

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**CHRISTINE A MELLENCAMP**  
Claimant

**APPEAL 15A-UI-14373-DL-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**VP INSTITUTE INC**  
Employer

**OC: 12/06/15**  
**Claimant: Respondent (2)**

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Iowa Code § 96.5(1)d – Voluntary Quitting/Illness or Injury  
Iowa Admin. Code r. 871-24.25(35) – Separation Due to Illness or Injury  
Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed an appeal from the December 24, 2015, (reference 02) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on January 22, 2016. Claimant participated and was represented by Tyler Johnston, Attorney at Law. Employer participated through company director, April King, and business manager, Sheila Townsend. Employer's Exhibit 1 was received. This decision is identical to 15A-UI-14372-DL-T excepting the employer account numbers.

**ISSUES:**

Did claimant voluntarily leave the employment with good cause attributable to the employer or did 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: Claimant was employed full-time as a massage therapist from December 3, 2012, and was separated from employment on December 9, 2015, when she quit. Her last day of work was August 7, 2015, when she was injured at work and alerted manager, Carie Moore. The employer did not file a first report of injury or designate a physician so she saw her personal medical provider Brett Stewart, physician's assistant (PA), who referred her to a female medical provider (unknown name) with Des Moines Orthopedic Surgeons, whom she saw on October 1 and 14, 2015. Claimant texted Moore on October 7 to tell her she was told not to use her arm until her next visit on October 14. (Employer's Exhibit 1, p. 8) On October 9 claimant and Moore spoke and Moore confronted claimant about a "bad attitude." She had not been warned about this issue in the past. Moore said claimant should not "gamble" on whether or not she would be able to work from week-to-week and that working at her regular job was not an option at that point. Moore told her to contact the employer when she felt like she was able to work again but to do some "soul searching" about whether she sees herself continuing with the company or sending resumes for other types of jobs. Moore then blocked her from being booked for massage

appointments. (Employer's Exhibit 1, p. 9) Claimant sought a second opinion from orthopedic surgeon (first name unknown) Tryin, M.D. on October 20, 2015. He told her she needed carpal tunnel surgery and put her on restrictions limiting repetitive movement. Claimant notified the employer verbally. The employer did not request documentation. Claimant has not yet had surgery and has not seen Dr. Tryin again.

Manager Jamie Evans told claimant the employer had medical information that she had been released to work-hardening effective November 3, 2015. Claimant declined because of continuing pain and wanted to get a second opinion. (Employer's Exhibit 1, p. 4) On November 23 Evans called claimant who said she had not heard back about a referral appointment. (Employer's Exhibit 1, p. 6) On November 30 claimant called Evans about her workers' compensation status and said that Doctors Now had released her without restriction. Claimant said she still had pain in her arm. (Employer's Exhibit 1, p. 7) Claimant did not present anything in writing to the employer. David Stilley, M.D., workers' compensation carrier-designated physician found claimant had reached maximum medical improvement (MMI) on November 25, 2015, and released her without restrictions.

On December 5 claimant called Evans to update her on the evaluation by occupational medicine physician's assistant (PA) Andrea (or Amanda, last name unknown) at Doctors Now. PA Andrea kept the restrictions and wanted further testing because she saw her well after the injury occurred. (Employer's Exhibit 1, p. 6) On Tuesday, December 8 Evans noted claimant had acknowledged she would return to work the following day. (Employer's Exhibit 1, p. 10) Claimant was a no-show for the shift. (Employer's Exhibit 1, p. 11) She contacted Evans to notify her she could not return to work on December 9 because she had church activities planned and no arrangement for child care. On December 9 via e-mail Cowling told claimant if she did not return to work she would not have job. (No documentation provided.)

Neither party submitted any medical documents and both were vague about dates and details of the chronology. Claimant started work as a certified pharmacy technician on December 30, 2015.

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

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

Iowa Admin. Code r. 871-24.25(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 Admin. Code r. 871-24.26(6)b 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.

b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with the employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

An employee's failure to return to the employer and offer services upon recovery from an injury "statutorily constitutes a voluntary quit and disqualifies an individual from unemployment insurance benefits." *Brockway v. Emp't Appeal Bd.*, 469 N.W.2d 256 (Iowa Ct. App. 1991). In

1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement added to rule 871-24.26(6)(b), the provision addressing work-related health problems. *Hy-Vee, Inc. v. Emp't Appeal Bd.*, 710 N.W.2d 1 (Iowa 2005).

Claimant did not present evidence in writing to employer that a physician suggested leaving the employment and has not presented credible evidence that any work restrictions were in force. Thus the claimant's failure to return to work upon her release is considered a voluntary quitting of employment without good cause attributable to the employer.

**DECISION:**

The December 24, 2015, (reference 02) unemployment insurance decision is reversed. Claimant is separated from the employment without good cause attributable to employer. Benefits are withheld until such time as she works in and has been paid wages equal to ten times her weekly benefit amount, provided she is otherwise eligible. Since no benefits were claimed or paid, no overpayment is established.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs

**NOTE TO EMPLOYER:**

If you wish to change the name and suite number of record, please access your account at: <https://www.myiowaui.org/UITIPTaxWeb/>.

Helpful information about using this site may be found at:

<http://www.iowaworkforce.org/ui/uiemployers.htm> and

<http://www.youtube.com/watch?v=mpCM8FGQoY>