

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JEAN M LEMCKE
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL 21A-UI-01964-S1-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/11/20
Claimant: Appellant (1/R)

Iowa Code § 96.4(3) – Ability to and Availability for Work
871 IAC 24.23(10) – Voluntary Leave of Absence

STATEMENT OF THE CASE:

Jean Lemcke (claimant) appealed a representative's December 21, 2020, decision (reference 01) that concluded ineligibility to receive unemployment insurance benefits as of October 11, 2020, because a leave of absence was granted by Tyson Fresh Meats (employer) at the claimant's request. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 25, 2021. The claimant participated personally. The employer participated by Christy Chappellear, Human Resources Manager, and Heather Dohmen, Nurse Manager.

The employer offered and Exhibits One and Two were received into evidence. The administrative law judge took official notice of the administrative file.

ISSUES:

The issue is whether the claimant is available for work and whether the claimant was on an approved leave of absence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on April 2, 2018, and, at the end of her employment, she was working as a full-time styler. The claimant had a work-related injury and was released to return to work with restrictions after reaching her maximum medical improvement.

The claimant felt pain in her shoulder after trying a number of jobs within her restrictions. She returned to the physician. She tried more jobs and still felt pain in her shoulder. On October 14, 2020, the claimant freely signed a request for leave of absence form. The terms of the leave indicated the claimant would contact the nurse each Wednesday and review and request available jobs. The claimant contacted the nurse for eight weeks and reviewed available jobs. The claimant declined each job on the bid list, saying she could not perform the work. Each job

was within her restrictions. Her physician had reviewed a video of the position and approved it for the claimant.

On December 12, 2020, the employer sent the claimant a letter describing the claimant's actions. She had applied for Family Medical Leave (FMLA) but her physician would not complete the medical certification. The claimant was unwilling to perform jobs offered, even though the job duties were found acceptable by her physician. The employer asked the claimant to return to work by January 4, 2021, the end date for her leave of absence. The claimant did not return to work.

The claimant filed for unemployment insurance benefits with an effective date of October 11, 2020. Her weekly benefit amount was determined to be \$506.00. The claimant received benefits from October 11, 2020, to the week ending December 12, 2020. This is a total of \$4,495.00 in state unemployment insurance benefits after October 11, 2020.

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 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, 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".

Iowa Admin. Code r. 871-24.22(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.

Iowa Admin. Code r. 871-24.23(1) and (10) provide:

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

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

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

The claimant has the burden of proof in establishing his ability and availability for work. *Davoren v. Iowa Employment Security Commission*, 277 N.W.2d 602 (Iowa 1979). When employees are unable to perform work due to a medical condition, they are considered to be unavailable for work. When employees request and are granted a leave of absence, they are considered to be voluntarily unemployed. The claimant requested a leave of absence by freely signing the employer's form. The employer granted the request. The claimant is considered to be voluntarily unemployed, or unavailable for work, during the period of the leave of absence. She is not eligible to receive unemployment insurance benefits from October 11, 2020, through January 9, 2021.

After the leave of absence, the claimant was unable to clearly identify any work she was able to perform. She is not eligible to receive unemployment insurance benefits as of October 11, 2020.

Even though the claimant is not eligible for regular unemployment insurance benefits under state law, she may be eligible for federally funded unemployment insurance benefits under the Coronavirus Aid, Relief, and Economic Security Act ("Cares Act"), Public Law 116-136. Section 2102 of the CARES Act creates a new temporary federal program called Pandemic Unemployment Assistance (PUA) that in general provides up to 39 weeks of unemployment benefits. An individual receiving PUA benefits may also receive the \$600 weekly benefit amount (WBA) under the Federal Pandemic Unemployment Compensation (FPUC) program if he or she is eligible for such compensation for the week claimed. The claimant must apply for PUA, as noted in the instructions provided in the "Note to Claimant" below.

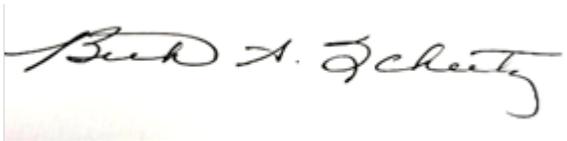
DECISION:

The representative's December 21, 2020, decision (reference 01) is affirmed. The claimant is considered to be unavailable for work and is not eligible to receive unemployment insurance benefits as of October 11, 2020.

Please notify the department immediately if the conditions change regarding your ability to work and you believe the disqualification can be removed.

The issue of whether claimant has been overpaid unemployment insurance benefits is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and decision.

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.



Beth A. Scheetz
Administrative Law Judge
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March 4, 2021
Decision Dated and Mailed

bas/scn