

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFF A TUHN
Claimant

APPEAL NO. 06A-UI-09068-M

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 07/30/06 R: 01
Claimant: Appellant (4R)

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated September 1, 2006, reference 01, which held claimant not able and available for work. After due notice, a telephone conference hearing was scheduled for and held on October 24, 2006. Claimant participated personally with witness Gloria West. Employer participated by David Williams, Hearing Representative, TALX, with witnesses Todd Narber, Store Director, and Sue Hirschman, Human Resources Manager. Exhibits A and B were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds: Claimant was off work due to non-work-related medical treatment through July 25, 2006. Claimant did not report back to the employer to ask for work until August 22, 2006. Claimant then worked for three days and quit. The last day of work was August 29, 2006. Claimant quit due to a change in job duties.

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 96.19, 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 24.23(35) provides:

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

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

Inasmuch as the illness was not work-related and the treating physician has released the claimant to return to work, the claimant has established the ability to work. Benefits shall be allowed effective the week ending September 2, 2006. Claimant is not eligible prior to that week as he had failed to make himself available to the employer for scheduling. Claimant was released for work but did not report in for almost a month. This matter must still be remanded for a hearing on the separation issue that occurred on or about August 30, 2006.

DECISION:

The decision of the representative dated September 1 2006, reference 01, is modified. Claimant is eligible to receive unemployment insurance benefits, effective September 2, 2006, provided claimant meets all other eligibility requirements. This matter is remanded for a determination on the separation issue that occurred on or about August 30, 2006.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/kjw