

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOAN N TAMARA

Claimant

APPEAL NO. 13A-UI-00828-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MAINSTREAM LIVING INC

Employer

OC: 12/23/12

Claimant: Appellant (4-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Joan Tamara filed a timely appeal from the January 16, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 21, 2013. Ms. Tamara participated. Marcanne Lynch represented the employer and presented additional testimony through Tracy Moore. Exhibits One through Five were received into evidence.

ISSUES:

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

Whether Ms. Tamara has been able to work and available for work since she established her claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joan Tamara started her full-time employment with Mainstream Living, Inc., in December 2011 and worked as a full-time supported living tech. Tracy Moore, Team Leader, was Ms. Tamara's immediate supervisor. Ms. Tamara last performed work for the employer on August 5, 2012. At that time, Ms. Tamara commenced an approved leave of absence. Ms. Tamara was pregnant and her doctor had placed her on bed rest. Ms. Tamara provided the employer with appropriate medical documentation to support her need for the leave of absence. Under the employer's written policies, the leave of absence would be considered a voluntary quit if the leave exceeded 15 consecutive weeks, unless the employer's President/CEO decided to grant an exception to the policy. The policy was contained in the handbook Ms. Tamara received at the start of her employment. Ms. Tamara never read the handbook, though she signed an acknowledgment form that obligated her to read the handbook. At the time the employer granted the leave of absence that started in August 2012, the employer imposed a return to work date of December 2, 2012. That date was about 17 weeks from the last day Ms. Tamara had performed work for the employer.

On November 26, 2012, Ms. Moore sent Ms. Tamara a telephone text message asking Ms. Tamara whether her doctor had released her to return to work. Ms. Tamara sent a reply text indicating that she would get a doctor's release by the end of the day. On November 27, Ms. Tamara contacted Ms. Moore by telephone and told her that her doctor would not yet release her to come back to work. Ms. Tamara had given birth on November 10. The baby was suffering from jaundice. Ms. Tamara's obstetrician wanted to keep both the baby and Ms. Tamara under medical observation. In addition, the baby was too young to go to daycare. When Ms. Tamara told Ms. Moore that the doctor would not release her to return to work by December 2, Ms. Moore told Ms. Tamara that she would have to re-apply at a later date. In other words, the employer was ending the employment. Ms. Tamara asked to continue the leave for additional weeks to see whether her doctor would release her to return to work, but the employer declined to grant that request.

On December 10, 2012, Marcanne Lynch, Human Resources Manager, sent Ms. Tamara a letter. The letter reads as follows:

Dear Joan:

You have been on an approved leave of absence; leave without pay through 12/1/12. As of this date, you have not been released to return from your approved leave of absence. Because you are not able to work, it is necessary to terminate your employment at this time.

You will need to keep the company informed of your contact information so that we are able to provide information you may need in the future such as your W-2 form.

We want to take this time to thank you for the efforts put forth during your tenure and wish you the best of luck in your future. Please contact use to discuss employment options when you are able to work. Also, please let me know if there is anything further you need from me.

Warmest regards,

Marcanne Lynch
Human Resources Manager

At no time had Ms. Tamara indicated to the employer that she wished to separate from the employment. Rather, Ms. Tamara had been willing to return to work *without* a medical release from her doctor, but the employer required the medical release before she could return.

On January 2, 2013, Ms. Tamara obtained a full medical release from her doctor. Ms. Tamara contacted Ms. Lynch, who directed Ms. Tamara to deliver the release to the employer's office. Ms. Tamara promptly replied. The release was back-dated to December 22, 2012. Ms. Lynch then initiated steps to start the process of hiring Ms. Tamara. On January 8, Ms. Lynch had Ms. Tamara complete releases so that the employer could complete the requisite criminal history and abuse check. On January 10, Ms. Lynch initiated the background check. Ms. Lynch and Ms. Tamara had agreed that January 14, 2013, would be Ms. Tamara's start date. On that day, Ms. Lynch notified Ms. Tamara that it was taking longer than usual for the background check to come back. During that conversation Ms. Tamara disclosed, for the first time, that she had been arrested and charged with theft from Wal-Mart, her other employer, during the prior period of employment with Mainstream Living.

On January 16, 2013, Ms. Lynch received the background check report. That report indicated a Theft in the Fourth Degree charge and a later guilty plea to a reduced charge of Theft in the Fifth Degree. On January 17, Ms. Lynch notified Ms. Tamara that the employer would not be rehiring Ms. Lynch. The employer decision not to rehire Ms. Tamara was based on Ms. Tamara's failure to disclose the criminal charge or conviction. The employer handbook contained a policy that obligated employees to disclose an arrest or conviction within three days of the event.

Ms. Tamara established a claim for unemployment insurance benefits that was effective December 23, 2012. The claim was established before Ms. Tamara had been released by her doctor to return to work. That release was not obtained until January 2, 2013. Ms. Tamara had commenced her search for new employment upon filing the claim for benefits. Ms. Tamara holds a bachelor's degree. Ms. Tamara sought new employment in the care giving, customer service, and hospitality fields. Ms. Tamara had Internet access and used her computer to complete applications and send résumés to prospective employers. Ms. Tamara was able to obtain three interviews. In addition to the new baby, Ms. Tamara has a 12-year-old child. Ms. Tamara has arranged child care for those times when she needed to participate in an interview. Ms. Tamara has arranged short-term childcare for when she becomes re-employed. Prior to the week that began February 17, 2013, Ms. Tamara had made two or three job contacts per week. During the week of February 17, 2012, Ms. Tamara has not looked for new employment because she has been occupied with attending to her baby's health issues. The appeal hearing occurred on Thursday, February 21, and Ms. Tamara had not made any job contacts up to that point in the week.

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.

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 January 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, claimant 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.

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.

The weight of the evidence in the record does not establish a voluntary quit. At no time did Ms. Tamara indicate by word or deed that she intended to sever the employment relationship. Rather, her interactions with the employer demonstrated an intent and desire to return to the employment as soon as her doctor would release her to do so. There was nothing voluntary about Ms. Tamara's separation from the employment. The employer elected to end the employment effective December 2, 2012, rather than grant a brief extension of the previously approved leave period. Ms. Lynch's December 10, 2012 letter to Ms. Tamara merely memorialized the discharge that had already been conveyed during the telephone conversation on November 27, 2012. The December 2012 discharge was not based on misconduct in connection with the employment. The criminal charge and conviction that only came to light in January 2013 was not a factor in the December 2012 discharge. The December 2012 separation from the employment would not disqualify Ms. Tamara for unemployment insurance benefits. See Iowa Code section 96.5(2)(a) and Iowa Admin. Code section 871 IAC 24.32(1)(a) (regarding disqualifications for misconduct in connection with the employment). Ms. Tamara would be eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

Because Ms. Tamara did not voluntarily quit the employment, she was under no obligation to subsequently return to the employer to offer her services. Iowa Code section 96.5(1)(d), which imposes such a requirement in the context of certain medically based voluntary quits simply does not apply. Mainstream Living's decision not to re-employ Ms. Tamara in January after discharging her from the employment in December, regardless of the reason for that decision, has no impact on Ms. Tamara's eligibility for unemployment insurance benefits and cannot serve as a basis for relieving the employer of liability 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 and (2) provide:

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.

Iowa Administrative Code 871 IAC 24.23 provides in relevant part as follows:

The following are reasons for a claimant being disqualified as being unavailable for work.

24.23(1) An individual who is ill and presently not able to perform work due to illness.

24.23(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

The weight of the evidence establishes that Ms. Tamara was not able and available for work prior to Wednesday, January 2, 2013, the date she obtained the medical release from her doctor. Ms. Tamara had *not* been released by her doctor to return to work prior to that date. The *back-dated* January 2, 2013 release is insufficient to establish that Ms. Tamara had indeed been released to return to work at any point prior to January 2, 2013. The weight of the evidence indicates that the attempt to make the January 2, 2013 release retroactive to December 22 had little to do with Ms. Tamara actually being able to work and available for work as of that date and much more to do with manipulating unemployment insurance eligibility requirements. Given Ms. Tamara's motivation to return to Mainstream Living, one would expect

if Ms. Tamara had indeed been released to return to work in December, she would have been in contact with the employer in December with a release in hand. Ms. Tamara did not meet the availability requirement during the benefit week that ended December 23, 2012 and was not eligible for benefits for that week.

Ms. Tamara's release to return to work came during the week that ended January 5, 2013. Ms. Tamara was available for work during the majority of the week. Ms. Tamara was also engaged in an active and earnest search for work during that week. Ms. Tamara is eligible for benefits for the week that ended January 5, 2013, provided she is otherwise eligible.

Ms. Tamara continued to be able to work, available work, and engaged in an active and earnest search for work during the benefit weeks that ended January 12, 19 and 26, and February 2, 9 and 16, 2013. Ms. Tamara is eligible for benefits for those weeks, provided she is otherwise eligible.

Ms. Tamara's testimony indicates that she has not been available for work, or engaged in a search for work, during the present week, which will end on February 23, 2013. Ms. Tamara is not eligible for benefits for the week that ends February 23, 2013.

This matter will be remanded to the Claims Division for determination of Ms. Tamara's work availability effective February 24, 2013.

DECISION:

The Agency representative's January 16, 2013, reference 01, decision is modified as follows. The claimant was discharged for no disqualifying reason effective December 2, 2012. The discharge would not disqualify the claimant for unemployment insurance benefits. The claimant would be eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

The claimant did not meet the work ability and availability requirements during the week that ended December 29, 2012 and is not eligible for benefits for that week. The claimant met the able and available and work search requirements during the benefit weeks that ended January 5, 12, 19 and 26, and February 2, 9 and 16, 2013 and is eligible for benefits for those weeks, provided she is otherwise eligible. The claimant has not met the work availability or work search requirements during the week that ends February 23, 2013 and is not eligible for benefits for that week.

This matter is remanded to the Claims Division for determination of claimant's work availability effective February 24, 2013

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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