

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RHONDA K HOLLAND

Claimant

APPEAL NO: 12A-UI-04365-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SIMPSON MEMORIAL HOME INC

Employer

OC: 02/26/12

Claimant: Appellant (1-R)

Section 96.4-3 – Able and Available for Work
871 IAC 24.22(2)j(1),(2),(3) – Leave of Absence

STATEMENT OF THE CASE:

The claimant appealed a department decision dated April 6, 2012, reference 01, that held she is voluntarily unemployed due to a leave of absence on February 26, 2012, and benefits are denied. A telephone hearing was held on May 29, 2012. The claimant participated. Chad Thomas, General Counsel and Tracey Sulzberger, RN/Coordinator, participated for the employer. Employer Exhibits #1-14 and Claimant Exhibits A – C with Appeal Documents was received as evidence.

ISSUE:

Whether claimant is on a leave of absence.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant worked for the employer as a part-time LPN in an assisted living facility from July 6, 2010 to January 24, 2012. Claimant signed for a job description that included physical activity requirements. She was put on notice she may be required to lift charts and equipments up to 10 pounds and lift equipment/supplies up to 50 pounds. She also may be required to carry objects up to 10 pounds equipment to 25 pounds and more than 50 pounds when transferring a resident.

The claimant used FMLA for a non-work related health issue in August/September 2011. The August 12 employer notification to claimant included an instruction to claimant to obtain a physician certification that she is capable of returning to work.

Claimant let the employer know in December 2011 she would need to be off work for 2–4 weeks for her surgery on January 27, 2012. The employer responded by providing FMLA notice and a certification for her health provider. The FMLA was approved. Claimant last worked on January 24. The employer provided claimant's physician with her job description.

On February 9 claimant's physician issued a return to work statement for her stating she is able to return with restrictions: 5 lbs weight maximum left upper extremity and minimize repetitive tight gripping. Progress as tolerated. The employer received the statement. In a telephone conversation between claimant and employer on or about February 10, she was told that she would not be allowed to return with the restrictions because she could not perform all of her job duties. Employer also believes that the restrictions would put residents at risk. Claimant filed an unemployment claim effective February 26 because she believed she had been terminated and wanted to work.

The employer protested claimant's unemployment claim as she is still employed on a leave of absence. During the department fact-finding interview on April 5, the employer told claimant she was still employed on leave from work. It clarified her employment status with a follow-up letter on April 10 letting her know she was still considered an employee on leave, but it would expire on April 23. If she could not return to work without restrictions certified by her doctor as of that date, there is no guarantee her job would be held open.

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(2)j(1)(2)(3) provides:

Benefit 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.

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.

The administrative law judge concludes the claimant was not able and available for work effective February 26, 2012, and benefits are denied.

Claimant was granted an open-ended FMLA period beginning January 27, 2012 with anticipation it would be for a period from 2 – 4 weeks. At about 4 weeks, her doctor released her with restrictions that the employer reasonably believes would not allow her to perform all of her job duties and would place residents at risk. It continued claimant's leave period until April 23 to give her the opportunity to provide an "unrestricted" work release. She was told and issued a letter she remained an employee on leave.

The employer is not required to fashion a light duty job for an employee that is on medical leave due to a non-job-related health issue. Claimant blames the employer for not telling her she might not be allowed to return to work if medically restricted, but the FMLA suggests otherwise. In addition the employer would not be able to speculate whether claimant might have any restriction as the result of her post-surgery recovery.

The record establishes the employer held the claimant's job open for the maximum allowable leave period to April 23, 2012 (though claimant argues she was terminated for not being allowed to return to work on February 20). This employment separation issue is remanded to claims for a department fact-finding.

DECISION:

The department decision dated April 6, 2012, reference 01, is affirmed. The claimant was not able to perform all of her job duties due to doctor imposed restrictions effective February 26, 2012. Benefits are denied. The employment separation issue at the end of the leave period on April 23 is remanded for a department fact-finding.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs