IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TERRY G FLANIGAN
Claimant

HEARTLAND EXPRES INC OF IOWA
Employer

APPEAL NO. 12A-UI-03613-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/01/12
Claimant: Appellant (4)

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

STATEMENT OF THE CASE:

Terry Flanigan filed a timely appeal from the March 30, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing started on April 24, 2012 and concluded on April 26, 2012. Mr. Flanigan participated personally and was represented by attorney Elizabeth Norris. Lea Peters, Human Resources Generalist, represented the employer. Exhibits One, A, and B and Department Exhibit D-1 were received into evidence.

ISSUE:

Whether Mr. Flanigan separated from the employment for a reason that makes him ineligible for unemployment insurance benefits.

Whether Mr. Flanigan has been able to work and available for work since establishing his claim for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Terry Flanigan was employed by Heartland Express, Inc. of Iowa as a full-time over-the-road truck driver from 2002 and last performed work for the employer on December 31, 2011. Mr. Flanigan was assigned to the employer's terminal in Olive Branch, Mississippi and hauled freight in the southern United States. Mr. Flanigan has at all relevant times resided in Benton, Kentucky, about 195 miles from the employer's terminal in Olive Branch, Mississippi. Mr. Flanigan's immediate supervisor at the time he last performed work for the employer was Fleet Manager Sean Polk.

Mr. Flanigan has been in the workforce since 1965 and has worked primarily as a career truck driver.

In mid-December 2011, Mr. Flanigan began to experience pain in his left shoulder. Mr. Flanigan is right-handed, but needed use of both hands to safely operate a tractor-trailer. The pain in Mr. Flanigan's left shoulder became progressively worse. Mr. Flanigan made an appointment

with the V.A. hospital in Paduka, and saw Dr. Terry Calhoun, M.D., on January 3, 2012. Dr. Calhoun prescribed pain medication, hydrocodone 7.5 mg, to be taken every six hours. Mr. Flanigan understood that he could not legally operate a commercial motor vehicle while taking hydrocodone. Dr. Calhoun told Mr. Flanigan that he needed to be on "light-duty. Dr. Flanigan but did not specify what that meant other than saying that Mr. Flanigan needed to stop using his left arm if it began to hurt and that Mr. Flanigan could not perform his over-the-road truck driving duties. Mr. Flanigan's shoulder would begin to hurt if he raised his left arm too high or raised the arm for too long.

On the same day Mr. Flanigan saw the doctor, he contacted the Heartland Express safety department. Mr. Flanigan told the safety department representative that his doctor had put him on pain pills and that he was not able to drive for the employer while he was taking the pain pills. Mr. Flanigan did not assert that his shoulder problem was work related and the safety department representative did not inquire. Over the course of a decade, Mr. Flanigan had driven the employer's tractor-trailer up to 11 hours per day. Mr. Flanigan asked the safety department representative whether the employer had any other work he could do. The safety department representative asked Mr. Flanigan how close he was to his assigned Heartland Express terminal. Mr. Flanigan said 195 miles. The safety department representative told Mr. Flanigan that he did not know if the employer had any openings at the Olive Branch terminal, but that Mr. Flanigan was too far away from the terminal anyway. Mr. Flanigan mentioned that he had been thinking about applying for unemployment insurance benefits. The safety department representative agreed that Mr. Flanigan would need an income. The safety department representative asked Mr. Flanigan whether he planned to look for work close to his home in Benton. Mr. Flanigan indicated that was the plan. Benton is a small town, but is within 20 miles of other communities, including the larger community of Paducah.

After the conversation with the Heartland Express safety department representative, Mr. Flanigan contacted Kentucky Workforce Development. That agency directed Mr. Flanigan to contact Iowa Workforce Development about filing an Iowa claim for benefits. Mr. Flanigan lacks computer skills. With his wife's assistance, Mr. Flanigan applied on-line for unemployment insurance benefits and established a claim that was effective January 1, 2012. Mr. Flanigan relied too heavily on his wife's assistance to the point of not reading any of the eligibility requirements.

On January 9, 2012, Mr. Flanigan contacted the Heartland Express Human Resources offices and spoke with Human Resources Representative Dave Dalmasso. Mr. Flanigan also spoke to the employer's insurance department. Mr. Flanigan told Mr. Dalmasso that his doctor had taken him off work and that he could not drive due to pain in his left shoulder and arm. Mr. Flanigan did not assert that his shoulder problem was work-related and Mr. Dalmasso did not inquire. Mr. Dalmasso told Mr. Flanigan that he was eligible for 18 days of leave under the Family and Medical Leave Act (FMLA). Mr. Flanigan had used 66 days of FMLA leave in connection with an earlier leave of absence that had started in March 2011. Mr. Dalmasso told Mr. Flanigan that it might be possible to extend the leave period, but that after a certain point, if Mr. Flanigan wanted to return, he would have to go through orientation and the new hire process.

Mr. Dalmasso followed up the January 9 conversation with a letter, dated January 9, 2012. The first paragraph of the letters states:

> Due to your report of your serious medical condition, enclosed please find the information regarding your request for a Family Medical Leave of Absence. You are eligible for up to 18 days of unpaid leave. You previously used 66 days of FMLA time from March 2011. The leave you currently requested is expected to start on 1/9/12 and

> end on 1/27/12. If you are not able to return on that date, please contact me so that we can identify the change in writing. Once you have been released to return to work, please contact me directly.

The letter did not specify what "the change in writing" would entail. The letter to Mr. Flanigan indicated that additional documents were being mailed to Mr. Flanigan with the letter. These additional documents included a Notice of Eligibility and Rights & Responsibilities pertaining to the leave of absence, a FMLA Certification of Health Care Provider form to be completed by Mr. Flanigan's doctor and returned to the Human Resources department by January 25, and a Job Description and Physical Requirements and Medical Qualification Form to be completed by the doctor and returned to the Human Resources department when Mr. Flanigan was able to return to work.

On January 30, 2012, Mr. Flanigan returned for a follow up appointment with Dr. Calhoun. At that time, Dr. Calhoun completed the FMLA Certification of Health Care Provider for Employee's Serious Health Condition. Mr. Flanigan faxed the document to the employer on the same day. The doctor indicated that Mr. Flanigan's condition has commenced on January 1, 2012 and that the probable duration of the condition was six months. The doctor indicated that he had treated Mr. Flanigan for the condition on January 3 and 30, 2012. The doctor indicated that he had prescribed medication. The doctor indicated that he had referred Mr. Flanigan for a CT of the upper left extremity/left shoulder and x-ray. The doctor indicated that Mr. Flanigan was unable to perform any of his job functions due to the condition and that Mr. Flanigan could not move his left shoulder. The doctor indicated that he expected Mr. Flanigan to be incapacitated for six months. The Certification made no reference to whether the doctor believed Mr. Flanigan's shoulder issue was work related or not.

Sometime in February, Mr. Flanigan underwent an x-ray and CT scan. The scans revealed a cyst in the joint of Mr. Flanigan's left shoulder, but the doctor indicated that he did not think the cyst was causing the problem. The doctor told Mr. Flanigan that he might require shoulder surgery. The doctor advised Mr. Flanigan that his shoulder problem could be from driving all the time. The doctor referred Mr. Flanigan for physical therapy. The physical therapist gave Mr. Flanigan stretching exercises to perform at home. Mr. Flanigan continued to receive physical therapy at the time of the appeal hearing and had a further appointment scheduled for May 15, 2012.

After the conversation with Mr. Dalmasso on January 9, Mr. Flanigan did not have any further contact with the employer until March 16. In the meantime, Mr. Flanigan continued under the belief that he was still on a leave of absence. The employer had done nothing to disabuse him of that idea. On March 16, 2012, Mr. Flanigan contacted the employer's human resources department to discuss an insurance issue. Lea Peters, Human Resources Generalist, became aware of the call and researched Mr. Flanigan's job status. Ms. Peters noted that Mr. Flanigan had only been authorized to take 18 days of FMLA leave.

On March 16, Ms. Peters called Mr. Flanigan back and asked him whether he had been released to return to work. Mr. Flanigan indicated he had not been released to return to work and that he had a medical appointment with a surgeon on March 21, 2012 because he had two cysts in his shoulder. Mr. Flanigan confirmed that his doctor had told him in January that he would be unable to drive over-the-road for six months. Mr. Flanigan told Ms. Peters that he wanted to return to his driving work, but that the doctor would not release him. Ms. Peters told Mr. Flanigan that he had only been authorized for 18 days of FMLA leave. Ms. Peters told Mr. Flanigan that there must have been "an error in the system" and that Mr. Flanigan's leave could not be further extended. Ms. Peters told Mr. Flanigan that once his doctor released him to

return to work, he could contact the employer and be considered for rehire. Mr. Flanigan said he hoped to return within a few months. During the contact with Ms. Peters, Mr. Flanigan did not say that he wanted or intended to quit the employment.

Mr. Flanigan participated in a fact-finding interview at the end of March 2012. Mr. Flanigan's statement to the fact-finding, as indicated in the fact-finder's notes was as follows:

> I am on a leave of absence because of the medication I am on. I am still able to work. I did talk to Don McAllen in Safety. Usually if that happens, they let you work around the terminal and that, but I am over 200 miles away from the nearest terminal. I went on medical leave on the 1st of January. I have not yet been cleared to return to my normal duties. I have been told that yes I can work but I cannot drive. I filed my unemployment claim based on the fact that I can still work but I can't drive a truck.

The employer's comments in the fact-finding interview, as indicated by fact-finder's notes, were as follows:

> Terry went out on a leave of absence on January 1, 2012 for a non-work related injury. Terry had used a large part of his FMLA for a previous leave and only had 18 days left on his FMLA. That was an oversight on our part, that he should have been off FMLA in mid-January. When it was discovered March 16th that he was out of FMLA, I had a conversation with Terry and he told me that he would be out at least another three to four months due to the medication he is on. As of right now, since he has not returned by March 16, we have considered it a voluntary resignation. We did tell him that if he was not able to return, we would consider it a voluntary resignation. If he is able to provide a doctor's note showing full release, and can meet the D.O.T. qualifications, we would consider taking him back.

In response to the employer's comments, Mr. Flanigan told the fact-finder: "She said something about being a voluntary quit. I never quit. I am actively looking for work right now. I can still work doing other things but not driving a truck."

In connection with the fact-finding interview, and in response to the fact-finder's request for medical documentation, Mr. Flanigan returned to his doctor and obtained a note that was backdated to January 30, 2012. The note indicates as follows:

> Terry Flanigan was treated by me, Dr. Terry L. Calhoun on January 3, 2012 and January 30, 2012. I informed Mr. Flanigan that he needed to be on light-duty because of his shoulder. Mr. Flanigan would not be able to drive-over-the-road because of prescription I prescribed him – hydrocodone 7.5 every 6 hours.

The note was written by a nurse, but appears to have been signed by Dr. Calhoun.

Mr. Flanigan began his work search in January 2012. Mr. Flanigan did not keep a weekly log of his job contacts, but is able to say, month-by-month, where he applied for work. Most, if not all, of the positions Mr. Flanigan has applied for would require use of both arms. Many of the positions Mr. Flanigan has applied for are at chemical manufacturing plants or involve some sort of auto repair. Some prospective positions would involve operating a fork lift, a task that would require use of both arms. Mr. Flanigan applied for work at many places where he did not know--and still does not know--whether the prospective employer would have any work within his physical capabilities. Indeed, Mr. Flanigan does not know what his physical capabilities are at

this point and thinks a prospective employer should hire him without Mr. Flanigan or the prospective employer knowing whether he is physically capable of performing the work.

REASONING AND CONCLUSIONS OF LAW:

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

> 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.

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. 871 IAC 24.22(2)(j).

The weight of the evidence in the record establishes that effective December 31, 2011, Mr. Flanigan commenced an approved leave of absence. The weight of the evidence indicates that Mr. Flanigan continued on an approved leave of absence until March 16, 2012, when the employer terminated the employment relationship rather than extend the leave of absence. The evidence indicates that both parties continued to behave until March 16, 2012 as if Mr. Flanigan was on an approved leave of absence. The weight of the evidence indicates that at no point did Mr. Flanigan express a desire to sever the employment relationship. Instead, Mr. Flanigan was off work for a medical condition that was most likely caused by, or at least aggravated by, the full-time driving duties he performed for the employer for a decade. The employer failed to take reasonable steps to investigate the matter to determine whether Mr. Flanigan's shoulder condition was work related and, therefore, should be addressed as a worker's compensation matter.

This case is similar to another case recently decided by the Iowa Court of Appeals. See Prairie Ridge Addiction Treatment Services vs. Sandra Jackson and Employment Appeal Board, No 1-874/11-0784 (Filed 19, 2012). While the Prairie Ridge case has not yet been published, it provides guidance for the administrative law judge to follow in analyzing the present case. In

Prairie Ridge, the employee had requested and been approved for a leave of absence. The employment ended when the employer decided to terminate the employment, rather than grant an extension of the leave of absence. Like the present case, the employee had not yet been released to return to work at the time the employer deemed the employment terminated. The court held that the employee had not voluntarily quit the employment, but had been discharged by the employer.

The evidence in the present case indicates that the employer elected to terminate the employment effective March 16, 2012, despite the fact that both parties had conducted themselves up to March 16 as if Mr. Flanigan was on a leave of absence, and despite the fact that Mr. Flanigan had not yet been released to return to his regular duties.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The evidence fails to establish any misconduct on the part of Mr. Flanigan that might serve to disqualify him for unemployment insurance benefits. In the absence of misconduct, the administrative law judge concludes that Mr. Flanigan was discharged for no disqualifying reason effective March 16, 2012. Mr. Flanigan would be eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged.

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, (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.
>
> (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.
>
> (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.

Mr. Flanigan has presented insufficient evidence to establish that he has been able to work and available for work since he filed his claim for benefits. Mr. Flanigan is essentially without the use of one of his arms and the condition still may require surgical intervention. Mr. Flanigan has presented insufficient evidence to establish what types of work he is able to perform and to indicate that he has sought work that he can perform. Mr. Flanigan has primarily applied for work that a reasonable person in his situation would not expect to be able to perform and for which a reasonable person in his situation would not expect to be hired. In other words, while Mr. Flanigan may have been involved in an active search for work, it has not been an earnest or

meaningful search for work. Benefits are denied January 1, 2012. Mr. Flanigan may establish his eligibility for benefits for the period on or after April 27, 2012, by presenting to the agency appropriate medical evidence indicating what type of work his actually able to perform and evidence that he is seeking full-time work that he is actually able to perform.

DECISION:

The Agency representative's March 30, 2012, reference 01, decision is modified as follows. The employer discharged the claimant effective March 16, 2012, for no disqualifying reason. The separation from the employment does not disqualify the claimant for benefits. The claimant would be eligible for benefits, provided he was able to meet all other eligibility requirements. The employer's account may be charged. The claimant has not demonstrated that he is able and available for work, or that he has made an earnest search for full-time employment, since he established his claim for benefits. Benefits are denied effective January 1, 2012. The claimant may establish his eligibility for benefits for the period on or after April 27, 2012, by presenting to the agency appropriate medical evidence indicating what type of work he is actually able to perform and evidence that he is seeking full-time work that he is actually able to perform.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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