

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALICIA L IRISH
Claimant

APPEAL NO. 11A-UI-09415-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MAINSTREAM LIVING INC
Employer

OC: 07/01/12
Claimant: Respondent (5R)

871 IAC 24.1(113) – Layoff

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 1, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 19, 2012. Claimant Alicia Irish participated. Marcanne Lynch represented the employer. Exhibits One through Five and A were received into evidence.

ISSUE:

Whether Ms. Irish separated from the employment for a reason that disqualifies her for unemployment insurance benefits. The administrative law judge concludes that the employer laid Ms. Irish off effective June 5, 2012, when the employer replaced her at the Adel House.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Alicia Irish was employed by Mainstream Living as Supported Living Tech from September 2011 and last performed work for the employer on May 12, 2012. Ms. Irish started the employment as a full-time employee. Effective March 18, 2012, the employer reclassified Ms. Irish as part time in response to repeated illness-related absences. Ms. Irish's immediate supervisor was Lisa Willis, Home and Community Based Services (HCBS) Coordinator. Until June 5, 2012, Ms. Irish was assigned to work at a home in Adel.

In January 2012, Ms. Irish was diagnosed with cyclic vomiting syndrome, a stress-related illness that can result in extended periods of vomiting. The condition, including the associated loss of fluids, can create the need for hospitalization or repeat hospitalization.

On May 12, 2012, Ms. Irish notified Ms. Willis that she was being admitted to the hospital. Ms. Irish had multiple conversations with Ms. Willis that day. Ms. Irish telephoned the Adel House at 7:02 a.m. That afternoon, Ms. Irish made two telephone calls to Ms. Willis. Ms. Willis told Ms. Irish to keep in contact and let her know when she was able to return to work. Whatever the employer's formal policy for reporting absences was, Ms. Willis entered into a less formal arrangement with Ms. Irish, whereby she advised Ms. Irish simply to keep her in the loop, that is, to provide periodic updates concerning her medical condition and her ability to work.

Ms. Irish contacted Ms. Willis on May 14 to provide an update regarding her hospitalization. Ms. Irish made two telephone calls to Ms. Willis and made an additional telephone call to the employer's main office. On the morning of May 16, Ms. Irish sent a text message to Ms. Willis.

Ms. Irish was again in contact with Ms. Willis on May 17 to provide an update regarding her hospitalization. On May 17, Ms. Irish received a text message from Ms. Willis at 3:44 p.m. and telephoned Ms. Willis at 4:02 p.m.

Ms. Irish was discharged from the hospital on Wednesday, May 23, 2012. On May 22, Ms. Irish contacted Ms. Willis with news of her hospital discharge and the two agreed that Ms. Irish would return to work the following Monday, May 28, 2012. On May 22, Ms. Irish received a text message from Ms. Willis at 10:44 a.m. and sent a return text message at 1:17 p.m.

Ms. Irish was re-admitted to the hospital on May 24. On May 25, Ms. Irish received a text message from Ms. Willis at 12:46 p.m. Ms. Irish telephoned Ms. Willis around 7:00 p.m. Ms. Irish told Ms. Willis that she was going back into the hospital. Ms. Irish told Ms. Willis that she was going to be getting a gastro intestinal tube and would be unable to speak until the tube was removed. The two agreed that Ms. Irish would make further contact with Ms. Willis upon her discharge from the hospital. Ms. Irish was discharged from the hospital on June 1.

Ms. Irish was re-admitted to the hospital on June 2 and was released the next day with a referral to Mayo Clinic.

On June 4, Ms. Irish telephoned Ms. Willis at 9:39 a.m. Ms. Irish immediately followed up with a telephone call to the employer's main office. That afternoon, Ms. Irish made another telephone call to the employer's main office. Ms. Irish updated Ms. Willis regarding her hospitalizations and told Ms. Willis that she needed to travel to Mayo Clinic June 10-12 and June 18-20. Ms. Willis arranged for other employees to work shifts for Ms. Irish on June 10-13 and June 17-21. Ms. Irish was again in contact with Ms. Willis on June 4 to indicate she was feeling sick again. Ms. Irish told Ms. Willis that her doctor had released her to return to work, but had also urged caution about returning to work due to the nature of the illness. Ms. Willis and Ms. Irish agreed it was best for Ms. Irish to remain off work until she finished at Mayo Clinic.

On June 5, Ms. Irish telephoned Ms. Willis at 11:33 a.m. Ms. Irish then telephoned the employer's main office at 12:11 p.m. On that same day, Ms. Irish sent a text message to Ms. Willis at 12:44 p.m. and received a response around 3:00 p.m. Ms. Willis had filled Ms. Irish's position at the Adel home. Ms. Willis told Ms. Irish that she needed to speak to Marianne Lynch, Human Resources Manager, about a new plan the employer had for scheduling Ms. Irish. E-mail correspondence between Ms. Lynch and others indicates that Ms. Willis contacted Ms. Lynch to let her know that Ms. Irish was wondering whether she had been fired. Ms. Lynch sent the following message to Traci Miner, Program Administrator that same day:

Hey Alicia Irish is out of hospital and feeling a bit better. Lisa filled her hours in Adel, so Alicia is wondering if we had fired her or what. Then I had this epiphany, but it involves work from you. My favorite kind lol. Alicia has been told that until we see some stability with her attendance (2 payperiods of full-time) she can not go back to full-time. She also does not qualify for FMLA = So as of right now we don't have to guarantee her set hours. Lisa reports that she is a greater worker, when there. What if we float her, but schedule her on a two week basis instead of monthly. That way, if she gets sick, it doesn't have

as big of an impact?? I told her we have been really flexible with her attendance, but we will need to start addressing it and being in a set schedule it would be even more strict.

Ms. Miner replied that she thought it was a good idea and that if the other coordinator was interested in having Ms. Irish work some hours, she and Ms. Miner could work together on a two-week schedule for Ms. Irish.

On June 5, Ms. Lynch told Ms. Irish that she wanted Ms. Irish to commence working with two service coordinators, one an HCBS coordinator and the other a TAY coordinator, to schedule work hours on a two-week basis, rather than the regular month at a time. Ms. Lynch told Ms. Irish that the two coordinators would be in contact with Ms. Irish. Ms. Irish told Ms. Lynch about her upcoming trips to the Mayo Clinic. Ms. Lynch said that the coordinators would contact Ms. Irish about starting with the new scheduling regimen when Ms. Irish returned from her second trip to Mayo Clinic.

Despite the meeting with Ms. Lynch, Ms. Willis continued to function as Ms. Irish's de facto supervisor and Ms. Irish continued to contact Ms. Willis concerning her need for time off.

On June 8, Ms. Irish telephoned the employer's main office shortly after 8:00 a.m. Ms. Irish again called the employer's main office around 3:00 p.m. Ms. Irish notified Ms. Lynch that her health was stabilizing and that she was leaving for Mayo Clinic. Ms. Irish indicated she would call Ms. Willis upon her return.

On June 11, Ms. Irish provided Ms. Willis with an update of what the Mayo Clinic doctors were saying. The doctors were not certain what was causing Ms. Irish's symptoms, other than stress. The doctors arranged for additional tests and discussed the possibility of surgery. Ms. Irish indicated she would be returning to Mayo Clinic for the planned second visit. Ms. Irish was also in contact with the employer's main office on June 11.

On June 13, Ms. Irish sent Ms. Willis a text message to let her know that she had returned from Mayo Clinic. Ms. Irish had been released to return to work with the same cautionary caveat that her condition could worsen due to stress. Ms. Irish was concerned for the wellbeing of the disabled persons in her care if she were to return to work prematurely and become sick at work. Ms. Willis sent Ms. Irish a text message asking Ms. Irish to come work a couple hours that day. Ms. Irish responded that she was still recovering from the trip to Mayo Clinic and was unable to come to work.

Up to that point, Ms. Irish had not provided any medical documentation to the employer other than some hospital discharge paperwork from Mayo. Ms. Irish did not offer more and the employer did not request more. Ms. Willis had indicated she believed Ms. Irish's symptoms, appointments, and hospitalizations had been as Ms. Irish described them.

Ms. Irish next made contact with Ms. Willis on June 21, upon her return from the second trip to Mayo Clinic. Despite the June 5 conversation with Ms. Lynch about working under different HCBS coordinators, Ms. Irish continued to desire to return to working at the Adel home. The employer had no more work for Ms. Irish at the Adel House.

Ms. Irish then commenced a fruitless effort to return to work. On June 21, Ms. Irish left a voice mail message for Ms. Lynch, indicating that she was home from her second trip to Mayo Clinic. Ms. Irish also left a message in the agency's general mailbox asking that the two coordinators contact her. Ms. Irish then waited.

On June 26, Ms. Irish again left a message in the agency's general mailbox. Ms. Irish left her name, number, and request that the HCBS and TAY coordinators call her back when they became available.

On July 2, Ms. Irish telephoned Ms. Lynch's number. When Ms. Lynch did not answer, Ms. Irish did not leave a message. Instead, Ms. Irish called the agency's main number and left another message in the general mailbox for the coordinators to call her.

On July 3, Ms. Irish again left a message in the general mailbox.

Ms. Irish then established a claim for unemployment insurance benefits that was deemed effective July 1, 2012.

Ms. Irish next made contact with the employer on July 11, by telephoning the employer's main number and speaking with the receptionist. Ms. Irish asked for the coordinators, but was told they were not available.

On July 11, Ms. Irish telephoned Dave Wagner of Mainstream Living to get a copy of her training certifications. Ms. Irish had completed an undergraduate degree and was applying for a graduate program. Ms. Irish received the requested information from Mr. Wagner on July 17, 2012.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record is incomplete at best. That fact is attributable to the employer not presenting testimony through Ms. Willis. The evidence establishes that Ms. Irish was gone from work after May 12, 2012 due to illness. The evidence indicates that she had an understanding with Ms. Willis regarding the contact she would have with the employer during her absence. Both parties acted as if Ms. Irish was on an approved leave of absence. This continued until June 5, 2012, when the employer replaced Ms. Irish at the Adel House. At that point, the position that Ms. Irish had held up to that point was gone. Ms. Irish made some attempts thereafter to return to work in a different position. Ms. Irish left several messages for the employer that went unreturned. Ms. Irish eventually gave up and filed a claim for unemployment insurance benefits. One might argue that Ms. Irish should have made more effective contact with the employer in June and July, but Ms. Irish's phone records demonstrate her many attempts to provoke a response from the employer. Once the employer laid her off from her job at the Adel House, the burden was on the employer to recall her to the employment.

A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period. 871 IAC 24.22(2)(j). If at the end of a period of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits. 871 IAC 24.22(2)(j)(1). On the other hand, if the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits. 871 IAC 24.22(j)(2).

The weight of the evidence establishes that Ms. Irish was laid off from her position effective June 5, 2012 and never recalled to the employment. The evidence establishes that Ms. Irish attempted thereafter to return to the employment in some capacity, but that the employer never responded to her attempts. Ms. Irish's separation from the employment was for good cause attributable to the employer. Ms. Irish is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Irish.

DECISION:

The Agency representatives August 1, 2012, reference 01, decision is modified as follows. The claimant was on an approved leave of absence until June 5, 2012, when the employer laid her off from her position. The claimant made a subsequent attempt to return to the employment, but the employer did not respond to those attempts. The claimant's separation from the employment was for good cause attributable to the employer. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Claims Division for determination of whether the claimant has been able to work and available for work since she established her claim for benefits. That determination should include consideration of medical documentation to be provided by the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css