

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

YAROSLAV VIVTCHARENKO
Claimant

APPEAL NO. 08A-UI-10451-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CEDAR VALLEY CORPORATION
Employer

OC: 11/25/07 R: 04
Claimant: Appellant (1)

Section 96.5-1 - Voluntary Quit

STATEMENT OF THE CASE:

Yaroslav Vivtcharenko (claimant) appealed a representative's October 31, 2008 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he voluntarily quit work with Cedar Valley Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 25, 2008. The claimant was represented by James Burns, Attorney at Law, and participated personally. The employer participated by Virginia Robinson, Human Resources Manager.

ISSUES:

Whether the claimant is denied unemployment insurance benefits because he voluntarily quit work without good cause attributable to the employer.

Whether the claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on May 15, 2006, as a full-time seasonal truck driver. The claimant stopped working on September 25, 2008, because he had been diagnosed with cancer. The claimant's physician prohibited him from performing his regular duties by imposing a ten-pound weight restriction for six months. This restriction would not allow the claimant to climb into the cab of the dump truck he regularly drove. The employer did not have work for the claimant that met his restrictions and placed him on a six-month medical leave. The claimant has not been released to return to work without restrictions.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily quit work without good cause attributable to the employer.

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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). Due to the claimant's restrictions, he intended not to perform his regular work. A claimant is not disqualified for leaving employment if he or she (1) left employment by reason of illness, injury or pregnancy; (2) on the advice of a licensed and practicing physician; (3) and immediately notified the employer or the employer consented to the absence; (4) and when certified as recovered by a physician, the individual returned to the employer and offered services but the regular or comparable suitable work was not available. Area Residential Care, Inc. v. Iowa Department of Job Service, 323 N.W.2d 257 (Iowa 1982).

The claimant left work due to an illness under the advice of his physician. The claimant could not perform his regular work. The employer consented to his leaving. The claimant has failed to provide the employer with certification that he has recovered. The claimant has failed to meet the requirements of the statute and, therefore, is not eligible to receive unemployment insurance benefits.

The next issue is whether the claimant was able and available for work. For the following reasons, the administrative law judge concludes he is.

871 IAC 24.23(1) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(1) An individual who is ill and presently not able to perform work due to illness.

When an employee is ill and unable to perform work due to that illness, he is considered to be unavailable for work. The claimant is considered to be available for work based on his doctor's note indicating he could work with restrictions. The claimant is not disqualified from receiving unemployment insurance benefits, so long as he is eligible.

DECISION:

The representative's October 31, 2008 decision (reference 01) is affirmed. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant is able to work and not disqualified from receiving unemployment insurance benefits, so long as he is eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw