IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LYNETTE R GORDON
Claimant

GOOD SAMARITAN SOCIETY INC
Employer

APPEAL NO. 09A-UI-05773-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/01/09
Claimant: Respondent (5)

871 IAC 24.1(113)(d) – Other Separations

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 2, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 19, 2009. Claimant Lynette Gordon participated. Fred Metcalf, Human Resources Associate, represented the employer and presented additional testimony through Brenda Wilson, FMLA Coordinator. Exhibits One through Seven, A and B were received into evidence.

ISSUE:

Whether Ms. Gordon 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: Lynette Gordon was employed by Good Samaritan Society as a full-time registered nurse. Ms. Gordon's immediate supervisor was Angela Prevo, Assistant Director of Nursing. Ms. Gordon started the employment in September 2007. Ms. Gordon last performed work for the employer on November 30, 2008. At that time, Ms. Gordon went on an approved maternity leave pursuant to the Family and Medical Leave Act (FMLA).

On October 31, 2008, Ms. Gordon contacted the FMLA Coordinator, Brenda Wilson, R.N., and obtained FMLA application materials. The materials included a notice to Ms. Gordon that she was required to contact the employer two working days prior to the end of her FMLA leave to let the employer know that she intended to return to the employment. The materials did not indicate who specifically Ms. Gordon would need to notify. The employer's practice was to have supervisors direct employees to Ms. Wilson regarding FMLA matters. The policy from which the two-day notice rule derives is contained in the employee handbook. The policy states: "If you are able to return to work earlier than anticipated, you must provide at least two days' notice, when feasible." [Emphasis added.] Ms. Gordon did not return from her FMLA leave earlier than anticipated.

On December 3, Ms. Gordon notified FMLA Coordinator Brenda Wilson that her doctor had placed her on bed rest until she gave birth and that Ms. Gordon could not return to work at that time.

On December 16, Ms. Gordon notified Ms. Wilson that she had given birth to twin boys. On January 20, Ms. Gordon contacted Ms. Wilson to check on her remaining FMLA leave. Ms. Gordon told Ms. Wilson that she would be returning to the doctor on January 27 and would let Ms. Wilson know her expected return to work date. Ms. Wilson told Ms. Gordon that she had used five weeks of her FMLA leave and had seven weeks remaining.

On January 28, Ms. Gordon contacted Ms. Wilson to check on her remaining FMLA leave. Ms. Gordon told Ms. Wilson that she expected to return to work on February 23 or 24. Ms. Gordon advised that she needed to return to the doctor. Ms. Wilson told Ms. Gordon that her available FMLA leave was set to expire the last week of February.

On January 30, Ms. Gordon contacted Ms. Wilson to ask whether she could go to part-time status after she returned from her FMLA leave. Ms. Wilson told Ms. Gordon that she would need to discuss that with her supervisor. Ms. Gordon indicated that she would call back the next Monday to speak with Ms. Prevo. Ms. Gordon did not contact Ms. Prevo the following Monday.

Ms. Gordon spoke with her immediate supervisor, Ms. Prevo, on Monday, February 23, 2009. Ms. Gordon contacted her supervisor to get her work schedule and to inquire about childcare assistance. Ms. Prevo told Ms. Gordon that she needed to return by February 24, the next day. Ms. Gordon told Ms. Prevo that her doctor would not release her to return to work until February 28, 2009 due to a suspected uterine infection. Ms. Prevo and Ms. Gordon both knew that the weekend that included February 28 would be Ms. Gordon's "usual" weekend off under the established rotating schedule. Ms. Prevo and Ms. Gordon discussed the following Monday, March 2, as Ms. Gordon's first day back on the schedule. Ms. Prevo directed Ms. Gordon to contact the scheduler to let the scheduler know to put her on the schedule.

On February 27, Ms. Gordon contacted the scheduler, who indicated that Karen Kaiser, Director of Nursing, wanted to speak with Ms. Gordon. Ms. Kaiser told Ms. Gordon that the employer had decided to eliminate her position due to low patient census and budget cuts. Ms. Kaiser made no reference to the FMLA leave.

On February 20, Ms. Wilson had sent Ms. Gordon a letter on behalf of the Human Resource Department. The letter included the following paragraph:

> As of 2/22/2009 you have exhausted the leave available to you under the FMLA. Please notify your supervisor and this office immediately to discuss your return to work. You will need to provide a release to return to work from your medical care provider.

The FMLA leave did not actually expire until February 24, 2009. This letter, sent by regular mail, did not come to Ms. Gordon's attention prior to the employer giving notice that the employment was terminated.

On February 24, Ms. Wilson sent Ms. Gordon a second letter. The letter included the following:

> This letter is to remind you that your Family Medical Leave (FMLA) is exhausted on February 25, 2009, as explained by your supervisor. The purpose of FMLA is to maintain your employment status during your protected time line.

> The extension of your leave is now not possible and your continued employment is now ended effective February 25, 2009, as your position will be filled in order to maintain quality services for our residents.

The employer had actually been looking to eliminate two nursing positions due to budget issues. The employer took the opportunity to eliminate Ms. Gordon's position when she did not return to work on day her FMLA leave expired. Ms. Gordon received this second letter by certified mail on March 2, 2009.

On February 27, 2009, Ms. Gordon's doctor released her to return to work without restrictions.

REASONING AND CONCLUSIONS OF LAW:

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

> 24.1(113) 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.
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> 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.
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> 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.
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> 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.

The weight of the evidence indicates that Ms. Gordon at no time indicated an intention to sever the employment relationship. On the contrary, the evidence indicates that Ms. Gordon maintained contact with the employer throughout the approved leave period and consistently indicated her intention to return to the employment. The evidence indicates that the only reason Ms. Gordon did not return to the employment on or before February 24, 2009 was that Ms. Gordon's doctor had not yet released her to return to the employment. The evidence does not support a conclusion that Ms. Gordon voluntarily quit the employment. Instead, the weight of the evidence indicates an "other separation" or a lay-off. The matter can be analyzed as

either, but the "other separation" category is perhaps most appropriate. Neither sort of separation would disqualify Ms. Gordon for unemployment insurance benefits. The evidence indicates that at the expiration of the FMLA leave, Ms. Gordon could not meet the physical standards required by the employment because her doctor had not yet released her to return to the employment. A separation from employment for this reason would not disqualify Ms. Gordon for unemployment insurance benefits. The evidence indicates that Ms. Gordon was able to meet the physical requirements of the employment as of February 28, 2009, the date her doctor released her to return to the employment.

DECISION:

The Agency representative's April 2, 2009, reference 01, decision is modified as follows. The employer elected to sever the employment relationship when the claimant was unable to return to work on the day her FMLA leave expired due to medical restrictions. The claimant's separation falls under the category of "other separations." The claimant separated from the employment for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css