IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RODRIGUEZ, ELIZABETH
Claimant

CDS GLOBAL INC
Employer

APPEAL NO. 10A-UI-13712-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/05/10
Claimant: Respondent (2-R)

Iowa Code Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 30, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was started on December 16, 2010 and was completed on February 21, 2011. Claimant participated personally and was represented by attorney, John Hemminger. Mr. Hemminger presented testimony through the claimant and Alberto Rodriguez. Attorney Mary Funk represented the employer and presented testimony through Michelle Sidwell, Chris Groat, and Robert Kuehn. Spanish-English interpreters Steven Rhodes and Anna Pottebaum assisted with the hearing. Exhibits One through Ten, A and B were received into evidence.

ISSUE:

Whether Ms. Rodriguez separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Elizabeth Rodriguez was employed by CDS Global as a full-time material handler beginning in 2007 and last performed work for the employer on July 1, 2010. Ms. Rodriguez's normal working hours were 7:00 a.m. to 3:30 p.m., Monday through Friday. Ms. Rodriguez's immediate supervisor was Robert Kuehn, Warehouse Supervisor. Ms. Rodriguez's primary language is Spanish, but Ms. Rodriguez has limited English skills, which she used to perform her work duties.

The employer approved Ms. Rodriguez for a period of vacation to run from July 2 through July 10, 2010. Ms. Rodriguez was to return to work on Monday, July 12, 2010. As Ms. Rodriguez was coming back to Des Moines from her vacation with her husband, Alberto Rodriguez, she became very ill. Mr. Rodriguez had to take Ms. Rodriguez to a hospital emergency room. Ms. Rodriguez was admitted to the hospital and was placed on IV fluids. Ms. Rodriguez remained hospitalized for eight days. Ms. Rodriguez was the discharged to the care of her primary care doctor. Ms. Rodriguez's doctor referred her to an infection specialist. Until August 13, 2010, Ms. Rodriquez had to report to the hospital two to three hours daily to undergo IV treatment for infection. Ms. Rodriquez was fitted with a peripherally inserted central

catheter (PICC line) to facilitate the treatment. Ms. Rodriquez thereafter continued under the care of her primary care doctor and the infection specialist. Ms. Rodriguez's last visit to the infectious disease specialist was on August 30, 2010. At that point, the specialist referred Ms. Rodriguez to the care of her primary care doctor. At that point, the primary care physician was out of the office and was not immediately available to Ms. Rodriquez.

On Monday, July 12, 2010, the day after Ms. Rodriquez was hospitalized, Mr. Rodriquez took a doctor's note to the workplace and left it with Mr. Kuehn. The note indicated that Ms. Rodriquez was under the care of East Des Moines Family Medical Physicians at Iowa Lutheran Hospital and would be unable to work from July 11 through July 14, 2010. Mr. Rodriquez is bilingual. Mr. Rodriquez told Mr. Kuehn that Ms. Rodriguez was sick and did not know when she would be able to return to work. On July 14, Mr. Rodriguez returned to Ms. Rodriguez's workplace and left a second doctor's note for Mr. Kuehn. This one said that Ms. Rodriguez was unable to work from July 15 through 18 due to medical reasons. At that time, Mr. Kuehn provided Mr. Rodriquez with an envelope containing Family and Medical Leave Act (FMLA) application materials for Ms. Rodriquez and her doctor(s) to complete and return to the employer.

Ms. Rodriguez's family doctor completed the FMLA medical certification form on July 19, 2010. The doctor provided information that appeared to be conflicting and did not provide a clear return to work date. The doctor indicated that Ms. Rodriguez's medical issues started on July 11, 2010 and that the "probable duration of condition" was two to three weeks. The doctor indicated that Ms. Rodriguez had been hospitalized from July 11-19, 2010 and that the primary care doctor had treated Ms. Rodriguez from July 12 to 19, 2010. The doctor indicated that she had referred Ms. Rodriguez to an infectious disease physician and that the "expected duration of treatment" through that provider was four to six weeks. In response to the question that asked whether the employee was "unable to perform any of his/her job functions due to the condition," the doctor indicated no. The indicated multiple diagnoses:

(L) pyelonephritis → IV Antibiotics through a PICC Line (Right arm)
sepsis – resolved
septic pulmonary emboli
(L) renal vein thrombus
Anemia
DM (status post DKA) → glucometer 4x's/day, insulin inject
Systolic heart murmur – resolved
Hypokelemia – resolved

In response to the question regarding whether Ms. Rodriguez would be "incapacitated for a single continuous period of time" due to the condition, the doctor indicated no. But in response to the follow up question that asked the doctor to "estimate the beginning and ending dates for the period of incapacity," the doctor indicated, "7/11/10 – At least 7/23/10." In response to the question whether Ms. Rodriguez would "need to attend follow-up treatment appointments or work part-time or on a reduced schedule" because of the medical condition, the doctor indicated yes. But in response to the follow up question whether the "treatments or the reduced number of hours of work [were] medically necessary," the doctor indicated no. Finally, in response to the question whether condition would cause episodic flare-ups periodically preventing Ms. Rodriguez from performing her job functions, the doctor indicated no.

Upon her release from the hospital on July 19, Elizabeth and Alberto Rodriguez went to the workplace to return the completed FMLA application materials. They spoke with a manager and showed the manager the PICC line.

On July 21, 2010, Michelle Sidwell, Senior Benefits Specialist, approved Ms. Rodriguez for FMLA leave for the period of July 11 through August 1, 2010 and communicated this to Mr. Kuehn by e-mail. In approving the leave, Ms. Sidwell relied upon the FMLA medical certification and the doctor's notes. The approval notification contained the following paragraph:

> IT IS YOUR REPONSIBILITY TO HAVE YOUR LEAVE EXTENDED. YOUR APPROVED LEAVE WILL END ON THE ABOVE DATE UNLESS CDS GLOBAL BENEFITS RECEIVES CERTIFICATION OF HEALTH CARE PROVIDER FORM AND/OR A SHORT TERM DISABILITY CLAIM FORM AND A REQUEST FOR AN EXTENSION OF YOUR LEAVE. FAILURE TO PROVIDE TIMELY NOTIFICATION MAY RESULT IN NON-PAYMENT OF BENEFITS.

Ms. Sidwell sent Ms. Rodriguez's copy of the leave approval notification to the wrong address and Ms. Rodriguez did not receive the notice. In short, Ms. Rodriquez did not know that her approved leave would expire on August 1, 2010.

On July 29, 2010, Mr. Rodriguez telephoned Mr. Kuehn and left a voice mail message indicating the FMLA paperwork had been submitted and that Ms. Rodriguez would need to be absent from work four to six weeks. Mr. Rodriquez told Mr. Kuehn in his message that if he needed more information, he could call him back. Mr. Rodriguez left the telephone number at which he and Ms. Rodriguez could be reached. Mr. Kuehn did not note the number or pass the number along to the benefits department or anyone else. Mr. Kuehn did not initiate further contact with Ms. Rodriguez or Mr. Rodriguez, both of whom would have been available at the number provided to Mr. Kuehn.

On August 10, 2010, when the employer had not heard further from Ms. Rodriguez, Ms. Sidwell attempted to telephone Ms. Rodriquez. Ms. Sidwell used the wrong number.

On August 11, 2010, Ms. Sidwell contacted the primary care doctor's office and was advised by a nurse that the doctor had released Ms. Rodriquez to return to work on August 1, 2010.

On August 11, Chris Croat, Senior Employee Relations Specialist mailed a letter to Ms. Rodriguez. Ms. Croat imposed an August 16, 2010 deadline for Ms. Rodriguez to contact the employer or else the employer would consider her to have voluntarily resigned. Ms. Croat sent the letter to the wrong address, to an address belonging to another employee with the same last name. Ms. Rodriguez did not receive the letter.

Ms. Rodriguez next made contact with the employer on September 8, 2010. At that time, Ms. Croat told Ms. Rodriguez that the employer had ended the employment on August 16, 2010 due to job abandonment. The employer had treated Ms. Rodriguez's absences from work since August 2, 2010 as unexcused absences.

The employer's written attendance policy required that Ms. Rodriguez personally notify her supervisor within an hour of the scheduled start of her shift if she needed to be absent. The policy required that she personally speak with the supervisor. The policy was contained in the employee handbook. Ms. Rodriguez received a copy of the employee handbook at the start of her employment.

REASONING AND CONCLUSIONS OF LAW:

The weight of the evidence establishes a voluntary separation from the employment due to a medical condition.

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.

Workforce Development rule 817 IAC 24.26(6)(a) provides as follows:

> Separation because of illness, injury, or pregnancy.
>
> a. Nonemployment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.

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.

The weight of the evidence establishes that Ms. Rodriguez failed to keep appropriate contact with the employer after July 19, 2010. Had she been in appropriate contact, she would have been aware of the employer's expectation that she return on August 1, 2010. Had she maintained appropriate contact, she would have been aware of the employer's expectation that she return by August 16, 2010. Ms. Rodriguez's failure to maintain appropriate contact was unreasonable. The evidence indicates that Ms. Rodriguez's doctor was aware that the leave was to expire on August 1, 2010. Had Ms. Rodriguez been in contact with her doctor, this information was available to her. Though the employer's attempts to contact Ms. Rodriguez were ineffectual, this did not relieve Ms. Rodriguez of her obligation to maintain appropriate contact under the employer's attendance and leave policies. The weight of the evidence establishes that there was no medical condition that prevented Ms. Rodriguez from returning to work on or after August 2, 2010. Ms. Rodriguez may still have needed time off for the daily treatments, but this would not prevent her from returning to work on at least a part-time basis. The weight of the evidence indicates that Ms. Rodriguez voluntarily separated from the employment by failing to return at the end of an approved leave of absence.

Ms. Rodriguez voluntarily quit the employment without good cause attributable to the employer. Accordingly, the claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to the claimant.

Iowa Code section 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 section 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 would 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 Agency representative's September 30, 2010, reference 01, decision is reversed. The claimant voluntarily quit the employment without good cause attributable to the employer. The claimant is disqualified for benefits until she has worked in a been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged.

This matter is remanded 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.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css