

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARTHA R MARTIN**  
Claimant

**APPEAL NO. 10A-UI-11163-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JENNIE EDMUNDSON**  
**MEMORIAL HOSPITAL**  
Employer

**OC: 09-06-09**  
**Claimant: Appellant (2)**

Iowa Code § 96.5(1)d – Voluntary Leaving/Illness or Injury  
871 IAC 24.26(6) – Separation Due to Illness or Injury  
Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.4(3) – Able and Available

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the August 3, 2010, reference 05, decision that denied benefits. After due notice was issued, a hearing was held on September 27, 2010. The claimant did participate. The employer did participate through Kathy John, Human Resources Representative; Mary Colburn, Director of Fourth Floor; and Donna Wellwood, Director of Human Resources.

**ISSUES:**

Was the claimant discharged due to job related misconduct or was she laid off by the employer due to lack of work?

Is the claimant able to and available for work?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a unit secretary of the orthopedic/neurology department, part-time, beginning February 13, 2006, through May 27, 2010, when she was discharged. The claimant asked for and was granted a leave of absence to receive surgical treatment for a non-work-related thumb injury. She was granted 60 days of leave from March 21, through May 21, 2010. On May 22, 2010 the claimant met with the employee health services nurse and indicated she was still having pain and taking prescription narcotics, Darvocet, for the pain. The claimant had a work release from her treating surgeon to return to work as long as she worked with a brace on her hand to protect her thumb. The employer would not allow the claimant to return to work as long as she was taking prescription pain medications, and they generally do not accommodate work restrictions that arise from non-work-related injuries.

The employer filled the claimant's job on May 21, 2010, when her leave of absence ended and she was not able to return to work. The claimant was paid short term disability benefits through June 24, 2010. The claimant has to apply for any open jobs at the hospital in order to be rehired.

The claimant was physically able to work within her work restrictions on May 21, 2010, when her leave of absence ended.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes no work was available to the claimant upon her release to return to work from a non-work related injury.

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.

Iowa Code section 96.5-1-d 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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

871 IAC 24.26(6)b provides:

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

b. 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 claimant's return to the employer to offer services after the medical recovery evinces an intention to continue working. The claimant was granted the leave of absence but the employer chose not to keep her position for her. The claimant's failure to be pain free or totally recovered from her surgery is not work related misconduct. Therefore, the separation was attributable to a lack of work by the employer. Benefits are allowed effective May 21, 2010.

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work from March 22, 2010 through May 21, 2010.

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(2)j(1)(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.

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

871 IAC 24.23(10) provides:

(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 requested and was given a leave of absence to have surgery for a thumb problem. She has recovered since her leave of absence ended and on May 21, 2010 was able to and available for work. Accordingly, benefits are denied between March 21, 2010 and May 21, 2010, but are allowed effective May 22, 2010.

**DECISION:**

The August 3, 2010, reference 05, decision is reversed. The claimant is not able to work and available for work from March 21, 2010 through May 21, 2010. The claimant is able to and available for work effective May 22, 2010. Claimant was laid off due to a lack of work. Benefits are allowed, provided the claimant is otherwise eligible.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

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