpaid \$4,788.00 in unemployment insurance benefits for the period of September 11, 2011 through January 15, 2012.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs