**IOWA WORKFORCE DEVELOPMENT**
**Unemployment Insurance Appeals Section**
**1000 East Grand—Des Moines, Iowa 50319**
**DECISION OF THE ADMINISTRATIVE LAW JUDGE**
68-0157 (7-97) – 3091078 - EI

**MARILYN R WEIR**
**2019 – 30TH ST**
**DES MOINES IA 50310**

**CAHABA GOVERNMENT BENEFIT ADMINISTRATORS**
**ATTN K MURPHY**
**400 E COURT AVE STA 161**
**DES MOINES IA 50309**

**Appeal Number: 04A-UI-07020-RT**
**OC: 06-06-04 R: 02**
**Claimant: Appellant (1)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Marilyn R. Weir, filed a timely appeal from an unemployment insurance decision dated June 22, 2004, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on August 16, 2004, with the claimant not participating. Although the claimant had called in a telephone number where she purportedly could be reached for the hearing, when the administrative law judge twice tried to call that number at 9:02 a.m. and 9:03 a.m., the phone rang numerous times but no one answered. Susan Eaton, Human Resources Generalist, participated in the hearing for the employer, CAHABA Government Benefit Administrators. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant. This hearing was originally scheduled for July 20, 2004 at 2:00 p.m., and rescheduled at the

employer's request to July 26, 2004 at 2:00 p.m., and rescheduled again by the administrative law judge.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time Medicare secondary payer from June 1, 2000 until she was separated from her employment on June 18, 2004. The claimant had also worked previously for a prior employer when the present employer took over the work for that prior employer. The claimant had not been to work since April 21, 2004. When the claimant did not come to work and did not notify the employer beginning on April 21, 2004, the employer became concerned and sent the police to the claimant's residence. The claimant then called and indicated that she was ill. The employer sent the proper paperwork to the claimant to apply for FMLA leave. On May 4, 2004, the claimant was still absent and had not called in about her absences. On that date the employer did receive the physician's portion of the FMLA leave form indicating that the claimant only needed intermittent leave and not full leave. However, the employer did not receive the claimant's portion. The employer tried to call the claimant three times on that day, without success. The employer then resent the forms on May 4, 2004 to the claimant, and a copy of the physician's statement. As of May 6, 2004, the employer had still not heard from the claimant and called two more times without success. On May 7, 2004, the employer again attempted to call the claimant and also the claimant's emergency contact. The employer did not reach the claimant, but was able to reach the emergency contact who informed the employer that that person had had no contact with the claimant for a year. On May 10, 2004, the employer again received the physician's form or portion of the FMLA application indicating again that intermittent leave was all that was necessary. The employer tried to call the claimant five times on that day, without success. The employer had still not received the claimant's portion of the FMLA application. On that day, May 10, 2004, the employer sent a letter to the claimant indicating that according to the physician's statement she was able to work at a reduced schedule under intermittent FMLA leave and this time the letter was sent requiring the claimant's signature. The claimant signed for the letter on May 11, 2004, indicating that she had received it. On May 13, 2004, the employer received the claimant's portion of the FMLA papers and gave the employer a release to contact her physician. However, when the employer still had not heard again from the claimant, the employer's nurse, on May 24, 2004, again called the claimant's physician and the physician again verified that the claimant's FMLA leave was only to be intermittent. The nurse tried to call the claimant without success. On June 1, 2004, the employer finally reached the claimant. The employer told the claimant that the physician's statement provided for only intermittent leave and the claimant needed to return to work or call her doctor and get new physician forms. The claimant said that she would do so but that she had dental appointments for June 2 and 3, 2004. The employer pointed out that this would not qualify for FMLA leave. On June 2, 2004, the claimant called and left a message for the employer indicating that she would have her doctor call the employer. The doctor did so and, again, verified that the claimant's FMLA leave was to be only intermittent leave. On June 3, 2004, the employer called the claimant and told the claimant that she needed to come back to work. The claimant agreed to return to work on June 7, 2004. At that time, the employer explained to the claimant that it would have to review all of the absences, which were basically no-call/no-show absences, where the claimant had failed to notify the employer of the reasons for her absences. The employer did not, at that time, tell the claimant that she would be discharged and the employer had no intention of discharging the claimant. Nevertheless, the claimant was absent as a no-call/no-show on June 7, 8, 9, 2004, and continuing thereafter. The employer tried to call the claimant on June 9, 2004, without success. Finally, when the

claimant had not returned to work nor notified or contacted the employer, the employer the employer sent a letter to the claimant dated June 18, 2004, indicating that the claimant's employment had been terminated. The claimant has never returned to the employer and offered to go back to work. The claimant never expressed any concerns to the employer about her working conditions nor did she ever indicate or announce an intention to quit if any of her concerns were not addressed. If the claimant had returned to work as promised on June 7, 2004, work would have been available for her.

The claimant conceded to most of this at fact finding.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is ineligible to receive unemployment insurance benefits because she is and was, at all relevant times hereto, not able, available, and earnestly and actively seeking work . She is.

Iowa Code Section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(4), provides:

> Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer.
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

871 IAC 24.26(6)b, (6)a provide:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(6) Separation because of illness, injury or pregnancy.

b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

a. Nonemployment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when she never returned to work after repeated efforts to contact the claimant and failed to send the claimant appropriate FMLA papers. The claimant seems to maintain that she was discharged. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant left her employment voluntarily. The evidence establishes that the claimant had agreed to come back to work on June 7, 2004, after having missed approximately 1½ months without really notifying the employer. The claimant then failed to return to work on June 7, 2004 or thereafter, and did not notify the employer of the reason. The administrative law judge concludes that the claimant's actions both demonstrate an intention to terminate the employment relationship and is an overt act to carry out that intention as required for a voluntary quit by Local Lodge 1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The administrative law judge notes that the employer here was most patient and generous with the claimant in its repeated efforts to contact the claimant and to get FMLA papers filled out appropriately, even in the face of a physician’s statement indicating that the claimant was only entitled to intermittent Family Medical Leave. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code Section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The claimant failed to appear at the hearing to provide any evidence of reasons attributable to

the employer for her quit. The administrative law judge concludes that the claimant simply refused to return to work. There is no evidence that the claimant was compelled to leave her employment because of any illness, injury, or allergy condition attributable to the employer and there is no present competent evidence showing adequate health reasons to justify termination. There is also no evidence that the claimant ever informed the employer of any work-related health problem, and further informed the employer that she intended to quit unless the problem was corrected or reasonably accommodated. There is also no evidence that the claimant has ever returned to the employer and offered to go back to work. Accordingly, the administrative law judge concludes that any illness or injury the claimant may have had, either employment related or non-employment related is not good cause attributable to the employer for the claimant's quit. Although the employer did tell the claimant that when she returned to work on June 7, 2004 it would discuss her previous absences, the employer did not tell the claimant that she would be discharged and, in fact, the claimant was not facing discharge at that point. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. The claimant did not work for the employer beginning April 21, 2004, and never really notified or informed the employer that she was not coming to work. Even assuming that these absences are for personal illness or reasonable cause, they are not properly reported and would be excessive unexcused absenteeism and the claimant would still be disqualified to receive unemployment insurance 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".

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she is temporarily unemployed or partially unemployed under Iowa Code Section 96.19(39)(c) so as to excuse the claimant from the provisions requiring that she be able, available, and earnestly and actively seeking work. Further, the claimant has failed to demonstrate by a preponderance of the evidence that she is able, available, and earnestly and actively seeking work. The claimant did not participate in the hearing and provide any evidence to that effect. Based upon the record here, the administrative law judge must conclude that there is a very real question as to the

claimant's ability to work and availability for work. Accordingly, the administrative law judge concludes that the claimant is not able, available, and earnestly and actively seeking work and, as a consequence, she is also ineligible to receive unemployment insurance benefits.

DECISION:

The representative's decision dated June 22, 2004, reference 01, is affirmed. The claimant, Marilyn R. Weir, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer. The claimant is also not able, available, and earnestly and actively seeking work and is also ineligible to receive unemployment insurance benefits for this reason.

b/b