**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**BONNIE M MCCALL**
Claimant

**HOME DEPOT USA INC**
Employer

**APPEAL NO. 07A-UI-10742-H2T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 09-23-07 R: 03**
**Claimant: Appellant (2)**

Section 96.5-1-d – Voluntary Leaving – Illness/Injury
Section 96.4-3 - Able and Available
Iowa Code § 96.6-2 – Timeliness of Appeal

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the November 5, 2007, reference 05, decision that denied benefits. After due notice was issued, a hearing was held on December 6, 2007. The claimant did participate. The employer did not participate.

**ISSUES:**

Did the claimant file a timely appeal?

Did the claimant voluntarily quit her employment with good cause attributable to the employer?

Is the claimant able to and available for work?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to the claimant's address of record on November 5, 2007. The claimant did not receive the decision. The first notice of disqualification was the overpayment decision of November 13, 2007. The appeal was sent immediately after receipt of that decision.

Claimant was employed as a cashier part time beginning January 5, 2007 through April 18, 2007 when she voluntarily quit. The claimant was given work restrictions due to pregnancy complications that included allowing her to sit whenever she thought necessary and allowing her to be allowed to use the bathroom to urinate whenever she thought necessary. When the claimant presented the work restrictions to the employer, she was assured by the Store Manager that the employer would have no trouble accommodating her work restrictions. The claimant continued working but her direct supervisor began to disregard her work restrictions including refusing to allow the claimant a stool to sit on while she operated the cash register and refusing to give the claimant permission to visit the bathroom when she requested to do so.

After the claimant requested to use the bathroom but was refused by her direct supervisor, she urinated while standing at the cash register. The claimant determined she could not continue to work as the employer would not accommodate her work restrictions as they had indicated they would and the claimant did not want to experience another episode of wetting her pants while at her work station in front of customers.

While working for Home Depot, the claimant was also employed by Flamingo and has since her employment ended for Home Depot begun working as a waitress for another restaurant chain.

**REASONING AND CONCLUSIONS OF LAW:**

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs “a” through “h”. Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant timely appealed the overpayment decision, which was the first notice of disqualification. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left the employment with good cause attributable to the employer.

Iowa Code § 96.5-1 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.

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 24.26(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 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.

Where disability is caused or aggravated by the employment, a resultant separation is with good cause attributable to the employer. *Shontz v. IESC*, 248 N.W.2d 88 (Iowa 1976). Where illness or disease directly connected to the employment make it impossible for an individual to continue in employment because of serious danger to health, termination of employment for that reason

is involuntary and for good cause attributable to the employer even if the employer is free from all negligence or wrongdoing. *Raffety v. IESC*, 76 N.W.2d 787 (Iowa 1956).

The claimant met the requirements of *Suluki v. EAB*, 503 N.W.2d 401 (Iowa 1993) by notifying management of the employer of the physician's advice to quit due to the medical condition caused or aggravated by the work. She also sought, in vain, for her Supervisor to comply with her work restrictions.

Inasmuch as the claimant did give the employer an opportunity to resolve her complaints and to accommodate her work restrictions, which they agreed to do, prior to leaving employment, and the employer failed to correct those legitimate complaints, the separation was with good cause attributable to the employer. Benefits are allowed.

The next issue is whether the claimant is able to and available for work. The administrative law judge concludes that she is.

Iowa Code § 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The claimant has been working for another employer since she voluntarily quit for Home Depot and thus is able to and available for work.

**DECISION:**

The November 5, 2007, reference 05, decision is reversed. The claimant's appeal is timely. The claimant voluntarily left her employment with good cause attributable to the employer. The claimant is able to and available for work. Benefits are allowed, provided the claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/pjs