

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GUADALUPE CORDOVA GARCIA
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 18A-UI-02311-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/21/18
Claimant: Respondent (2)**

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The employer filed an appeal from the February 8, 2018, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on April 19, 2018. The claimant participated and was represented by attorney Phil Miller. Also participating on behalf of the claimant were Brian Ulin and Carina Cordova. The employer participated through Hearing Representative Thomas Kuiper and Human Resource Generalist Jennifer Glosser. Claimant's Exhibits 2 through 8 were received into evidence.

ISSUE:

Was the claimant able to work, available for work, and actively and earnestly seeking work the week ending January 21, 2018?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a butt trimmer on the cut floor from January 27, 2001, until this employment ended on January 9, 2018.

On December 11, 2017, claimant was released to return to work after suffering a work-related knee injury. The release stated claimant could return to work as of that date, without restriction, but recommended she see a back specialist, as it was possible her on-going pain was related to a problem with her back. (Exhibit 2). On December 12, 2017, claimant returned to work. She was assigned to work on the "upper" cut floor, which required her to climb between 20 and 30 stairs between four and six times during her shift. When claimant was given that work assignment, she told the employer she was still experiencing knee pain and asked to be moved to the "lower" cut floor where there were not any stairs. The employer refused to change claimant's assignment, explaining that the reason they were doing so was because they needed her in the area assigned and she had been released to return without restriction. Glosser testified claimant was told if she refused to perform her job duties she would be discharged, at

which point claimant asked to leave to give her time to contact her attorney. Claimant then left work and Glosser testified the employer did not hear from her again. According to Glosser, after several weeks had passed without hearing from claimant, the decision was made to separate her from employment.

Claimant testified she left work on December 12 because the employer told her if she was not going to perform the work she was assigned she had to leave and she was in too much pain to perform the assigned work. Claimant denied she was told she would be discharged if she did not perform the work assigned that day. According to claimant she called the employer's nurses the following day to report she was still in pain and informed them she wanted a second opinion. Claimant testified she was told by the nurses that because the doctor had released her to return to work without restriction there was nothing else the employer could do for her. Claimant did not report to work, but testified she continued to call in daily until her separation on January 9, 2018. Claimant testified in January she called her own doctor and made an appointment to be seen. Claimant could not remember the doctor's name, exactly when she made the appointment, or when she saw the doctor, but testified the doctor placed a restriction on her stating she could not climb stairs. Claimant testified this was the only restriction placed on her, but did not provide a copy of the restriction or doctor's report.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work effective January 21, 2018.

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".

Iowa Admin. Code r. 871-24.22(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.

Iowa Admin. Code r. 871-24.22(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.

Iowa Admin. Code r. 871-24.23(3) provides:

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

(3) If an individual places restrictions on employability as to the wages and type of work that is acceptable and when considering the length of unemployment, such individual has no reasonable expectancy of securing work, such individual will be deemed not to have met the availability requirements of Iowa Code section 96.4(3).

To be able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723. The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that "[i]nsofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

An individual claiming benefits has the burden of proof that she is be able to work, available for work, and earnestly and actively seeking work. Iowa Admin. Code r. 871-24.22. Claimant testified, at an unknown date in January a doctor placed a restriction on her prohibiting her from climbing stairs. Claimant contends this was the only restriction put in place. Claimant did not provide any documentation of the restriction, such as the doctor's written report or recommendation. Claimant did, however, provide documentation showing she was released to return to work without restriction effective December 11, 2017, but failed to return to work. Inasmuch as claimant removed herself from work and has not shown she did so with a medical directive, she is not considered able to or available for work.

DECISION:

The February 8, 2018, (reference 02) unemployment insurance decision is reversed. The claimant is not able to work and available for work effective January 21, 2018. Benefits are withheld.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs