

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

CELINDA P RIZO PALOMERA

Claimant

and

IOWA STAFFING INC

Employer

HEARING NUMBER: 19BUI-11526

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1J

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

Although the Administrative Law Judge found that the Claimant quit her employment, the Administrative Law Judge also found the Claimant was on FMLA from Iowa Staffing. We note that the claim was filed during the week commencing on November 4, 2018. This makes the Claimant's base period run from the 3rd quarter of 2017 through the second quarter of 2018, inclusive. All the wage credits in this period are from Iowa Staffing Inc. We also see that the Claimant has wage credits in the third quarter of 2018, and all those credits are from Iowa Staffing, Inc. This quarter encompasses the assignment to Marzetti Frozen Pasta. There are no wages reported to the Claimant in 2018 from anyone but Iowa Staffing, Inc. This confirms the information at the hearing: the Claimant worked for Iowa Staffing not Marzetti. When she quit the assignment, she remained an employee with Iowa Staffing, and was granted FMLA leave – which is only granted to *employees*.

“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.” 871 IAC 24.25. This case does not involve a quit in the sense of a permanent separation from the regular employee. As we have held in the past the loss of an assignment is not tantamount to loss of employment.

This is a temporary quit, that is, a voluntary leaving of employment within the meaning of *Gilmore v. EAB*, No. 03-2099 (Iowa App. 11/15/2004). Mr. Gilmore did not consider himself separated from employment when applying for benefits. Instead Mr. Gilmore received medical restrictions preventing him from driving, which was his job. He was placed on leave. The Administrative Law Judge found Mr. Gilmore not able and available until he was fully released, and also found that Gilmore had temporarily quit his work. The Court of Appeals affirmed on the voluntary leaving of work theory. Even though Mr. Gilmore was on a leave of absence, had been fully released and returned to work, still the Court of Appeals applied the fully released standard for quits. The Court then found “the evidence clearly shows Gilmore was not fully recovered from his injury until March 6, 2003. Gilmore is unable to show that he comes within the exception of section 96.5(1)(d). Therefore, because his injury was not connected to his employment, he is considered to have voluntarily quit without good cause attributable to the employer, and is not entitled to unemployment benefits” during the period of the leave which was at issue. *Gilmore*, slip op. at 4-5. Under a *Gilmore* theory this is a voluntary *leaving*, not a permanent quit, and the Claimant should be denied benefits only so long as she remains on leave and on restrictions. Once she is off leave, is fully released, and she *immediately* returns and offers her services to Iowa Staffing then she will once again be eligible for benefits under the *Gilmore* interpretation of Iowa Code §96.5(1)(d).

In the alternative, even if we ruled that the Claimant had not voluntarily left employment for a temporary period, still we would find she was not able and available for work. Notice on this issue was waived and so we can address it without a remand.

Iowa Administrative Code 871 IAC 24.22(2) states:

- 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 employee–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 becomes unemployed the individual is considered as having voluntarily quit and therefore is 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.

Similarly, rule 871 IAC 24.23(10) states:

24.23 Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

...

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such

period.

Note in particular that if at the end of leave a claimant returns but is not re-employed then it is treated as a lay off and generally benefits would be allowed, while if at the end of the leave a claimant does not return then it is treated as a (permanent) voluntary quit. So long as the Claimant remains on leave she is not able and available for work, and may not collect benefits *even if* we did not find a voluntary leaving. Meanwhile if the Claimant returns at the end of her leave and offers her services to Iowa Staffing, and if she is otherwise able to work, then she will be once again able and available for work.

The upshot of our analysis is this: the Claimant is denied benefits so long as she is on leave and is on restrictions that prevent her working. To obtain benefits she must return to the Employer at the end of leave, present a release to work, and offer her services. If the Employer has nothing for her she once again may be able to collect benefits, assuming she is otherwise eligible.

DECISION:

The administrative law judge's decision dated December 14, 2018 is **MODIFIED IN THE CLAIMANT'S FAVOR**. The Employment Appeal Board concludes that the Claimant left employment on a temporary basis and did not voluntarily quit her job permanently. Her leaving was not attributable to the employment. Accordingly the Claimant is denied benefits until the earlier of (1) such time the Claimant has worked in and was paid wages for insured work equal to ten times the Claimant's weekly benefit amount, or (2) such time as the Claimant fully recovers and then returns and offers her services to the Employer. Of course the Claimant may not collect benefits even after requalifying unless she is otherwise eligible.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

RRA/fnv