

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KIM SESSIONS**

Claimant

**APPEAL NO. 06A-UI-09247-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NORDSTROM DISTRIBUTION MGMT INC**

Employer

**OC: 07/23/06 R: 12  
Claimant: Respondent (2)**

Iowa Code Section 96.5(1)(d) – Separations Due to Medical Conditions

**STATEMENT OF THE CASE:**

Nordstrom Distribution Management filed a timely appeal from the September 8, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 5, 2006. Claimant Kim Sessions participated. Jessica Meyer of TALX UCM Services represented the employer and presented testimony through Mauricio Costaneda, Human Resources Manager for the Nordstrom CS Distribution Center. Claimant's Exhibit A was received into evidence. Employer's Exhibits One through Four were received into evidence. The administrative law judge took official notice of the Agency's administrative file and Department Exhibit D-1 was marked for identification purposes.

**ISSUE:**

Whether the claimant's voluntary separation from the employment due to a non-work-related mental health condition was for good cause attributable to the employer.

Whether the claimant has been able and available for employment since establishing her claim for benefits.

Whether the claimant has been overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: On April 14, 1997, Kim Sessions commenced her employment with Nordstrom Distribution Management as a full-time merchandise processor. Ms. Sessions' regular work hours were 6:00 a.m. to 2:00 p.m. or 2:30 p.m., Monday through Friday.

On December 9, 2005, Ms. Sessions returned from a medical leave of absence. The leave of absence was based on diagnosis and surgery for carpal tunnel syndrome that was determined to be work-related. The matter was the basis for a workers' compensation claim. Mauricio Costaneda, Human Resources Manager for the Nordstrom CS Distribution Center, supervised Ms. Sessions' return to work. Ms. Sessions returned to the employment with restrictions relating to the carpal tunnel condition. The initial restrictions included that Ms. Sessions be

limited to working no more than four hours at a time. The employer's plan was to gradually increase Ms. Sessions' daily work schedule as her physical health allowed. Ms. Sessions worked a reduced schedule throughout December and January, but was frequently absent.

Ms. Sessions last appeared and performed work on February 1, 2006. Ms. Sessions was scheduled to work February 2, 3, 6 and 7, but was absent each day without notifying the employer. On the evening of February 7, after the close of business, Ms. Sessions left a voicemail message for Mr. Castaneda. Ms. Sessions indicated she had been unable to notify the employer of her recent absences because she was afraid to leave her home to access a telephone. Ms. Sessions indicated she would not be a work on February 8. On February 9 and 10, Ms. Sessions was absent without notifying the employer. The employer has an attendance policy that deems three days of no-call, no-show a voluntary quit.

On February 11, Mr. Castaneda sent a letter to Ms. Sessions by certified mail. Mr. Castaneda notified Ms. Sessions that the employer deemed the workers' compensation matter closed as of January 30 and she was no longer on an approved leave of absence. Mr. Castaneda notified Ms. Sessions that if she needed additional accommodations in the workplace, she would need to meet with Mr. Castaneda to begin the employer's "Reasonable Accommodation Process." Mr. Castaneda attached an application for "Short Term Accommodation Consideration." Mr. Castaneda instructed Ms. Sessions to contact him no later than February 27. Mr. Castaneda further indicated that the employer needed medical documentation to excuse Ms. Sessions' February absences. Mr. Castaneda warned that failure to contact him by February 27 could negatively impact Ms. Sessions' employment.

Ms. Sessions receives her mail at a post office box. On February 22, Mr. Castaneda contacted the East Dubuque Post Office to inquire whether his certified letter had made it to Ms. Sessions' post office box. It had. The post office had put a note in the box alerting Ms. Sessions that there was a certified package waiting for her at the counter. Ms. Sessions did not sign for the February 11 letter until March 6.

On February 22, Mr. Castaneda telephoned Ms. Sessions and left a message notifying her that the employer's human resources director was in town. Mr. Castaneda urged Ms. Sessions to contact him to make arrangements to meet with the human resources director. Mr. Castaneda did not receive a response from Ms. Sessions.

Before the February 27 deadline for Ms. Sessions' response to Mr. Castaneda's letter, Medical Associates Clinic provided the employer with documentation indicating that Ms. Sessions was not mentally able to return to work and was under the care of a psychiatrist. The employer did not make this documentation available for the hearing.

On March 15, 2006, Mr. Castaneda sent a second letter to Ms. Sessions by certified mail. Mr. Castaneda indicated that Ms. Sessions had failed to appropriately respond to his letter of February 11, 2006 and had failed to appropriately respond to his voicemail message of February 22, 2006. Mr. Castaneda indicated that the employer deemed Ms. Sessions to have abandoned her employment and that the employment was therefore terminated effective immediately.

After Ms. Sessions' after-hours telephone call on February 7, she continued to call the employer on a regular basis and left messages regarding her mental health status and other personal matters. Ms. Sessions left all of these messages after normal working hours, a time when she knew the building was closed. Mr. Castaneda was out of the State beginning the last week of

February and returned on March 6. During that absence, Mr. Castaneda's assistant received additional after-hours messages from Ms. Sessions.

On March 20, Mr. Castaneda participated in a conference call with Ms. Sessions. Ms. Sessions asserted she had not received the employer's March 15 letter. During the call, Mr. Castaneda read the March 15 letter to Ms. Sessions. Mr. Castaneda told Ms. Sessions that the employment had been terminated under the employer's "no-call, no-show" policy as an abandonment or voluntary quit. Mr. Castaneda pointed to the four days in early February when Ms. Sessions had been absent without notifying the employer.

Ms. Sessions provided two medical documents that address her mental ability to work and/or maintain appropriate contact with the employer. One of the documents is a "Psychiatric Progress Note" concerning an April 6, 2006 appointment with Psychiatrist Peter Szeibel, M.D. This visit occurred a month and a half after Ms. Sessions' most recent contact with the employer. Dr. Szeibel indicated a diagnosis of recurrent and severe major depression disorder, anxiety disorder, and post traumatic stress disorder (PTSD). Dr. Szeibel indicated that Ms. Sessions was being treated with six different psychotropic medications. Dr. Szeibel further indicated: "Having significant PTSD symptoms. Unable to return to work." Finally, Dr. Szeibel indicated that Ms. Sessions' functioning ability was 31-40 on a scale of 1-100 and that she was functionally impaired.

Ms. Sessions established a claim for benefits that was effective July 23, 2006. In response to an Iowa Workforce Development inquiry on August 10, 2006 into whether Ms. Sessions was able to work, Dr. Szeibel completed a second medical document that Medical Associates Clinic faxed to the Agency on September 7. On this document, Dr. Szeibel indicated that Ms. Sessions suffers from recurrent major depression and post-traumatic stress disorder, that the condition was not work-related, and that he had not advised Ms. Sessions to quit her employment. Dr. Szeibel indicated that Ms. Sessions could not perform her occupational duties from November 13, 2005 to July 1, 2006. Dr. Szeibel indicated that since November 13, 2005, Ms. Sessions had been "intermittently" unable to work due to post-traumatic stress disorder and that Ms. Sessions had suffered from depression prior to November 13, 2005. Finally, Dr. Szeibel indicated that he had first treated Ms. Sessions for her mental health condition on February 21, 2001 and had most recently treated her for the condition on April 6, 2006.

#### **REASONING AND CONCLUSIONS OF LAW:**

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.

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 evidence in the record establishes that Ms. Sessions initiated a separation from the employment due to a mental health condition that was not caused by or aggravated by the employment. However, the information Dr. Szeibel provided to Iowa Workforce Development indicates that Ms. Sessions separation from the employment was not based on advice she received from a license and practicing physician. The evidence in the record fails to establish that Ms. Sessions has been granted a full release to return to work without restrictions. The evidence in the record fails to establish that Ms. Sessions returned to the employer and offered services upon full recovery and certification for work by a licensed and practicing physician. Accordingly, Ms. Sessions' voluntary separation from the employment was without good cause attributable to the employer and Ms. Sessions is not eligible for benefits.

If Ms. Sessions is granted an unequivocal release to return to work without restrictions and if she then returns to the employer and offers services, but is denied employment, the Agency will reconsider her eligibility for benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The evidence indicates that Ms. Sessions has received benefits for which she is not eligible and is therefore required to repay the benefits. Ms. Sessions is overpaid \$3,936.00.

**DECISION:**

The Agency representative's September 8, 2006, reference 01, decision is reversed. The claimant voluntarily separated from the employment for a non-work-related medical condition, but not on the advice of a licensed and practicing physician, has been released without restrictions to return to work, and has not returned to the employer upon being fully released and offered services. The claimant is ineligible for benefits effective July 23, 2006. The claimant is overpaid \$3,936.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw