IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RYAN F PETERS
Claimant

ADVANCE SERVICES INC
Employer

APPEAL NO: 13A-UI-05089-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/16/12
Claimant: Appellant (2)

Section 96.4-3 – Able and Available
871 IAC 24.22(2)j – Leave of Absence
Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Ryan F. Peters (claimant) appealed a representative's April 22, 2013 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits in connection with his employment with Advance Services, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on June 12, 2013. The claimant participated in the hearing. The employer responded to the hearing notice on May 28, 2013 and requested to be allowed to participate by phone, or in the alternative, to have the in-person hearing conducted in Council Bluffs, Iowa, closer to the employer's corporate office in Omaha, Nebraska, rather than in Des Moines, Iowa. The administrative law judge denied the request to relocate the hearing from Des Moines, as the claimant had been employed by the employer at a work site in Slater, Iowa, where the employer does have an on-site representative, and which is less than a half-hour drive to Des Moines; while the judge indicated that an additional person might be allowed to participate by phone, this would only be allowed if there was at least one person who appeared at the hearing site to participate as the employer's representative. These rulings were made pursuant to 871 IAC 26.6(4). The employer then failed to appear at the time and place designated in the hearing notice and did not participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant eligible for unemployment insurance benefits by being able and available for work? Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The employer is a temporary employment firm. After a prior period of employment with the employer, the claimant most recently began an assignment with the employer on or about

April 1, 2012. He worked full time as an agricultural assistant at the employer's Slater, Iowa business client. His last day on the assignment was March 8, 2013.

The claimant injured his back about two weeks prior to March 8, but continued to work pending being able to get in to see his doctor. On March 11 he went into the workplace but did not clock in; at this point he was in so much pain he virtually could not even walk. It was agreed between the claimant, the employer's on-site representative, and the business client's manager that the claimant should stay off work until he could get in to see a doctor.

On March 12 the claimant saw a doctor and was given an epidural for pain control. He got into see an orthopedic surgeon on March 19. After an MRI on March 20 and a diagnosis of a herniated disc, the claimant was referred to and began physical therapy on March 22. On March 28 the claimant obtained a doctor's release for light-duty work, with a restriction of only being able to lift or carry five to ten pounds. The claimant provided this information to the employer's on-site representative at that time, inquiring whether he could return to work; he could perform about 70 percent of his normal job duties within the lifting restrictions. The employer's on-site representative indicated that she would have to get back to the claimant.

On April 2 the employer's on-site representative informed the claimant that the assignment was ended because of his work restrictions. The claimant inquired if there was work available at some other business client, and the representative again indicated that she would have to look into it. She subsequently inferred to the claimant that he would need to be released without any restrictions before he could be put back onto an assignment.

The claimant has identified a number of types of work, such as computer work or truck driving, that he would be physically able to perform even with the five-pound weight restriction. As of about mid-May 2013, and as of the date of the hearing, the claimant's lifting restriction had been increased to 45 pounds.

The claimant established an unemployment insurance benefit year effective December 16, 2012. He reopened the claim by filing an additional claim effective March 31, 2013.

REASONING AND CONCLUSIONS OF LAW:

There was a separation from employment as of April 2, 2013. Considering the claimant's status as of that date, there are only three provisions in the law which could disqualify a claimant from unemployment insurance benefits (until he has been reemployed and has been paid wages for insured work equal to ten times his weekly benefit amount). An individual is subject to such a disqualification if the individual (1) is discharged for work-connected misconduct (Iowa Code § 96.5-2-a); (2) "has left work voluntarily without good cause attributable to the individual's employer." (Iowa Code § 96.5-1); or (3) refuses to accept an offer of suitable work without good cause (Iowa Code § 96.5-3). Here, there is no question of an actual offer of work or refusal of work after April 2, 2013, so the focus will be on whether there was a disqualifying separation from employment.

Separations are categorized into four separate categories under Iowa law. Rule 871 IAC 24.1(113) defines "separations" as:

> 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 labor-saving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
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> 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.

As the employer characterized the separation in this case as a voluntary quit, I will first determine whether Iowa Code § 96.5-1 regarding voluntary quits applies in this case. Rule 871 IAC 24.25 provides that, 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 claimant had been willing to continue working, but the employer was unable or unwilling to provide work.

Further, Iowa Code § 96.5-1-d provides an exception that an individual who otherwise could be subject to disqualification is not disqualified:

> If the individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of 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.

The Agency rule implementing this section explains that "[r]ecovery is defined as the ability of the claimant to perform all of the duties of the previous employment." 871 IAC 24.26(6)a.

The issue then is whether a person is subject to voluntary quit disqualification under Iowa Code § 96.5-1 under the following circumstances: The person is actively working but then is suffers a medical condition that prevents him from performing his normal job duties, and the employer determines there is no work available for him with those restrictions. The person has never stated that he is quitting the employment. The employer has not formally discharged the claimant from employment but has stated that the employee cannot return to work until he can return without restriction, if work is then available for him, and ultimately determines it can no longer hold the position for the claimant.

The problem is that the case law points in several directions and has not addressed this issue head on. Additionally, the statute and rules are unclear as to this issue. For example, in *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989), the Iowa court considered the

case of a pregnant certified nursing assistant (CNA) who went to her employer with a physician's release that limited her to lifting no more than 25 pounds. Wills filed a claim for benefits because the employer would not let her return to work because of its policy of never providing light-duty work. The court ruled that Wills became unemployed involuntarily and was able to work because the weight restriction did not preclude her from performing other jobs available in the labor market. *Id*. at 138. The court characterized the separation from employment as a termination by the employer, but in essence the employer informed the claimant that it did not have any jobs available meeting her restrictions and would not create a job to accommodate her restrictions. The court does not mention Iowa Code § 96.5-1-d at all. Perhaps significantly, the facts do not indicate that the claimant had stopped working at any point, and it was the employer who requested that she go to her doctor to get a release to continue working.

On the other hand, in *White v. Employment Appeal Board*, 487 N.W.2d 342, 345 (Iowa 1992), the Iowa court considered the case of the truck driver who was off work due to a heart attack for about three months, returned to work for a month, and then was off work for seven months after a second heart attack. He then returned to his place of employment and informed management that his doctor had instructed him that he was unable to drive because of his pacemaker device. The employer told the claimant that there was no available work for him with his restriction. The claimant then applied for unemployment insurance benefits. *Id*. at 343. The facts did not indicate whether the claimant stated that he was quitting employment or intended to permanently sever the employment relationship at any point. In *White*, the court reversed the district court's decision that the claimant quit work involuntarily due to a physical disability and stated that "unemployment due to illness raises policy considerations which call for a continuation of the rules laid out in cases antedating [the cases relied on by the district court] … Under these rules, if White's disability was not work related, the agency properly imposed the disqualification. If, however, the cause of White's disability was work related, the disqualification was improper." *Id*. at 345. The court decided that there had been no finding as to whether the disability was or was not work related and remanded the case. The court does not refer to or distinguish the *Wills* case. It does not explain how the first prong of the voluntary quit disqualification test set forth earlier in its decision—"it must be demonstrated that the individual left work voluntarily"—had been met.

To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship, and chooses to leave the employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. *Wills* supra at 138; *Peck v. Employment Appeal Board*, 492 N.W.2d 438, 440 (Iowa App. 1992). In my judgment, the facts of the *Wills* case more closely resemble this case. The claimant was actively employed until the restrictions from his (assumed for the purpose of this discussion) non-work-related medical condition prevented him from performing his normal job duties. He did not intend to quit his employment. The employer informed the claimant that no other work

was available for him after April 2, 2013. The action initiating the separation was therefore taken by the employer, and the separation therefore could be considered for unemployment insurance purposes as a discharge, but not for disqualifying misconduct.[1]

Perhaps this type of separation would meet the definition of "other separations" found in 871 IAC 24.1(113)(d): "Termination of employment for military leave lasting or expecting to last longer than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required." The problem with this definition section is that it does not provide guidance on whether such a separation is qualifying or disqualifying. Obviously, if a person terminates employment because he decides to retire, it is a voluntary quit and a disqualification would be imposed. On the other hand, if the employer mandates that an employee retire due to reaching a certain age, the termination is involuntary and initiated by the employer and is a discharge for reasons other than misconduct and no disqualification is imposed. Likewise, if a claimant decides that he no longer meets the physical standards required by the job and leaves employment, it should be treated a quit and benefits will only be awarded if the person meets the exceptions to the voluntary quit statute.

Further guidance is provided by 871 IAC 24.22(2) which provides:

> 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 individual, the individual is considered laid off and eligible for benefits.

[1] In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer has not asserted the claimant committed conduct that could be characterized as misconduct under these criteria.

(2) If the employee—individual fails to return at the end of the leave of absence and subsequently become unemployed the individual is considered having voluntarily quit and is therefore ineligible for benefits.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

In this case, apparently there was a mutually agreed upon leave of absence, at least initially, through about March 28. The leave of absence extended beyond what the employer or the claimant initially anticipated for the length of the leave of absence. Because the restrictions imposed by the claimant's doctor prevented the claimant from performing his normal job duties, the employer declined to allow the claimant to return to work by accommodating his restrictions. As such, even though the separation is considered an "Other Separation," it is ultimately treated as a layoff, because it was initiated by the employer. There is no valid reason to disqualify the claimant from benefits for being laid off for a lack of work upon.

The claimant, therefore, is not subject to the voluntary quit statute since he has not quit. He is not disqualified under the discharge statute since his separation was not due to misconduct. The refusal of suitable work statute does not apply here.

The remaining question is whether the claimant is eligible to receive unemployment insurance benefits after April 2, 2013 by being able and available for work. Iowa Code § 96.4-3. After a permanent separation has occurred, to be found 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); 871 IAC 24.22(1). The claimant has demonstrated that as of March 28, 2013 he is able to work in some gainful employment, even if he could not perform all of his the duties of his prior employment with the employer. As of the benefit week beginning March 31, 2013, benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's April 22, 2013 decision (reference 02) is reversed. As of April 2, 2013, the claimant did not voluntarily quit and was not discharged for misconduct. As of the benefit week beginning March 31, 2013 the claimant is able and available for work, and is eligible to receive unemployment insurance benefits, if he is otherwise qualified.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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