IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

KATHLEEN THORNE Claimant **ADVANCE SERVICES INC** Employer	**APPEAL 16A-UI-09052-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/17/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 10, 2016, (reference 03) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on September 27, 2016. The claimant participated personally and through Joseph A. Cacciatore, attorney at law. The employer participated through Melissa Lawein, risk manager. Claimant exhibits A through E and department exhibit D-1 were received into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the claimant voluntarily quit the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons that constitute misconduct under Iowa law? Is the claimant able to work and available for work effective July 17, 2016?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a laborer on assignment for Pella Windows and was separated from employment on June 17, 2016.

The evidence is disputed as to whether the employer or claimant initiated the separation. The undisputed evidence is that the claimant obtained a work-related injury to her shoulder on June 14, 2016, and visited with Dr. Doty, who issued the claimant work duty restrictions consistent with light duty work, including no lifting, reaching or pulling more than five pounds. The employer by way of Cindy Kane, met with the claimant and they agreed the claimant would perform cleaning duties, which would meet her restrictions. On June 15, 2016, the claimant called the employer and job assignment, two hours in advance, per policy, to report her absence

from work. The claimant called off due to continued pain in her shoulder and swelling. The claimant called off again on June 16, 2016, again due to pain. When the claimant called off on July 17, 2016, she again spoke to Cindy Kane. The claimant stated she had a call into the doctor and had an appointment scheduled for June 21, 2016. Ms. Kane told the claimant she would notify the client. Ms. Kane also reportedly asked to sign a form stating she was declining light duty work. The claimant explained she was only declining work while she was in pain and until she visited her doctor again on June 21, 2016. The claimant never signed any form but Ms. Kane reportedly notified the employer that the claimant voluntarily quit because she refused her light duty assignment. The claimant did not state verbally or in writing that she had quit the employment at any time. The undisputed evidence is that the employer then sent the claimant a letter dated June 20, 2016, (Department exhibit 1) which both parties agree was not received by the claimant, and that the employer received back in the mail as undeliverable. The letter does not state the claimant voluntarily quit, but that she declined light duty work.

The claimant went to her doctor's appointment on June 21, 2016, and was given updated restrictions of a two-pound lifting/pushing/reach limit. The claimant went to the employer and spoke with Joy Hall, to present her doctor's note. The claimant intended to return to work as a result, but was informed that the employer did not need anything until she was released without restrictions. On July 5, 2016, the claimant again visited Dr. Doty, and had updated restrictions, which she again brought to the employer, and was not permitted to return to work, but informed she needed a complete release from restrictions to return.

Due to the underlying worker's compensation matter, communications then ensued between employer and claimant counsel from the period of July 5 and 25, 2016 (Claimant exhibit A). At issue was the claimant's repeated request to return to work in light of her restrictions. It was not until July 25, 2016 that the claimant (through counsel) learned the employer had separated the claimant from employment, alleging she voluntarily quit the employment (Claimant exhibit A). The claimant's worker's compensation claim was closed effective August 25, 2016, and the claimant has no restrictions to employability currently.

Ms. Lewein testified for the employer but had no personal knowledge of the claimant, nor her worker's compensation claim or communications. Neither Ms. Kane nor Ms. Hall participated in the hearing by way of written statement or testimony, nor did either party request a subpoena to compel appearance.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

The evidence is disputed as to whether the claimant voluntarily quit the employment on June 17, 2016, by way of notifying Cindy Kane that she could not work due to pain, and

therefore declined her light duty work, or whether she was discharged after calling off for three days (June 15-17), which caused her unable to perform the offered light duty work. The claimant credibly testified that she spoke to Cindy Kane on June 17, 2016 and explained she could not work due to pain and would not be returning to work until she met again with her worker's compensation doctor on June 21, 2016. Upon visiting the doctor on June 21, and again July 5, 2016, the claimant visited the employer and spoke Joy Hall, providing documentation and inquiring about returning to work. The employer did not allow the claimant to return and did not inform her that because she had not worked June 17, 2016, that she was deemed to have quit her job that day. Instead, the claimant continued contacting the employer, believing she still had a job available. It was not until several weeks later through counsel, that the claimant learned the employer had initiated separation based on her call off on June 17, 2016.

Neither Ms. Hall nor Ms. Kane attended the hearing or furnished any written statement to refute the first hand testimony offered by the claimant. Ms. Lewein herself had no personal knowledge of the claimant, or her worker's compensation claim. When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. In this case, since the claimant did not have the option of remaining employed nor did she express intent to terminate the employment relationship. Rather, the employer discharged her while she was under medical care for a work-related injury. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The next issue is whether the claimant was discharged for reasons that constitute misconduct.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge

concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such 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. On the other hand 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for

unemployment insurance benefits related to that separation. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system, no-fault absenteeism policy or leave policy is not dispositive of the issue of qualification for benefits.

In spite of the claimant's work related injury, which contributed to her repeatedly (but properly) calling off work, because the final cumulative absence for which she was discharged was related to properly reported illness or injury and related ongoing medical treatment, no misconduct has been established and no disqualification is imposed. Benefits are allowed, provided claimant is otherwise eligible.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective July 17, 2016.

Iowa Code § 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".

Iowa Admin. Code r. 871-24.22(1)a provides:

> 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.
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> 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.

Iowa Admin. Code r. 871-24.22(2) provides:

> 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.
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> (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.

To be able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1). "An evaluation of an individual's ability to work for the purposes of determining that individual's eligibility for unemployment benefits must necessarily take into consideration the economic and legal forces at work in the general labor market in which the individual resides." *Sierra* at 723.

Inasmuch as the injury is considered work-related for the purposes of unemployment insurance benefits only and the treating physician has released the claimant to return to work, even with restrictions the claimant has established her ability to work. Because the employer had no work available or was not willing to accommodate the work restrictions, benefits are allowed.

DECISION:

The August 10, 2016, (reference 03) decision is reversed. The claimant did not quit, but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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