

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANICE PETERS
Claimant

APPEAL NO. 10A-UI-07117-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HCM INC
Employer

OC: 03-28-10
Claimant: Respondent (2-R)

Section 96.5(1)d – Voluntary Leaving/Illness or Injury
871 IAC 24.25(35) – Separation Due to Illness or Injury
Section 96.4-3 – Able and Available for Work
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 7, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on July 1, 2010. The claimant participated in the hearing. Sharon Winkle, Administrator, and Trina Viles, DON, participated in the hearing on behalf of the employer.

ISSUE:

The issues are whether the claimant voluntarily left her employment and whether she is able and available for work.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was hired as a CNA by the employer July 6, 2000, and went on FMLA November 16, 2009, because she has cancer and was undergoing chemotherapy treatments. The employer held her job for 26 weeks; but when the claimant could not provide a potential return to work date by March 4, 2010, the employer terminated her employment while telling her she had an opportunity to return when she received a full release to work by her physician. The claimant finished chemotherapy March 8, 2010, but is taking chemotherapy pills that make her experience dizziness and weak knees and prevents her from being able to walk across her back yard without feeling exhausted. She stated she was getting ready to quit her job so she could “bow out gracefully” because she cannot do the job the way she used to be able to do it. She had not been released to return to work by her physician because of the dizziness she experiences.

The claimant has claimed and received benefits since her separation from this employer. That issue was addressed in Appeal Number 10A-UI-07118.ET.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant is temporarily separated from her employment without good cause attributable to the employer and is not able and available for work.

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 24.25(35) provides:

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.

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".

While the claimant would like to work, she has not been released by her physician to perform any work at this time because she is experiencing dizziness; and although she believes she could perform a job that would allow her a break every two hours, let her keep moving and not require any lifting, that is a very limited area of potential employment, if it exists at all, and does not seem to comport with her dizziness. The claimant has not been released to return to full work duties and the employer is not obligated to accommodate a non-work-related medical condition. Accordingly, the separation is without good cause attributable to the employer and benefits must be denied.

DECISION:

The May 7, 2010, reference 01, decision is reversed. The claimant's separation was without good cause attributable to the employer and she is not able to work and available for work effective March 4, 2010. Benefits are withheld until such time as the claimant works in and has been paid wages equal to ten times her weekly benefit amount, provided she is otherwise eligible or until such time as the claimant obtains a full release without restriction to return to regular duties, offers services to the employer, and the employer has no comparable, suitable work available. The claimant has received benefits but was not eligible for those benefits. The overpayment issue has been addressed in Appeal Number 10A-UI-07118.ET.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw