IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SUSANA PATINO FLORES
Claimant

MARZETTI FROZEN PASTA INC
Employer

APPEAL NO: 12A-UI-14705-B

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/03/12
Claimant: Respondent (2-R)

Iowa Code § 96.5-1 - Voluntary Quit
Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Marzetti Frozen Foods, Inc. (employer) appealed an unemployment insurance decision dated December 7, 2012, reference 01, which held that Susana Patino Flores (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a hearing began in Des Moines, Iowa on February 11, 2013 but was not completed until March 27, 2013. The employer participated through Steve Bowers, Human Resources Manager; Robert Ringgenberg, Assistant Supervisor; Travis Aslin, Health & Safety Manager; and Jody Chance, Employer Representative. The claimant participated in the hearing. On February 11, 2013, Noe Murillo interpreted by telephone on behalf of the claimant for the first part of the hearing but had to leave so Anna Pottebaum interpreted for a short period of time before her phone call dropped. Workforce Associate Rosana Devine joined the in-person hearing to interpret on behalf of the claimant but the hearing could not be completed because the employer witnesses had to leave. The hearing was rescheduled for March 11, 2013 but the employer's request for a postponement was granted. In the hearing on March 27, 2013, Anna Pottebaum interpreted for the first part of the hearing but had to leave so Rafael Geronimo interpreted for the latter part of the hearing. Employer's Exhibits One through Four were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant's voluntary separation from employment qualifies her to receive unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired as a full-time production worker on May 1, 2004 and was placed on indefinite medical leave on September 5, 2012. She sustained a work-related strain injury of her right shoulder and lower back on September 8, 2011. Treating

physician Jon Yankey, M.D. discharged her from treatment on November 28, 2011 and released her to return to full work duties. On May 22, 2012, the claimant reported continued pain resulting from the original injury and she was treated conservatively with medication, physical therapy and activity restrictions. An MRI of the cervical spine was completed on July 13, 2012 which showed early degenerative changes in the lower lumbar spine with "perhaps minimal disc bulging there." The claimant was sent to a pain clinic for an evaluation.

Kenneth Pollack, M.D. wrote a letter on August 1, 2012 stating that he found no medical indication for proceeding with epidural steroid injections as the claimant's MRI showed "minimal degenerative changes of the L4-5 disc with absolutely no evidence of nerve root compression or irritation at any level." Dr. Yankey evaluated the claimant on August 15, 2012 and the examination "revealed no radicular symptoms, no objective neural deficits, and thus, no evidence of radiculopathy." So based on his evaluation, Dr. Pollack's evaluation and the claimant's MRI, Dr. Yankey determined the claimant had no indication for surgical intervention and was at maximum medical improvement for the previous work-related injury. He ordered a functional capacity evaluation (FCE) which was completed on August 16, 2012.

The following permanent restrictions were recommended for the claimant based on her FCE: 1) Limit lifting to 40 pounds from floor to waist and 30 pounds from waist to head on an occasional basis; 2) Limit carrying to 45 pounds on an occasional basis; 3) Limit single arm carrying to 30 pounds on an occasional basis; 4) Limit forward bending to occasional basis; and 5) Limit kneeling to occasional basis. The claimant was again discharged from treatment after her appointment on August 28, 2012 when her FCE was discussed with her. Dr. Yankey found the claimant to have zero percent impairment of the whole person as a result of the September 2011 work injury.

The employer had work available for the claimant within her physical restrictions but she refused to perform the work claiming that she was medically unable to do so. A meeting was held on September 5, 2012 with the claimant, Steve Bowers, Robert Ringgenberg and Travis Aslin. At the conclusion of the meeting, all parties agreed that the claimant would be placed off work on medical leave as she contends she cannot perform the work within her restrictions. The employer met again with the claimant on September 17, 2012 and formalized the previous agreement. In this meeting, the employer provided a letter to the claimant in English and in Spanish which confirmed she would be placed off work because "you continue to state that you are unable to perform the jobs in our plant and you believe that you are likely to be injured if you are assigned regular work in the plant." The claimant signed the English version of the letter which confirmed she agreed that the letter accurately described her physical condition in regard to her ability to work for the employer.

The claimant returned to the employer on November 17, 2012 with a ten-pound lifting restriction and the employer was unable to accommodate that restriction but was still able to provide her work within her permanent restrictions as determined by the August 16, 2012 FCE. The claimant has not returned to the employer since that date but testified in the hearing that as of February 15, 2013, she has been medically able to perform the work duties. She contends the employer fired her on September 5, 2012 and contends that she did not understand the discussions in the meeting and/or the English and Spanish letters provided to her on September 17, 2012.

All three employer witnesses testified the claimant has a good grasp of the English language and has never used or needed an interpreter to communicate with them. The employer witnesses testified the claimant was offered an interpreter for the September 17, 2012 meeting but she refused the offer. The claimant denies that claim and even went so far as to call one

employer witness a "liar". The employer received an email from the claimant's case worker that the case worker brought a Spanish interpreter to one of the claimant's appointments and she sent the interpreter away and became angry about it. The claimant denies that the case worker even brought an interpreter to her medical appointment. The employer introduced an application the claimant provided for an internal job opening on which she wrote a full page of information in English but she claims her children helped her write it. The employer witnesses testified the job application was indicative of how the claimant could write in English as they have seen her write other documents in English.

The claimant filed a claim for unemployment insurance benefits effective June 3, 2012 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the reasons for the claimant's separation from employment qualify her to receive unemployment insurance benefits. The claimant is not qualified to receive unemployment insurance benefits if she voluntarily quit without good cause attributable to the employer or if the employer discharged her for work-connected misconduct. Iowa Code §§ 96.5-1 and 96.5-2-a.

The claimant contends she was fired but the employer witnesses contend the claimant was placed on indefinite medical leave because she claimed she was unable to work within her work restrictions. She did suffer a work-related injury but she was properly treated for that injury and her treating physician had released her from care. The employer sent her to a different physician at a pain clinic and that physician also found no need for further treatment. The claimant was then sent for a functional capacity evaluation and the treating physician agreed with the recommendations and gave her permanent work restrictions but she still refused to work. When evaluating whether a separation is a discharge or a quit, one must simply look at who initiated the separation and in this case, it was the claimant.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980) and *Peck v. Employment Appeal Bd.,* 492 N.W.2d 438 (Iowa Ct. App. 1992). The claimant demonstrated her intent to quit and acted to carry it out by refusing to work even though there was work available within her medical restrictions. Her unemployment is voluntary in that she has elected not to work. The claimant testified that she is now medically able to do the work but admitted she has not returned or contacted the employer about working.

The claimant's contention that she did not understand the meeting or the contents of the English and Spanish letters on September 17, 2012 is without merit. First of all, she speaks very good English and had not used an interpreter during her long-term employment. She applied for a supervisory position which seems unlikely if she felt uncomfortable with the English language. The administrative law judge noted during the hearing that the claimant had corrected her Spanish interpreter's English explanation at one point. At another point, the interpretation was that the claimant called one of the employer witnesses a liar and the administrative law judge told her that was inappropriate. She immediately responded in English by stating she was sorry. And finally, one of the letters provided to her in the final meeting was in Spanish and if she still claimed to not understand what was being addressed at this important meeting, it was her obligation to request an interpreter so she would know.

It is the claimant's burden to prove that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. She has not satisfied that burden. Benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated December 7, 2012, reference 01, is reversed. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs