

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GERALDINE A LEE
Claimant

APPEAL NO. 07A-UI-08282-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARION COUNTY
Employer

**OC: 07/22/07 R: 03
Claimant: Appellant (2-R)**

Section 96.4(3) – Able and Available

STATEMENT OF THE CASE:

Geraldine Lee filed an appeal from a representative's decision dated August 21, 2007, reference 01, which denied benefits on a finding that she was not able to work. After due notice was issued, a hearing was held by telephone on September 13, 2007. Ms. Lee participated personally and Exhibits A through D were admitted on her behalf. The employer participated by Dave Hansen, Interim Human Resources Director; Ken Thrailkill, Maintenance Supervisor; and Lisa Shives, Administrative Assistant. Exhibits One through Five were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Ms. Lee is able to and available for work within the meaning of the law.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Lee began working for Marion County on October 23, 2000 as a full-time custodian. She suffered a work-related tear to her right rotator cuff in January of 2006. She subsequently underwent surgery in March of 2007. Ms. Lee returned to work on modified duty and the employer accommodated her restrictions.

Ms. Lee suffered an additional injury to her right shoulder on April 23, 2007. She was seen by the company doctor, Dr. Thurston, on April 30. Dr. Thurston did not believe the claimant could safely work using only one hand as she had been advised to avoid using her right upper extremity. On May 2, the employer advised Ms. Lee that she could not return to work until she could fulfill the essential functions of her job. She was advised that her time off would be covered by the Family and Medical Leave Act (FMLA) effective April 30.

The employer met with Ms. Lee on June 29 and told her the last day of paid leave would be July 26. She was advised that the employer could no longer accommodate her restrictions. She had exhausted her available FMLA time. She was told her only other option was to take a 30-day, unpaid leave of absence. Ms. Lee accepted the offer and completed the request for leave on July 26. At that point, she had only a ten-pound lifting restriction. Because she had not fully recovered to the extent that she could perform all of the essential functions of her job, Ms. Lee was notified on August 29 that her leave of absence would not be extended. Therefore, she became separated from the employment.

Ms. Lee filed a claim for job insurance benefits effective July 22, 2007. She has prior experience working in convenience and department stores. She has supervisory experience. She retains the physical and mental ability to perform some work activity.

REASONING AND CONCLUSIONS OF LAW:

The only issue in this matter is whether Ms. Lee was able to and available for work as required by Iowa Code section 96.4(3) when she filed her claim for job insurance benefits. The law does not require that an individual be able to perform her usual job. She must be able to engage in some type of gainful work activity that is engaged in by others as a means of livelihood. See 871 IAC 24.22(1). When she filed her claim for job insurance benefits effective July 22, 2007, Ms. Lee had only a ten-pound lifting restriction. The restriction does not preclude all work activity.

Ms. Lee retains the physical ability to work in either a department store or convenience store. She could also work as a telemarketer or in some other clerical position that did not require heavy lifting. She also has supervisory skills from past employment. The administrative law judge concludes that there are gainful jobs in the economy that Ms. Lee could perform, her restrictions notwithstanding. She remained available to return to employment had suitable work been offered. It is concluded, therefore, that she was able to work as required by Section 96.4(3). Accordingly, benefits are allowed.

The administrative law judge has considered the fact that Ms. Lee was on an unpaid leave of absence when she filed her claim. An individual is considered voluntarily unemployed and is ineligible for benefits during a leave of absence that is negotiated with the consent of both parties. 871 IAC 24.22(2)j. However, the leave in this case was not initiated by Ms. Lee. It was offered to her as the only means of preserving her job, since she did not have a full release. She completed the paperwork because taking leave was the only option available as of July 26, other than leaving the employment. The administrative law judge concludes that Ms. Lee's unpaid leave as of July 26 was not the type of circumstance contemplated by 871 IAC 24.22(2)j. As such, it does not provide the basis for disqualification from benefits.

Subsequent to the representative's decision that is the subject of this appeal, Ms. Lee became separated from the employment. The parties declined to waive notice on the separation issue. This matter shall be remanded to Claims to adjudicate the separation issue and to review Ms. Lee's group code designation.

DECISION:

The representative's decision dated August 21, 2007, reference 01, is hereby reversed. Ms. Lee was able to and available for work within the meaning of the law effective July 22, 2007. Benefits are allowed, provided she satisfies all other conditions of eligibility. This matter is remanded to Claims to adjudicate Ms. Lee's August 29, 2007 separation and to review her group code designation.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw