IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ASHLEY N RHODES
Claimant

WESLEYLIFE
Employer

APPEAL NO: 15A-UI-02648-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/25/15
Claimant: Respondent (1/R)

Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

WesleyLife (employer) appealed a representative's February 17, 2015 decision (reference 02) that concluded Ashley N. Rhodes (claimant) qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 3, 2015. The claimant participated in the hearing. Alyce Smolsky of Equifax/TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Janet Simpson and Heather Frank. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant began working for the employer on June 7, 2014. She worked full time as an overnight resident associate in the assisted living unit of the employer's West Des Moines, Iowa continuing care retirement community. Her last shift of work was November 14, 2014.

The claimant had suffered a non-work-related injury on November 17, 2014 in which she broke her collarbone. She underwent surgery on November 22, 2014. She advised the employer that she would need to be off work at least six weeks, so at least through the end of December 2014. Since the claimant had not worked for the employer long enough to be eligible for FMLA (Family Medical Leave), she was placed on a 30-day leave of absence. The employer expected her to return to work on or about January 5.

The claimant was not released by January 5. The employer considered her to have voluntarily quit when she did not return to work by that date. There was some discussion after that date as to whether she could return to work, but the employer required a certification by her doctor that she was released as able to return to work and was fit for duty.

The claimant was seen by her doctor on January 13 and was advised that she would be released to full duty as of February 16, 2015. The claimant provided that information to the employer on February 16, but at that time she was not re-employed.

The administrative law judge notes that there had been another representative's decision issued on February 10, 2015 (reference 01) that concluded that the claimant was not eligible to receive unemployment insurance benefits due to a disqualifying separation which had purportedly occurred on November 14, 2014, and that there was an additional representative's decision issued on February 10, 2015 (reference 03) which concluded that the claimant was not eligible as not being able and available for work as of January 25, 2015. The administrative law judge observes that there were not two separations from employment between the parties, and concludes that the representative's separation decision issued on February 10, 2015 (reference 01) was effectively amended and reversed by the issuance of the separation decision issued in this case on February 17, 2015 (reference 02).

REASONING AND CONCLUSIONS OF LAW:

The separation from employment occurred on January 5, 2015 when the claimant failed to return to work after her leave of absence and the employer concluded that she had voluntarily quit. Considering the claimant's status as of that date, there are only three provisions in the law which disqualify claimants from unemployment insurance benefits (until they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount). An individual is subject to such a disqualification if the individual (1) is discharged for work-connected misconduct (Iowa Code § 96.5-2-a); (2) "has left work voluntarily without good cause attributable to the individual's employer." (Iowa Code § 96.5-1); or (3) refuses to accept an offer of suitable work without good cause (Iowa Code § 96.5-3). Here, there is no question of an actual offer of work or refusal of work, so the focus will be on whether there was a disqualifying separation from employment.

Separations are categorized into four separate categories under Iowa law. Rule 871 IAC 24.1(113) defines "separations" as:

> 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 labor-saving 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.
>
> 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.

The first question considered here is whether Iowa Code § 96.5-1 regarding voluntary quits applies in this case. Rule 871 IAC 24.25 provides that, 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 from whom the employee has separated. The claimant had been willing to continue working, had not been able to return to work without restrictions by the time her leave expired.

Further, Iowa Code § 96.5-1-d provides an exception that an individual who otherwise could be subject to disqualification is not disqualified:

> If the individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of 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.

The Agency rule implementing this section explains that "[r]ecovery is defined as the ability of the claimant to perform all of the duties of the previous employment." Rule 871 IAC 24.26(6)a.

The issue then is whether a person is subject to voluntary quit disqualification under Iowa Code § 96.5-1 under the following circumstances: The person is actively working but then is suffers a medical condition that prevents her from performing her normal job duties, and the employer determines it cannot allow the employee to continue in the position. The person has never stated that she is quitting the employment, but does not return by the end of the allowed leave of absence. The employer has not formally discharged the claimant from employment but has stated that it cannot continue to hold her position if she was not able to return by a certain date due to her medical condition.

The problem is that the case law points in several directions and has not addressed this issue head on. Additionally, the statute and rules are unclear as to this issue. For example, in *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989), the Iowa court considered the case of a pregnant certified nursing assistant (CNA) who went to her employer with a physician's release that limited her to lifting no more than 25 pounds. Wills filed a claim for benefits because the employer would not let her return to work because of its policy of never providing light-duty work. The court ruled that Wills became unemployed involuntarily and was able to work because the weight restriction did not preclude her from performing other jobs available in the labor market. *Id*. at 138. The court characterized the separation from employment as a termination by the employer, but in essence the employer informed the claimant that it did not have any jobs available meeting her restrictions and would not create a job to accommodate her restrictions. The court does not mention Iowa Code § 96.5-1-d at all. Perhaps significantly, the facts do not indicate that the claimant had stopped working at any point, and it was the employer who requested that she go to her doctor to get a release to continue working.

Likewise, in *Sharp v. Employment Appeal Board*, 479 N.W.2d 280 (Iowa 1991), the court reviewed the situation of a meat cutter who was diagnosed with viral hepatitis and was directed by her doctor not to work with food, and so determined she could not return to work with the employer, and she did not. The court favorably quoted *Perkins v. Equal Opportunity Comm'n*, 451 N.W.2d 91 (NE 1990) for the premise that "there may be circumstances in which an employee voluntarily leaves his employment but such leaving should be considered involuntary" for purposes of unemployment insurance eligibility. The court continued that it was "equally clear … that Sharp could not do the work required because to do so might imperial the employer's operations. We therefore conclude that for the purposes of [unemployment insurance eligibility], sharp left her employment involuntarily. We adopt the *Perkins* analysis and thus conclude that Sharp was not disqualified for benefits." Sharp, 479 N.W.2d 280, 283 – 284. This court again does not mention Iowa Code § 96.5-1-d at all.

On the other hand, in *White v. Employment Appeal Board*, 487 N.W.2d 342, 345 (Iowa 1992), the Iowa court considered the case of the truck driver who was off work due to a heart attack for about three months, returned to work for a month, and then was off work for seven months after a second heart attack. He then returned to his place of employment and informed management that his doctor had instructed him that he was unable to drive because of his pacemaker device. The employer told the claimant that there was no available work for him with his restriction. The claimant then applied for unemployment insurance benefits. *Id*. at 343. The facts did not indicate whether the claimant stated that he was quitting employment or intended to permanently sever the employment relationship at any point. In *White*, the court reversed the district court's decision that the claimant quit work involuntarily due to a physical disability and stated that "unemployment due to illness raises policy considerations which call for a continuation of the rules laid out in cases antedating [the cases relied on by the district court] … Under these rules, if White's disability was not work-related, the agency properly imposed the disqualification. If, however, the cause of White's disability was work related, the disqualification was improper." *Id*. at 345. The court decided that there had been no finding as to whether the disability was or was not work-related and remanded the case. The court does not refer to or distinguish the *Wills* case. It does not explain how the first prong of the voluntary quit disqualification test set forth earlier in its decision—"it must be demonstrated that the individual left work voluntarily"—had been met.

To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship, and chooses to leave the employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. *Wills* supra at 138; *Peck v. Employment Appeal Board*, 492 N.W.2d 438, 440 (Iowa App. 1992). It appears that the facts of the *Wills* and *Sharp* cases more closely resemble this case. The claimant was actively employed she suffered the injury which prevented her from being able to perform her normal job duties. She did not intend to quit her employment. The employer could no longer wait for the claimant to recover.[1] The action initiating the separation was therefore

[1] Even if the separation was treated as a voluntary quit, the result would be the same. If the claimant voluntarily quit, she would not be eligible for unemployment insurance benefits unless it was for good cause attributable to the employer. Where the quit is for medical or health reasons, the quit is disqualifying at least until the claimant has recovered and seeks to return to work unless the medical or health issue is attributable to the employer. Iowa Code § 96.5-1; Rule 871 IAC 24.25(35); Rule 871 IAC 24.26(6)b.

Where a claimant has been compelled to leave employment due to a medical or health issue not caused or aggravated by the work environment, the claimant is not eligible to receive unemployment insurance benefits until or unless the claimant then recovers, is released to return to work by her physician, and in

taken by the employer, and the separation therefore could be considered for unemployment insurance purposes as a discharge, but not for disqualifying misconduct.[2]

Perhaps this type of separation would meet the definition of "other separations" found in Rule 871 IAC 24.1(113)(d): "Termination of employment for military leave lasting or expecting to last longer than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required." The problem with this definition section is that it does not provide guidance on whether such a separation is qualifying or disqualifying. Obviously, if a person terminates employment because she decides to retire, it is a voluntary quit and a disqualification would be imposed. On the other hand, if the employer mandates that an employee retire due to reaching a certain age, the termination is involuntary and initiated by the employer and is a discharge for reasons other than misconduct and no disqualification is imposed. Likewise, if a claimant decides that she no longer meets the physical standards required by the job and leaves employment, it should be treated a quit and benefits will only be awarded if the person meets the exceptions to the voluntary quit statute.

Further guidance is provided by Rule 871 IAC 24.22(2) which provides:

> j. Leave of absence. 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.
>
> (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the individual, the individual is considered laid off and eligible for benefits.
>
> (2) If the employee—individual fails to return at the end of the leave of absence and subsequently become unemployed the individual is considered having voluntarily quit and is therefore ineligible for benefits.
>
> (3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

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fact does attempt to return to work with the employer. Rule 871 IAC 24.25(35). Here, the claimant was released to return to work; she did seek to return to work with the employer, but her position was no longer available to her.

[2] In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer has not asserted the claimant committed conduct that could be characterized as misconduct under these criteria.

Because the employer concluded it could no longer wait for the claimant to fully recover from the medical condition prevented her from performing her normal job duties, the employer concluded that her employment was ended. As such, even though the separation is considered an "Other Separation," it is ultimately treated as a layoff, because it was initiated by the employer. There is no valid reason to disqualify the claimant from benefits for being laid off for a lack of work.

The claimant, therefore, is not subject to the voluntary quit statute since she has not quit. She is not disqualified under the discharge statute since her separation was not due to misconduct. The refusal of suitable work statute does not apply here.

Because there was only one separation and the Agency records do not correctly reflect that the reference 01 decision issued on February 10 was effectively amended by the reference 02 decision issued on February 17, 2015, the matter is remanded to the Benefits Bureau for corrective action as necessary. Further, while the other representative's decision issued on February 10 (reference 03) concluded that the claimant was not able and available for work as of January 25, 2015, additional information has been presented suggesting that she became able and available as of February 16, 2015. The matter is further remanded to the Benefits Bureau for review of the claimant's status as being able and available as of that date.

DECISION:

The representative's February 17, 2015 decision (reference 02) is affirmed. The claimant did not voluntarily quit and was not discharged for misconduct. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

The matter is **REMANDED** to the Benefits Bureau to address the issue of the prior but superseded separation decision and for investigation and determination of the issue of the claimant's status as being able and available as of February 16, 2015.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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