

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BETTY A NEZERKA
Claimant

NORDSTROM INC
Employer

APPEAL 17A-UI-06528-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/03/16
Claimant: Appellant (4)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.23(10) – Availability Disqualifications – Leave of Absence
Iowa Code § 96.19(38)b – Partial Unemployment
Iowa Code § 96.7(2)a(2) – Same Base Period Employment

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 23, 2017, (reference 02) unemployment insurance decision that denied benefits because she is on a voluntary leave of absence. The parties were properly notified of the hearing. A telephone hearing was held on July 14, 2017. The claimant participated and testified. The employer participated through Hearing Representative Thomas Kuiper and Human Resource Assistant Breanna Jacobs. Official notice was taken of the administrative record, specifically, claimant's monetary and wage records.

ISSUES:

Is the claimant able to work and available for work effective May 14, 2017?
Is the claimant on an approved leave of absence?
Is the claimant eligible to receive partial benefits and if so, if the employer's account subject to charge?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as an order picker beginning April 26, 2010. Claimant originally filed her claim for benefits the week beginning July 3, 2016 and has an additional claim date of May 14, 2017. At the time claimant reopened her claim in May 2017, she was on an approved leave of absence with this employer. Claimant's leave of absence was due to a non-work related medical condition preventing her from standing or walking for long periods of time, both of which are required of her position with this employer. The leave was approved through July 10, 2017, but a request for an extension has been submitted. The employer testified it was unable to accommodate claimant's restrictions regarding standing and walking and it therefore granted her a leave of absence. Claimant was still on a leave of absence at the time of the hearing.

Claimant's monetary and wage records, as well as her testimony, establish that, during her base period, she also worked full time for another employer. Claimant was temporarily laid off from her other employer at the time she reopened her claim from benefits and remained temporarily

laid off at the time of the hearing. Claimant further testified that, while she may not be able to perform her regular duties for this employer, she is nevertheless able and available for work. In support of this claim claimant testified that, should she be recalled to her full-time employer, she is confident she would be able to return to work under her restrictions. Claimant further testified she has continued to seek other employment while on layoff and leave from her employers, and has since begun part-time employment with a new employer under the same medical restrictions she that resulted in her leave of absence from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work.

Iowa Code § 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(2)(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.

Iowa Admin. Code r. 871-24.23(10) provides:

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

(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 medical leave of absence from May 14, 2017, when she reopened her claim for benefits, to July 10, 2017. As noted above, a claimant who is on a voluntarily leave of absence is considered to be voluntarily unemployed and is disqualified from benefits. However, in claimant's case, her leave of absence is not with her full-time employer, but with her supplemental part-time employer.

Iowa Admin. Code r. 871-24.27 provides:

871—24.27(96) Voluntary quit of part-time employment and requalification.

An individual who voluntarily quits without good cause part-time employment and has not requalified for benefits following the voluntary quit of part-time employment, yet is otherwise monetarily eligible for benefits based on wages paid by the regular or other base period employers, shall not be disqualified for voluntarily quitting the part-time employment. The individual and the part-time employer which was voluntarily quit shall be notified on the Form 65-5323 or 60-0186, Unemployment Insurance Decision, that benefit payments shall not be made which are based on the wages paid by the part-time employer and benefit charges shall not be assessed against the part-time employer's account; however, once the individual has met the requalification requirements following the voluntary quit without good cause of the part-time employer, the wages paid in the part-time employment shall be available for benefit payment purposes. For benefit charging purposes and as determined by the applicable requalification requirements, the wages paid by the part-time employer shall be transferred to the balancing account. This rule is intended to implement Iowa Code section 96.5(1) "g."

See also, McCarthy v. Iowa Emp't Sec. Comm'n, 76 N.W.2d. 201 (Iowa 1956) wherein the court held that persons who become unemployed by a layoff from their full-time employer cannot be disqualified for a previous voluntary quit from a part-time employer. Here, claimant has not voluntarily quit her employment with this employer, but has been temporarily voluntarily separated from the employer while on medical leave. Generally individuals who are on a leave of absence do not qualify for benefits under Iowa law, as it is considered a temporary voluntary separation. However, in claimant's situation the temporary voluntary separation is not from her full-time employer, but from a supplemental part-time employer. Inasmuch as claimant's temporary separation is without good cause attributable to the employer, she would generally be disqualified from benefits. However, the claimant has not requalified for benefits since the separation but appears to be otherwise monetarily eligible according to base period wages from her full time employer. Thus, she may be eligible for benefits based upon those other wages.

Claimant's status as being temporarily laid off from her regular employer does not require her to be otherwise able to and available for work. Nevertheless, when claimant was placed on medical leave from her supplemental part-time employer, she began looking for additional work that she could complete within her restrictions. 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.

Claimant has shown that, while she may not be able to perform work for this employer, she is able and available for work, as evidenced by the fact that she was hired for and began employment on July 10, 2017, despite the continued existence of her medical restrictions. Since she is able to perform less strenuous jobs with fewer educational and training requirements than she held in her work history, she is considered able to work even if she cannot yet return to a job as most recently performed for the employer. Should claimant be permanently separated from this employer before she is leased to return to work, she should notify her local Iowa Workforce Development office of this change in status, such that an initial investigation and determination may be made on the permanent separation. Benefits are allowed, provided claimant is otherwise eligible, but the account of this employer (327152-000) shall not be charged.

DECISION:

The June 23, 2017, (reference 02), unemployment insurance decision is modified in favor of the appellant. The claimant is able to work and available for work effective May 14, 2017. The claimant is temporarily voluntarily separated from this employment without good cause attributable to the employer and has not requalified for benefits but appears to be otherwise monetarily eligible. Benefits are allowed, provided she is otherwise eligible. The account of this part-time employer (327152-000) shall not be charged.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

nm/rvs