

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEXTER, LINDA, S
Claimant

APPEAL NO. 11A-UI-00254-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY--ALGONA
Employer

OC: 12/05/10
Claimant: Appellant (2)

871 IAC 24.1(113) – Layoff
Iowa Code Section 96.4(3) - Able & Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 30, 2010, reference 04, decision that denied benefits. After due notice was issued, a hearing was started on February 18, 2011 and concluded on February 22, 2011. Claimant participated personally and was represented by attorney, Dennis McElwain. Karen Mousel represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Numbers 11A-UI-00252-JTT and 11A-UI-00253-JTT. Exhibits One through Sixteen and A through C were received into evidence.

ISSUES:

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

Whether the claimant has been able to work and available for work since she established her claim for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Linda Dexter was employed by Good Samaritan Society, Inc., as a full-time cook. Ms. Dexter started the employment in 1991 and last performed her regular duties on January 12, 2010. Ms. Dexter's immediate supervisor was Deb Hyer, Dietary Manager.

On January 12, 2010, Ms. Dexter fell in the workplace. Ms. Dexter suffered injury to her right shoulder. Ms. Dexter twisted her left foot. Ms. Dexter hit the back of her head on the floor. Ms. Dexter was taken to the hospital for evaluation and treatment. The employer handled the matter as a worker's compensation matter. The employer's worker's compensation carrier assigned a nurse case manager, who accompanied Ms. Dexter to each doctor appointment. The nurse case manager was responsible for reporting Ms. Dexter's progress toward rehabilitation back to the carrier and to the employer. The employer's worker's compensation

carrier authorized and paid for all treatment Ms. Dexter received from January 12, 2010 through November 12, 2010.

The employer acquiesced in Ms. Dexter's doctor acting as the designated physician for worker's compensation purposes. In connection with the January 12, 2010 injury, Ms. Dexter's doctor took her off work and communicated this to the employer. Later in the month, the doctor released Ms. Dexter to return to work under light-duty status. The twist foot had resolved by that time. The employer assigned Ms. Dexter to perform duties that complied with the medical restrictions. These included going through a recipe book, ordering groceries, watching DVDs, participating in on-line training, performing hall inspections, delivering mail to residents, and performing one-on-one activities with residents to address their social needs. Ms. Dexter frequently told the employer she was unable to perform the duties due to pain. When Ms. Dexter would decline one duty, the employer would offer another. The employer believed Ms. Dexter's assertions that she was in pain were in good faith and allowed Ms. Dexter to go home upon request. Ms. Dexter worked intermittently between February 3 and March 29, 2010.

Effective March 9, 2010, the employer authorized a leave of absence under the Family and Medical Leave Act. The FMLA leave of absence was to expire on June 4, 2010.

On March 25, 2010, Ms. Dexter's primary care doctor released her to return to part-time light-duty work up to four hours per day. On March 31, 2010, the employer offered Ms. Dexter work that complied with the light-duty restrictions and Ms. Dexter declined the offer. In rejecting the offer, Ms. Dexter noted, "can't handle pain."

On April 20, 2010, Ms. Dexter's primary care doctor released her to return to full-time light-duty work. On April 23, 2010, the employer offered Ms. Dexter work that complied with the light-duty restrictions and Ms. Dexter declined the offer. In rejecting the offer, Ms. Dexter noted, "I need to stay on FMLA till surgery & healed."

On June 11, 2010, Ms. Dexter underwent surgery on her right shoulder.

On June 15, 2010, the employer sent Ms. Dexter a letter advising her that the FMLA leave for which she had approved on March 9, 2010 had expired on June 4, 2010, but that the employer was going to continue the leave as a General Leave of absence for an additional 30 days. The employer noted, "If you are not able to return to work by the end of the 30 days, we will reevaluate the status of your leave."

On June 22, 2010, and by a June 29, 2010, addendum, Ms. Dexter's primary care doctor provided the employer with documentation indicating that Ms. Dexter was to be off work until July 9, 2010, but then was released to light-duty work effective July 12, 2010. Ms. Dexter was to wear a sling at all times until July 12, but then could remove the sling. Ms. Dexter's doctor specifically noted that Ms. Dexter was, "Also able to drive starting 7/12/10."

On June 29, 2010, the employer sent Ms. Dexter a letter advising her that 30-day leave that started on June 4, 2010 would expire on July 4, 2010, but that the employer was extending the leave until July 23, 2010 to include Ms. Dexter's next doctor appointment on July 20, 2010. There was no formal leave extension after the June 29, 2010 letter.

On July 20, 2010, Ms. Dexter's primary care doctor released her to perform light duty until the next appointment set for August 17, 2010. The doctor indicated that Ms. Dexter was to wean herself out of using a sling, but was to perform one handed duty only. The doctor also indicated, "No driving with Tramadol use." Tramadol is a pain medication. On August 2, 2010,

the employer documented an offer of light-duty work that would comply with the restrictions. The offer had been made by phone and Ms. Dexter had rejected the offer.

On August 17, 2010, Ms. Dexter's primary care doctor released her to perform light-duty work until the next appointment set for September 16, 2010. On August 18, 2010, the employer offered Ms. Dexter light-duty work that would comply with the restrictions. Ms. Dexter rejected the offer and added, "unable to drive while taking Tramadol and Flexeril."

On September 16, 2010, Ms. Dexter's primary care doctor released her to perform light-duty work until the next appointment on October 21, 2010. On September 17, 2010, the employer offered Ms. Dexter light-duty work that would comply with the restrictions. Ms. Dexter rejected the offer and added, "unable to drive—still having visual distortions possibly due to neck."

The employer and Ms. Dexter continued to act as if Ms. Dexter continued on an approved leave of absence. Ms. Dexter had said nothing to indicate that she wanted to quit the employment. Prior to October 22, 2010, the employer did not advise Ms. Dexter that her refusal of light-duty work would be interpreted as a voluntary quit from the employment. In addition, prior to October 22, 2010, the employer said nothing to Ms. Dexter to indicate that she had exhausted personal medical leave. The employer's written leave policy indicated that leave could be extended up to a year. Ms. Dexter's absence from the workplace had continued to be attributable to the workplace accident in January 2010.

On October 21, 2010, Ms. Dexter's primary care physician released her to return to work without restrictions. The information was promptly conveyed to the employer. The employer had already filled Ms. Dexter's cook position. Ms. Dexter's release to return to work without restrictions prompted the employer to send her the follow letter on October 22, 2010:

Dear Linda,

Per our letter dated June 29, 2010, your leave was extended until July 23, 2010 to accommodate your doctor appointment. We have extended several offers for light duty work, but each time you declined. Your general leave has expired and currently there are no cook positions available at this time. Due to these factors we are terminating your employment for the center effective October 22nd – but we encourage you to reapply should a position become available.

Though the shoulder issue was resolved as of October 2010, Ms. Dexter had another health issue related to the workplace fall that had not yet been appropriately addressed or resolved. After the fall, Ms. Dexter had experienced problems with her vision. The vision problem prevented Ms. Dexter from driving herself to work from Sioux City to Le Mars.

On October 28, 2010, Ms. Dexter underwent an MRI to investigate the vision issues. On November 12, Ms. Dexter commenced taking Neurontin, a prescription medication, to address nerve pain related to the vision issue. The treating physician left it to Ms. Dexter to decide when she felt well enough to drive.

Ms. Dexter established a claim for unemployment insurance benefits that was effective December 5, 2010. Ms. Dexter waited to establish the claim for benefits until after her vision issues had resolved to the point where she felt safe to drive. Upon filing the claim for benefits, Ms. Dexter commenced her search for new employment. Ms. Dexter did not make further contact with Good Samaritan Society after she received the October 22, 2010 letter that

indicated the employer was terminating the employment. Ms. Dexter received that letter on October 25, 2010.

Since she established her claim for benefits, Ms. Dexter has made two job contacts per week and has looked for a variety of cooking and other positions. Ms. Dexter has no medical restrictions that prevent from performing suitable work.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

The employer's silence between July 23, 2010 and October 22, 2010 on the topic of extension or termination of the leave is problematic. Though the employer indicated in the June 29, 2010 letter that the leave would be extended until July 23, 2010, the employer continued to act well beyond that date as if Ms. Dexter continued on an approved leave of absence. In the absence of any notice from the employer to indicate otherwise, Ms. Dexter reasonably concluded that she remained on an approved leave of absence until October 25, 2010, when she received word that the employer was terminating her employment. The fact that Ms. Dexter's absence from the workplace was based solely on health matters relating back to the January 2010 workplace injury is important. The weight of the evidence establishes that Ms. Dexter's workplace accident-related injuries included vision issues that prevented her from driving herself to work. Ms. Dexter continued to experience health issues relating back to that injury beyond the date the employer used as the termination date. The weight of the evidence fails to establish a voluntary quit.

The weight of the evidence indicates instead that Ms. Dexter continued on an approved leave of absence until October 22, 2010, when the employer ended the employment in response to learning that she had been released to return to her regular duties. When an employer fails to re-employ a worker at the end of an approved leave of absence, the employer is deemed to have laid the worker off. See 871 IAC 24.22(2)(j). Because Ms. Dexter was laid off, and neither voluntarily quit nor was discharged for misconduct, the separation from the employment would

not disqualify her for unemployment insurance benefits. Contrast Iowa Code section 96.5(1) and (2)(a) regarding voluntary quit without good cause and discharge for misconduct. Ms. Dexter would be eligible for benefits, provided she was otherwise eligible. The employer's account may be charged. The remaining issue would be whether Ms. Dexter has been able and available for work since she established her claim for benefits.

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 and (22) 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.

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.

(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 weight of the evidence establishes that Ms. Dexter was released by a physician to return to work prior to establishing her claim for unemployment insurance benefits. Ms. Dexter has no medical condition that prevents her from being able to perform suitable work. Ms. Dexter was

not required to make contact with Good Samaritan Society in order to demonstrate her availability for suitable work. Ms. Dexter has made an active and earnest search for new employment since she established her claim for benefits. Ms. Dexter has met the work ability and work availability requirements of the law since she established her claim for benefits. Effective December 5, 2010, Ms. Dexter is eligible for benefits, provided she meets all other eligibility requirements.

DECISION:

The Agency representative's December 30, 2010, reference 04, decision is reversed. The claimant was laid off effective October 22, 2010. The claimant has been able and available for work since she established her claim for benefits,. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css