

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

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Appeal Number: 05A-UI-01098-RT  
OC: 01-02-05 R: 01  
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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(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, Mary E. Gilbert, filed a timely appeal from an unemployment insurance decision dated January 27, 2005, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on February 23, 2005 with the claimant participating. Sally Fagerlind, Team Leader, and Kathy Bagwell, House Coordinator, participated in the hearing for the employer, Opportunity Village. This appeal was consolidated with appeal number 05A-UI-01099-RT for the purposes of the hearing with the consent of the parties. Department Exhibit One was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant. An initial hearing was originally scheduled for February 16, 2005 at 1:00 p.m. and rescheduled at claimant's request.



#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time personal assistant from November 10, 2004 until she was separated from her employment on January 3, 2005. On that day the claimant spoke to the employer's witness, Kathy Bagwell, House Coordinator. Ms. Bagwell asked the claimant if she was returning to work inasmuch as she had been released to return to work by her physician on that day. The claimant said that she was not, that she was still hurting and had an appointment on January 28, 2005 and would not be returning to work. Ms. Bagwell did not tell the claimant that she was terminated or fired or discharged. Ms. Bagwell did not have such authority. Ms. Bagwell told the claimant that the employer did not know if the employer could keep the claimant on and that the claimant would have to talk to Ms. Fagerlind. Ms. Bagwell was referring to the claimant's failure and refusal to return to work after being released by her physician several times, as discussed below. The claimant did not call Ms. Fagerlind and has never returned to the employer and offered to go back to work.

The claimant was off work from December 7, 2004 to December 12, 2004 for an illness or medical condition unrelated to her employment. She provided the employer a doctor's excuse, as shown at Department Exhibit One, indicating that she could return to regular duty on December 13, 2004. However, the claimant did not return to work that day but called the employer and told it that she was still sick and then the claimant provided a second doctor's excuse, as shown also at Department Exhibit One, indicating that the claimant was released to return to regular duty on December 30, 2004. Before that date the claimant got yet a third doctor's excuse indicating that the claimant was released to return to regular duty on January 3, 2005. This is also shown at Department Exhibit One. Nevertheless, the claimant persisted in failing and refusing to return to work. Rather, the claimant filed for unemployment insurance benefits effective January 2, 2005.

The claimant has been approved for department or director approved training from January 29, 2005 to May 7, 2005 and she is appropriately attending such training. The claimant has placed restrictions on her ability to work, including less lifting, and apparently was not willing to work until at least January 28, 2005 when she saw her doctor, but no doctor's statement indicates that the claimant is not able to work.

#### 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, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits for these reasons.

Iowa Code Section 96.5-1 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.



871 IAC 24.25 (35) provide:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:

- (a) Obtain the advice of a licensed and practicing physician;
- (b) Obtain certification of release for work from a licensed and practicing physician;
- (c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
- (d) Fully recover so that the claimant could perform all of the duties of the job.

871 IAC 24.26(6)a provides:

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.

The first issue to be resolved is the character of the separation. The employer maintains that claimant voluntarily quit when she failed and refused to return to work after being released several times by her physician. The claimant maintains that she was discharged on January 3, 2005 when she was so informed by the employer's witness, Kathy Bagwell, House Coordinator. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant voluntarily left her employment. The evidence establishes that the claimant was absent from work for an illness or medical condition unrelated to her employment. She was three times released to return to work by her physician to regular duty on December 13, 2004, December 30, 2004, and January 3, 2005. However, the claimant failed and refused to return to work on any of those days after she had been released. There appears to be no real medical reason for the claimant's refusal and



failure to return to work. The claimant testified that she was "still hurting" but this is belied by the doctor's statements. Finally, on January 3, 2005, during a conversation with Ms. Bagwell, the claimant indicated that she would not return to work until another appointment with her physician, which was not to occur until January 28, 2005. At that time Ms. Bagwell did not tell the claimant that she was terminated or fired, but merely that the claimant needed to speak to the employer's other witness, Sally Fagerlind, Team Leader. The claimant did not do so and never returned to work. Accordingly, the administrative law judge concludes that the claimant's failure and refusal to return to work was a voluntary quit on January 3, 2005. At that time, the claimant had no further doctor's excuses excusing the claimant from work thereafter and was clearly released to return to work on that day. The claimant's testimony that she was discharged is simply not credible. The claimant first testified that when she spoke to Ms. Bagwell on January 3, 2005, Ms. Bagwell told the claimant immediately that she was fired. The claimant then stated that she called Ms. Bagwell to ask about the schedule and then was told that she was terminated. Finally, the claimant did concede that she had told Ms. Bagwell that she was still hurting. The claimant changed her testimony too frequently concerning this conversation to be credible. Further, the claimant testified that she was going to return to work but this is different than what she informed the fact finder at the fact finding, when the claimant stated that she was still hurting too much and she knew she could not return to work on January 3, 2005. The claimant's testimony was also tainted by her equivocations regarding the doctor's statements at Department Exhibit One. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily on January 3, 2005. 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 only reason that the claimant left her employment was for an illness or medical condition unrelated to her employment. There is no evidence that she obtained the advice of a licensed and practicing physician to quit her position or that she has returned to the employer and offered to provide services and no comparable work was available. There is also no evidence that the claimant has ever fully recovered so that she could perform all the duties of her job. The claimant testified that she is not able to do that job and can only do a job that requires less lifting. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer and, as a consequence, she is disqualified to receive unemployment insurance benefits. The Unemployment Security Law is not designed to provide health and disability insurance and only those employees who experience illness and induced separations that can fairly be attributed to the employer are properly eligible for unemployment insurance benefits. White v. Employment Appeal Board, 487 N.W.2d 342, 345 (Iowa 1992). Here, the claimant's illness or medical condition and her separation are not fairly attributable to the employer. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such 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".

Iowa Code Section 96.4-6-a-b provides:

6. a. An otherwise eligible individual shall not be denied benefits for any week because the individual is in training with the approval of the director, nor shall the individual be denied benefits with respect to any week in which the individual is in training with the approval of the director by reason of the application of the provision in subsection 3 of this section relating to availability for work, and an active search for work or the provision of section 96.5, subsection 3, relating to failure to apply for or a refusal to accept suitable work. However, an employer's account shall not be charged with benefits so paid.

b. An otherwise eligible individual shall not be denied benefits for a week because the individual is in training approved under 19 U.S.C. § 2296(a), as amended by section 2506 of the federal Omnibus Budget Reconciliation Act of 1981, because the individual leaves work which is not suitable employment to enter the approved training, or because of the application of subsection 3 of this section or section 96.5, subsection 3, or a federal unemployment insurance law administered by the department relating to availability for work, active search for work, or refusal to accept work.

For purposes of this paragraph, "suitable employment" means work of a substantially equal or higher skill level than an individual's past adversely affected employment, as defined in 19 U.S.C. § 2319(l), if weekly wages for the work are not less than eighty percent of the individual's average weekly wage.

The administrative law judge concludes that the claimant has the burden of proof 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 met her burden of proof to demonstrate by a preponderance of the evidence that she is excused from the provisions requiring her to be available for work and earnestly and actively seeking work. The evidence establishes that the claimant has been approved for department approved training from January 29, 2005 to May 7, 2005 and that she is appropriately attending such training. An otherwise eligible individual shall not be denied benefits for any week that the individual is not available for work and not conducting an earnest and active search for work while that individual is in training with the approval of the director. Accordingly, the administrative law judge concludes that the claimant does not have to be available for work and earnestly and actively seeking work. However, the claimant must still be able to work. The administrative law judge concludes that the claimant is, and was, at relevant times able to work. The physicians' statements at Department Exhibit One clearly indicate that the claimant was released to return to regular duty



on three different days, the last of which was January 3, 2005. Although the claimant seemed to imply that she was not able to work, this is in contradiction to the doctors' statements. The administrative law judge concludes that the claimant was able to work and does not have to be available for work and earnestly and actively seeking work and, as a consequence, the claimant is not ineligible to receive unemployment insurance benefits for these reasons. However, as noted above, the administrative law judge concludes that the claimant is disqualified to receive unemployment insurance benefits because she left her employment voluntarily without good cause attributable to the employer.

**DECISION:**

The representative's decision dated January 27, 2005, reference 01, is affirmed. The claimant, Mary E. Gilbert, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer. The claimant is able to work and does not have to be available for work and earnestly and actively seeking work because the claimant is attending department approved training from January 29, 2005 to May 7, 2005.

b/kjf