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

Appeal Number: 04A-UI-11905-RT
OC: 10/17/04 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.

JEAN K TORGESON
1562 – 340TH ST
MANLY IA 50456

MASON CITY CLINIC PC
250 S CRESCENT DR
MASON CITY IA 50401

____
(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, Jean K. Torgeson, filed a timely appeal from an unemployment insurance decision dated November 1, 2004, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on November 29, 2004, with the claimant participating. Dana Young, Administrator, participated in the hearing for the employer, Mason City Clinic. Pam Metli, Nurse Manager, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. Claimant's Exhibits A, B, and C were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibit A, B, and C, the administrative law judge finds: The claimant was employed by the employer first as a full time nurse and more recently as a part-time float nurse from October 1, 1995 until she separated from her employment on October 15, 2004. In August 2002, the claimant first began to develop a medical condition of fibromyalgia and chronic fatigue syndrome. These conditions were unrelated to her employment. At that time, the claimant was given a restriction that she could no longer work in the operating room. The employer met that restriction. On or about July 3, 2003, another restriction prohibited the claimant from working over 40 hours per week and the employer met this restriction. Then beginning in September 2003 the claimant was either off work or allowed only to work part-time hours or reduced hours off and on until February 2004. The employer was able to meet these restrictions. In February 2004, the claimant resigned her position, which had been a full time nurse. Although not required by any physician, the claimant asked the employer to alter her activities and allow stretching breaks and stand for only five hours. The employer ultimately met these restrictions by giving the claimant a part-time position on or about April 19, 2004 as a float nurse working three days per week. This was acceptable to the claimant. On May 26, 2004, the claimant's physician allowed the claimant to work an additional five hours. The employer met this by allowing the claimant to work three days and then five hours. On or about June 26, 2004, the claimant's physician added another five hours and the employer also met this by allowing the claimant to work three days and two, five-hour days. The claimant had a relapse and on July 28, 2004 she was not permitted to work at all. The claimant had already exhausted her family medical leave in April 2004.

When the claimant did not come back to work for almost three months, the employer called a meeting with the claimant on October 15, 2004. The claimant had been off work over 11 weeks and was not on family medical leave. At that time, the claimant was not able to provide the employer a date when she could return to work or even what restrictions would be placed on her if and when she could return to work. A letter was prepared by the employer as shown at Claimant's Exhibit B and given to the claimant at the meeting on October 15, 2004. The letter indicates that the employer must seek a replacement for the claimant, but once she is released to work the employer would be happy for her to apply for any open position available for which the claimant was qualified. The employer did require a written release from the claimant's healthcare provider. On October 25, 2004, the claimant was released by her healthcare provider, "to work part-time as able." This appears at Claimant' Exhibit A. The claimant then and at all material times thereafter has only been able to work three, four-hour shifts per day. The claimant cannot stand for more than one hour and must have four stretch breaks every hour and she cannot talk on the phone very long. The employer was unable to meet these restrictions and further the employer had no position for a part-time position such that would meet the claimant's restrictions. The employer so notified the claimant by letter dated November 3, 2004 as shown at Claimant's Exhibit C. The claimant has not returned to the employer and offered to go back to work either under the three day per week part-time work she was given in April 2004 or the full time work she had had prior to that time. The claimant is now employed part-time working two, four-hour shifts. The employer with whom the claimant is working does not have a third four-hour shift available. The claimant has received no more specific release from any physician following her total inability to work beginning July 28, 2004.

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 relevant times not able and available for work. The claimant is ineligible to receive unemployment insurance benefits for this reason.

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)a,b 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.
>
> 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.
>
> 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.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit at a meeting on October 15, 2004 when the claimant had been unable to work for almost three months and was still unable to work and could not give the employer any idea as to when she could return to work. The claimant maintains that she was discharged at this meeting and she was given a letter, as shown at Claimant's Exhibit B. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that in effect the claimant voluntarily quit. The evidence is clear that beginning on July 28, 2004, the claimant was unable to work at all and was still unable to work as of October 15, 2004 and could provide the employer no date as to when she would be able to work and/or what restrictions she would have if and when she was able to work. The claimant had already exhausted her family medical leave in April 2004. The administrative law judge notes that the employer had met all of the claimant's various working restrictions and requirements as set out in the Findings of Fact since August 2002. There is no evidence that the claimant's medical conditions causing her inability to work, fibromyalgia and chronic fatigue syndrome, were caused by her employment. Even the claimant seems to concede this. Under these circumstances, the administrative law judge is constrained to conclude that the claimant effectively quit on October 15, 2004 when she could not return to work and could not give the employer an idea of when she could return to work and the employer needed to replace the claimant. The letter at Claimant's Exhibit B does not say that the claimant was discharged but only that the employer is seeking a replacement and the claimant's last day of employment will be October 15, 2004. The employer had no choice but to replace the claimant since the claimant had been off work for almost three months and not subject to family medical leave. The administrative law judge concludes that in effect the claimant voluntarily quit when she could not return to work for the employer. See Shontz v. Iowa Employment Security Commission, 248 N.W.2d 88 (Iowa 1976). The claimant even stated at fact finding, "I left because of a non-work-related illness." Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily on October 15, 2004. 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 left her employment because of a medical condition of fibromyalgia and chronic fatigue syndrome. There is no real evidence that this condition was attributable to her employment. The claimant has presented no competent evidence showing that her illness is attributable to the employment or even adequate health reasons to justify a separation. There is also no evidence that the claimant has recovered from such illness and such recovery has been certified by a license and practicing physician and the claimant has returned to work and offered to perform services and no suitable comparable work was available. The claimant was released to work on October 25, 2004, "to work part-time as able." This is shown at Claimant's Exhibit A. However, the claimant testified that she is only able to work at most three, four hour shifts and that restriction is continuing. Further, the claimant testified that she cannot stand for more than one hour and needs four stretch breaks every hour and cannot talk very long on the

phone. The claimant is not even able to work the three-day part-time job she last occupied with the employer, let alone a full time job. Under these circumstances, the administrative law judge concludes that although the claimant did fax the release as shown at Claimant's Exhibit A to the employer, she is not able to work at any work available or suitable by the employer nor has her recovery sufficiently been certified by a licensed and practicing physician so as to allow the claimant to return to work for the employer. The administrative law judge must conclude that the claimant has not demonstrated by a preponderance of the evidence that she is entitled to unemployment insurance benefits either as a result of an employment or non-employment related separation because of illness. In White v. Employment Appeal Board, 487 N.W.2d 342 (Iowa 1992), the Iowa Supreme Court held that the Employment Security Law is not designed to provide health and disability insurance and that only those employees who experience illness induced separations that can fairly be attributed to the employer are properly eligible for unemployment insurance benefits. The administrative law judge is not without sympathy for the claimant but must conclude here that the claimant voluntarily quit her employment 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 or demonstrates that she has recovered from her illness and this is certified by a physician and she returns to the employer, offers to go back to work, and no comparable suitable work to that which the claimant had been doing prior to her illness is available to the claimant.

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:
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> 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)(2) provide:

> 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.
>
> (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.

The administrative law judge concludes that the claimant has the burden to prove 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 demonstrate by a preponderance of the evidence that she is either temporarily unemployed or partially unemployed under Iowa Code section 96.19(38)(d and c) so as to excuse her from the requirement that she be able, available, earnestly and actively seeking work. The administrative law judge also concludes that the claimant has failed to demonstrate by a preponderance of the evidence that she is able and available for work. The only medical release the claimant has to return to work, as shown at Claimant's Exhibit A, states that the claimant is "released to work part-time as able." The claimant testified that she is able to work only, at most, three, four-hour shifts per week. The claimant further testified that she cannot stand for more than one hour and must take four stretch breaks every hour and cannot talk on the phone too long. The administrative law judge is constrained to conclude here that under these restrictions the claimant is not able to work. It is true that the claimant has found part-time work allowing her to work two, four-hour shifts at a store. The administrative law judge does not believe that this is evidence that the claimant is able to work under the definition as noted above. Further, the claimant has placed restrictions on her availability to work for three, four-hour shifts per week. The claimant's wage credits were earned either as full time or working part-time at least three hours per day. In order to be available for work, the claimant does not have to be available for a particular shift, but does need to be available on the same basis as which her wage credits were earned. See 871 IAC 24.22(2)(a). The administrative law judge is constrained to conclude here that the claimant is not available for work so as to be eligible for unemployment insurance benefits. Accordingly, the administrative law judge concludes that the claimant is not able and available for work and, as a consequence, she is ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits or returns to the employer certifying her recovery and offers to return to work doing comparable or suitable work as she had been prior to her separation and is able and available for work.

DECISION:

The representative's decision dated November 1, 2004, reference 01, is affirmed. The claimant, Jean K. Torgeson, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits or has recovered from her illness and such recovery is certified by a licensing and practicing physician and the claimant returns to the employer and offers to perform services doing comparable or suitable work as to what the claimant had done prior to her separation. The claimant must also demonstrate that she is able and available for work because she is not now able and available for work.

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