IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BOBBIE J COLBECK
Claimant

FAREWAY STORES INC
Employer

APPEAL NO. 12A-UI-13664-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/14/12
Claimant: Appellant (3)

Iowa Code Section 96.5(1) – Voluntary Quit
Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Bobbie Colbeck filed a timely appeal from the November 6, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 16, 2012. Ms. Colbeck participated. Dave Kelchen represented the employer. Exhibits One through Eight, A and B were received into evidence.

ISSUES:

Whether Ms. Colbeck separated from the employment for a reason that disqualifies her for unemployment insurance benefits. The administrative law judge concludes that Ms. Colbeck voluntarily quit without good cause attributable to the employer and is disqualified for benefits.

Whether Ms. Colbeck has been able and available for work since she established her claim for benefits. She had not been.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Bobbie Colbeck was employed by Fareway Stores as a part-time cashier from 2008 until September 7, 2012 when she voluntarily quit. On August 31, 2012, Ms. Colbeck returned from her lunch break under the influence of alcohol. Multiple store employees noted Ms. Colbeck's impaired behavior and the smell of alcohol. When asked by Dave Kelchen, Store Manager, whether she had been drinking, Ms. Colbeck lied and said she had not. Mr. Kelchen directed Ms. Colbeck to clock out. Ms. Colbeck had difficulty with that process. Because Ms. Colbeck was in no condition to drive herself home, Mr. Kelchen gave Ms. Colbeck a ride home. Later that afternoon, Ms. Colbeck sent Mr. Kelchen a text message asking whether she should bother to show up to work the next day. Mr. Kelchen responded by text message that Ms. Colbeck should not report for work, but that he would call her the following Tuesday, September 4, 2012. Mr. Kelchen intended to suspend Ms. Colbeck for a couple days, issue a reprimand on September 4 for Ms. Colbeck's conduct on August 31, and to allow Ms. Colbeck to continue in the employment.

On Tuesday, September 4, Mr. Kelchen telephoned Ms. Colbeck at 11:00 a.m. to set up a meeting later that day. Mr. Kelchen had to leave a message. Ms. Colbeck returned the call at 12:10 p.m. and agreed to meet with Mr. Kelchen at the store at 1:30 p.m. Ms. Colbeck did not appear for the meeting. At 3:02 p.m., Ms. Colbeck sent a text message to Mr. Kelchen indicating that she was without a car. A couple hours later, Ms. Colbeck sent a text message: "Guess fired?"

On September 5, Mr. Kelchen sent Ms. Colbeck a text message at 11:42 a.m. indicating that he needed to set up a meeting for that day. Mr. Kelchen also telephoned Ms. Colbeck, but she did not answer. At 3:05 p.m., Ms. Colbeck sent a message saying that she was without a car, just like the previous day.

On September 6, at 10:05 a.m., Mr. Kelchen called Ms. Colbeck, but had to leave a message for her to call him. Mr. Kelchen also sent a text message telling Ms. Colbeck to please call him to set up a meeting. At 10:50 a.m., Mr. Kelchen called Ms. Colbeck and left another message. Mr. Kelchen said that he was setting up a meeting for 11:00 a.m. the next day and that Ms. Colbeck's failure to appear for the meeting would be deemed a voluntary quit. At 11:00 a.m. on September 6, Mr. Kelchen left Ms. Colbeck another message directing her to call him back at Fareway. At 12:23 p.m., Ms. Colbeck sent Mr. Kelchen a text message indicating that she needed her car. At 12:31 p.m., Ms. Colbeck sent a text message saying that she would try to appear for the Friday meeting. Ms. Colbeck asserted her car was in the employer's lot. Ms. Colbeck's car had not been in the employer's lot since September 2. Ms. Colbeck's mechanic had collected her car from the lot on or before September 2 based on prior arrangements Ms. Colbeck made with the mechanic. At 1:58 p.m. on September 6, Ms. Colbeck sent a message to Mr. Kelchen asking where her car was. Mr. Kelchen immediately responded with a text message indicating he did not know where her car was, but that Fareway had not done anything with it.

On September 7, Ms. Colbeck did not appear for the meeting Mr. Kelchen had set for 11:00 a.m. Ms. Colbeck did not contact Mr. Kelchen that day or thereafter. The employer concluded that Ms. Colbeck had voluntarily quit.

On August 27, 2012, Ms. Colbeck had fainted at work and was transported by ambulance to the emergency room. The physician assistant's notes from that visit indicate that Ms. Colbeck was "in no apparent distress." The physician's assistant diagnosed hypokalemia (low potassium) and that Ms. Colbeck had had a syncopal (fainting) episode. The physician's assistant referred Ms. Colbeck for follow up evaluation by a cardiologist.

Ms. Colbeck's separation from the employment was not based on a medical issue that prevented her from continuing in the employment. Ms. Colbeck's separation from the employment was not based on advice from a physician or any other medical professional that she separate from the employment.

Ms. Colbeck reports that since she established her claim for benefits she is too weak to work, too weak to actively search for work, too weak to drive more than a few miles, and too weak to do her own grocery shopping. Ms. Colbeck reports that she cannot stand. Ms. Colbeck had limited her job search to looking on the Internet at home for work she might be able to perform at home.

Fareway was Ms. Colbeck's sole base period employer.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

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.

An employee who voluntarily quits in response to a reprimand is presumed to have voluntarily quit without good cause attributable to the employer. See Iowa Admin. Code r. 871 IAC 24.25(28).

The evidence in the record indicates that Ms. Colbeck voluntarily quit the employment by failing to appear for disciplinary meetings on September 4 and 7, and by failing to make further contact with the employer after September 6, 2012. The weight of the evidence indicates a quit in response to pending disciplinary action. Such quits are presumed to be without good cause attributable to the employer. See Iowa Admin. Code rule 871 IAC 24.25(28). Because Ms. Colbeck voluntarily quit the employment without good cause attributable to the employer, she 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. Because Fareway was Ms. Colbeck's sole base period employer, Ms. Colbeck cannot be considered for reduced benefits.

Iowa Code section 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 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".

871 IAC 24.22(1)a and 22(2) provide:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

By Ms. Colbeck's own characterization of her health condition, she has not been able to work or available for work since she established her claim for benefits. In addition, Ms. Colbeck has failed to make an active or earnest search for work since she established her claim. Ms. Colbeck reports she is essential homebound, cannot stand, and had limited her work search to looking on the Internet for work she might perform from home. Because Ms. Colbeck is, by her report, not able to work, not available for work in the community, has not made an active and earnest search for work, all of this presents a second basis for disqualifying Ms. Colbeck for unemployment insurance benefits. Benefits are denied effective October 14, 2012. This disqualification continued as of the January 9, 2013 appeal hearing. Any future adjudication of Ms. Colbeck's ability to work and/or availability for work should include a review of medical documentation.

DECISION:

The Agency representative's November 6, 2012, reference 01, decision is modified as follows. 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. The claimant has not been able to work, available for work, or engaged in an active or earnest search for work since she established her claim for benefits. Benefits are denied effective October 14, 2012.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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