

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DENISE L ALBEE
Claimant

APPEAL NO. 14A-UI-00401-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HOME DEPOT USA INC
Employer

OC: 12/15/13
Claimant: Appellant (4)

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

STATEMENT OF THE CASE:

Denise Albee filed a timely appeal from the January 3, 2014, reference 01, decision that disqualified her for unemployment insurance benefits based on an agency conclusion that she had voluntarily quit without good cause attributable to the employer. After due notice was issued, a hearing was held on February 4, 2014. Ms. Albee participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. The administrative law judge took official notice of the agency's administrative record (Clear2There Hearing Control Screen) that documents the employer's failure to provide a telephone number for the hearing.

ISSUES:

Whether Ms. Albee separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

Whether Ms. Albee had been able to work and available for work within the meaning of the law since she established the claim for benefits that was effective December 15, 2013.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Denise Albee was employed by Home Depot as a part-time cashier from October 2011 and last performed work for the employer in September 2013. Ms. Albee had no other employment while she worked for Home Depot and that employer is Ms. Albee's sole base period employer. In September 2013, Ms. Albee commenced an approved leave of absence due to a personal medical issue involving lower back pain. At the time Ms. Albee commenced the leave of absence, she had an understanding with the employer that she would return to work on November 25, 2013. Ms. Albee did not return to work on November 25, 2013. On November 25, 2013, Ms. Albee telephoned the employer's leave department in Atlanta, Georgia. During that call, Ms. Albee told the leave department representative that she had not been released to return to work and was scheduled to have a follow up appointment with her doctor on December 11, 2013. Ms. Albee told the leave department representative that on

December 11, 2013 she would learn whether she could be released to return to work or whether the doctor wanted to further extend the leave period. In other words, Ms. Albee requested an extension of her leave of absence until her next doctor appointment on December 11, 2013.

On November 27, 2013, Ms. Albee received a letter from the employer. The letter was in essence an extension of the leave through December 9, 2013. The letter indicated that Ms. Albee needed to return to the employment by December 10, 2013 or provide the employer medical documentation by that date to support her continued need for time off. Why the employer elected to make the deadline for response or return the day before Ms. Albee was scheduled to see her doctor is unclear. Ms. Albee did not respond to the letter because the letter said her employment would be terminated if she did not return on December 10, 2013.

Ms. Albee met with a doctor on December 11, 2013. The doctor did not release Ms. Albee to return to work at that time. Instead, the doctor referred Ms. Albee to a neurosurgeon. Ms. Albee's doctor has recommended that she not work until her back issue is resolved.

Ms. Albee established a claim for benefits that was effective December 15, 2013. At no time since Ms. Albee went off work, or since she established her claim for unemployment insurance benefits, has a doctor released her to return to work. Ms. Albee saw the neurosurgeon on January 23, 2014. On February 3, 2014, Ms. Albee underwent an MRI. As of the February 4, 2014 appeal hearing, Ms. Albee did not yet know the results of the MRI. Ms. Albee was next scheduled to undergo a nerve conduction test on February 12, 2014. Ms. Albee was to return to the doctor after the nerve conduction test. Ms. Albee understands that she will need to undergo surgery to address her back issues. Ms. Albee finds it difficult and painful to stand more than five minutes at a time. Ms. Albee also finds it painful to sit.

Ms. Albee reports that she receives Social Security Disability benefits based on multiple mental health diagnoses. These include depression, anxiety and borderline personality disorder.

REASONING AND CONCLUSIONS OF LAW:

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

Separations. 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.

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, 810 N.W.2d 532 (Iowa Ct. App. 2012). In Prairie Ridge, Ms. Jackson had requested and been approved for a leave of absence after she was injured in an automobile accident. The employment ended when the employer decided to terminate the employment, rather than grant an extension of the leave of absence once the approved leave period had expired. Like the present case, Ms. Jackson had not yet been released to return to work at the time the employer deemed the employment terminated. The court held that Ms. Jackson had not voluntarily quit the employment. The Court further held that since Ms. Jackson had not voluntarily quit, she was not obligated to return to the employer and offer her services in order to be eligible for unemployment insurance benefits.

The evidence in the present case indicates that the employer elected to terminate the employment effective December 10, 2013. The employer did this despite knowledge that Mr. Albee had not been released to return to work. Thus, the evidence establishes a discharge, rather than a voluntary quit. Because the involuntary separation from the employment was not based on misconduct, the *separation* would not disqualify Ms. Albee for unemployment insurance benefits. Ms. Albee would be eligible for benefits if she met all other eligibility requirements. The employer's account may be charged for benefits.

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.

The weight of the evidence establishes that Ms. Albee has not been able to work or available for work since she established her claim for benefits. Ms. Albee testified that her doctor does not want her to work until her back issue is resolved. Ms. Albee testified that she had been undergoing diagnostic tests including an MRI, was to meet with a pain specialist, and that she will need surgery on her back. Ms. Albee testified that it is painful for her to stand more than five minutes and also painful for her to sit. Because Ms. Allbee had not met the work ability and availability requirements since she established her claim for benefits, she is not eligible for unemployment insurance benefits. Benefits are denied effective December 15, 2013. The ineligibility continued as of the February 4, 2014 appeal hearing.

DECISION:

The Agency representative's January 3, 2014, reference 01, decision is modified as follows. The claimant was discharged for no disqualifying reason. The separation did not disqualify the claimant for benefits. The claimant would be eligible for benefits provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

The claimant has not met the work ability and work availability requirements since she established her claim for benefits and, for that reason, is not eligible for benefits. Benefits are denied effective December 15, 2013. The ineligibility continued as of the February 4, 2014 appeal hearing and will continue until the claimant provides proof to Workforce Development that she has been released to return to work. The claimant would have to otherwise demonstrate that she is available for work.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs