

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RODNEY O LARIOS
Claimant

APPEAL NO. 11A-UI-15448-L

**ADMINISTRATIVE LAW JUDGE
DECISION**

KELLY SERVICES INC
Employer

**OC: 10/23/11
Claimant: Appellant (1)**

Iowa Code § 96.5(1)d – Voluntary Leaving/Illness or Injury
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 30, 2011 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held on February 6, 2012 in Cedar Rapids, Iowa. Claimant Rodney Larios participated and was represented by Erin Dooley, Attorney at Law. Employer Kelly Services, Inc. (Kelly) participated through branch manager Lennie Zieser. Claimant's Exhibits A, B, and D were admitted to the record. No others were offered.

ISSUE:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Larios was most recently employed as a full-time team leader for Kelly assigned at Quality Associates from November 15, 2010 through December 20, 2011. The employer knew about his criminal record on December 6, 2010 from a report that cited misdemeanor battery in 2004. (Claimant's Exhibit D) On December 20 he told former Kelly representative Taffi he was removing himself from the assignment due to medical reasons. Continued work was available. He had surgery on December 22, 2010 and was medically released on January 23, 2011. (Claimant's Exhibit B) He is still eligible to work at Kelly but never returned to offer his services.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant is temporarily separated from the employment without good cause attributable to the employer.

Iowa Code § 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 § 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 § 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.

The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that:

"Insofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Employment Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

The statute provides an exception where:

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. Iowa Code § 96.5(1)(d).

Section 96.5(1)(d) specifically requires that the employee has recovered from the illness or injury, and this recovery has been certified by a physician. The exception in section 96.5(1)(d) only applies when an employee is fully recovered and the employer has not held open the employee's position. *White*, 487 N.W.2d at 346; *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985); see also *Geiken v. Lutheran Home for the Aged Ass'n.*, 468 N.W.2d 223, 226 (Iowa 1991) (noting the full recovery standard of section 96.5(1)(d)).

In the present case, the evidence clearly shows Gilmore was not fully recovered from his injury until March 6, 2003. Gilmore is unable to show that he comes within the exception of section 96.5(1)(d). Therefore, because his injury was not connected to his employment, he is considered to have voluntarily quit without good cause attributable to the employer, and is not entitled to unemployment ... benefits. See *White*, 487 N.W.2d at 345; *Shontz*, 248 N.W.2d at 91.

Since the employer knew about his criminal background, allowed him to keep working until he left for surgery, and kept his employment status active, Larios' claim that he was fired because of the background check results is not credible; nor is his claim that he returned to offer his services. He has not established that the injury was work related, as is his burden. Thus, he must meet the requirements of the administrative regulation cited above. Since he has not returned to Kelly to offer his services but remains eligible for employment, the separation is without good cause attributable to the employer and benefits must be denied.

DECISION:

The November 30, 2011 (reference 01) decision is affirmed. The claimant temporarily separated from the employment without good cause attributable to the employer. Benefits are withheld until such time as the claimant works in and has been paid wages equal to ten times his weekly benefit amount, provided he is otherwise eligible or until such time as claimant offers services to the employer, and the employer has no comparable, suitable work available.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs