

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELAINE R KEISTER
Claimant

APPEAL NO. 09A-UI-04606-S2

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

**Original Claim: 02/08/09
Claimant: Appellant (3)**

Section 96.5-1-d – Voluntary Quit for Medical Reasons
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Elaine Keister (claimant) appealed a representative's March 16, 2009 decision (reference 03) that concluded she was not eligible to receive unemployment insurance benefits because she had voluntarily quit employment with Hy-Vee (employer). After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held on April 28, 2009, in Cedar Rapids, Iowa. The claimant was represented by Matt Reilly, Attorney at Law, and participated personally. The employer participated by Kevin Sherlock, Store Director. The employer offered and Exhibit One was received into evidence.

ISSUES:

Whether the claimant is denied unemployment insurance benefits because she voluntarily quit work without good cause attributable to the employer.

Whether the 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 that: The claimant was hired on January 8, 2007, as a full-time salad bar manager. She was diagnosed with fibromyalgia by her physician. The claimant requested Family Medical Leave (FMLA) The employer granted FMLA from August 10 through October 13, 2008, based on the claimant's reporting a non-work-related illness. The claimant returned to work for a two-week period. She again took FMLA on October 24, 2008. She has not been released to return to work without restriction. The claimant's FMLA expired but the employer continues to consider the claimant an employee. At the time of the separation from employment the claimant had never reported to her employer that her physical diagnosis was work-related.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily quit work without good cause attributable to the employer.

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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). A claimant is not disqualified for leaving employment if he or she (1) left employment by reason of illness, injury, or pregnancy; (2) on the advice of a licensed and practicing physician; (3) and immediately notified the employer or the employer consented to the absence; (4) and when certified as recovered by a physician, the individual returned to the employer and offered services but the regular or comparable suitable work was not available. Area Residential Care, Inc. v. Iowa Department of Job Service, 323 N.W.2d 257 (Iowa 1982).

The claimant left work due to an injury under the advice of her physician. The employer consented to her leaving. The claimant has failed to provide the employer with certification that she has recovered. In addition, the claimant has failed to offer her services to the employer. The claimant has failed to meet the requirements of the statute and, therefore, is not eligible to receive unemployment insurance benefits. The claimant may requalify by returning to the employer with an unconditional release. The claimant could then receive benefits if regular work or comparable, suitable work was not available.

The next issue is whether the claimant was able and available for work. For the following reasons, the administrative law judge concludes she is.

871 IAC 24.23(1) provides:

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.

When an employee is ill and unable to perform work due to that illness she is considered to be unavailable for work. The claimant was released to return to work with restrictions by her physician. She is considered to be available for work because her physician stated she was

able and available for work. The claimant is not disqualified from receiving unemployment insurance benefits.

DECISION:

The representative's March 16, 2009 decision (reference 03) is modified in favor of the respondent. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant is not disqualified from receiving unemployment insurance benefits because she is able and available for work with the employer.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw