

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERI L WILBURN
Claimant

APPEAL NO. 10A-UI-07466-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 02/28/10
Claimant: Appellant (3-R)

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

STATEMENT OF THE CASE:

Teri Wilburn filed a timely appeal from the May 19, 2010, reference 02, decision that denied benefits based on an Agency conclusion that she had voluntarily quit without good cause attributable to the employer. After due notice was issued, a hearing was held on July 2, 2010. Ms. Wilburn provided a telephone number for the hearing, but was not available at that number at the time of the hearing. Fred Metcalf, Human Resources Coordinator, represented the employer and presented additional testimony through Angela Prevo, Assistant Director of Nursing. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Eight into evidence. The hearing in this matter was consolidated with the hearing in Appeal Number 10A-UI-05703-JTT.

ISSUES:

Whether Ms. Wilburn has been on an approved leave of absence since she established her claim for unemployment insurance benefits.

Whether Ms. Wilburn separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

Whether Ms. Wilburn has been able to work and available for work since she established her claim for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Wilburn was employed by Good Samaritan Society, Inc., as a part-time certified nursing assistant. Ms. Wilburn started the employment in August 2008 and last performed work for the employer on February 14, 2010.

Effective February 16, 2010, Ms. Wilburn commenced an approved leave of absence. Ms. Wilburn suffered from respiratory issues that made it difficult for her to work her entire shift. Though the employer suggested the leave of absence, Ms. Wilburn voluntarily commenced the

approved leave of absence. The approved leave of absence was expected to last until March 18, 2010.

The employer's leave policy is set forth in an employee handbook. Ms. Wilburn signed her acknowledgment of receipt of the 2010 revised handbook on March 1, 2010. The administrative law judge notes this date falls within the period of the leave of absence. The handbook references two leave categories: leaves under the Family and Medical Leave Act (FMLA) and "General Leave of Absence." Though Ms. Wilburn's leave was based on health issues and Ms. Wilburn had worked for the employer for more than a year, the employer would not approve an FMLA leave because Ms. Wilburn could not get a doctor to provide medical certification that would cover all of the days Ms. Wilburn had missed. The employer instead authorized a leave under its General Leave policy. The handbook indicates a general leave may not exceed 30 days. The 30 days would have expired on March 18, 2010. The handbook required that Ms. Wilburn provide medical certification to support her request for leave. This was despite the fact that the employer had refrained from approving FMLA leave because Ms. Wilburn was unable to provide medical certification. The handbook indicates that:

There is no guarantee of a position upon returning from a general leave of absence unless state or local laws require otherwise. However, the Society will try to place you in your former position or another position subject to center/campus needs, availability of qualified replacements, budgetary restrictions and other factors. If such placement is not possible, you may be assigned to a job for which you are qualified; this job may not be within the same job classification or pay rate as the former position. Depending on the length of your leave, and the center/campus needs, steps may be taken to replace your position during your absence. If, at the end of your general leave of absence, your position has been replaced and no open position for which you are qualified exists, you may apply for future openings.

The handbook indicated that:

A fitness-for-duty certification from your physician will be required prior to returning to work if the reason for the leave is related to health.

This certification should include a statement of your ability to resume duties, physical restrictions (if any) and the date you may safely return to work. Generally, the center/campus will request that you furnish this information at least two weeks before your expected return so that the center/campus can make adjustments to work schedules, where warranted.

Unless federal, state or local laws require otherwise, the Society will assume you have voluntarily resigned if any of the following occur:

You fail to return from a leave of absence at the specified or agreed-upon time.

You refuse to accept an open position for which you are qualified when the leave ends.

You fail to notify the Society of your availability.

The administrator may approve exceptions to this if compelling reasons exist.

On March 10, 2010, Karen Kaiser, Director of Nursing Services sent Ms. Wilburn a letter by certified mail. Ms. Wilburn received the letter on March 15, 2010. The letter indicated, "You will not be guaranteed reinstatement to your position when returning from a general leave of

absence unless federal, state or local laws require otherwise.” The letter directed Ms. Wilburn to the employee handbook.

On March 30, 2010, Ms. Wilburn underwent a medical procedure at the University of Iowa Hospitals & Clinics. The treating physician provided a medical excuse that indicated Ms. Wilburn needed to continue off work until April 4, 2010, but was released effective April 5, 2010 to return to work without restrictions.

Ms. Wilburn provided this medical excuse and release to the employer during the first week of April 2010 and spoke to Fred Metcalf, Human Resources Coordinator. At that time, Mr. Metcalf told Ms. Wilburn that the employer had work for her, but could not allow her to return to work unless she provided medical certification that covered all of the time she was away from work. Mr. Metcalf also told Ms. Wilburn that she needed to prove that she was able to work without restrictions. This last requirement was imposed despite the medical release that indicated Ms. Wilburn could return to work without restrictions effective April 5, 2010. Mr. Metcalf was not aware of any medical restrictions that would prevent Ms. Wilburn from performing her duties.

On April 15, 2010, Angela Prevo, Assistant Director of Nursing, sent Ms. Wilburn a letter by certified mail. Ms. Wilburn received the letter on April 19, 2010. In the letter, Ms. Prevo referenced Ms. Kaiser’s letter of March 10, 2010. Ms. Prevo asserted there had been no response from Ms. Wilburn aside from word that Ms. Wilburn had applied for unemployment insurance benefits. Ms. Prevo referred Ms. Wilburn to the employee handbook. Ms. Prevo indicated that:

The Center will assume you have voluntarily resigned as you failed to return from a leave of absence at the specified or agreed upon time of March 18, 2010 with your failure to notify the society of your availability, a fitness-for-duty certification as well as a two week notice before your return to work.

On April 15, 2010, the employer completed internal forms that indicated Ms. Wilburn had voluntarily terminated the employment effective April 15, 2010 based on a failure to return from a leave of absence.

On April 19, 2010, the employer completed a Workforce Development Notice of Separation, form 60-0154, that indicated Ms. Wilburn had voluntarily quit effective April 15, 2010.

Ms. Wilburn established a claim for unemployment insurance benefits that was effective February 28, 2010 and received benefits for the period of February 28, 2010 through April 3, 2010. Good Samaritan Society was Ms. Wilburn’s only base period employer.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-1-d 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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the 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, if so found by the department, provided the individual is otherwise eligible.

Workforce Development rule 817 IAC 24.26(6) provides as follows:

Separation because of illness, injury, or pregnancy.

a. Nonemployment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.

b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with the employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

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.

When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Ms. Wilburn failed to appear for the hearing and thereby failed to present evidence either to establish an involuntary separation from the employment or a voluntary separation for good cause attributable to the employer.

The weight of the evidence indicates that Ms. Wilburn voluntarily separated from the employment on February 16, 2010, due to a non-work-related health issue. The weight of the evidence indicates that the separation was not based upon the advice of a licensed and practicing medical professional. The separation was initially deemed a leave of absence set to expire on March 18, 2010. However, Ms. Wilburn failed to return to the employment at the end of the approved leave of absence and did not make further contact with the employer until the

first week of April. The weight of the evidence establishes a voluntary quit without good cause attributable to the employer. Ms. Wilburn 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 for benefits paid to Ms. Wilburn.

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:

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, (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.

(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.

During the period of February 16, 2010 through March 18, 2010, Ms. Wilburn was on an approved leave of absence. This is considered a period of voluntary unemployment and Ms. Wilburn did not meet the work availability requirements of Iowa Code section 96.4(3) during

that period. See 871 IAC 24.23(10). The weight of the evidence indicates that Ms. Wilburn continued to be unavailable for work until the first week of April 2010, at which time she presented the employer with a medical document that granted her a full medical release and expressed interest in returning to the employment. The weight of the evidence indicates that Ms. Wilburn was able and available for work effective April 5, 2010.

DECISION:

The Agency representative's May 19, 2010, reference 02, decision is modified as follows. The claimant voluntarily separated from the employment effective February 16, 2010 without good cause attributable to the employer. The claimant 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. The claimant did not meet the work availability requirements of Iowa Code section 96.4(3) from February 28, 2010 through April 4, 2010. Effective April 5, 2010, the claimant was both able to work and available for work.

This matter is remanded to the Claims Division for entry of an overpayment decision regarding the benefits disbursed to the claimant for the period of February 28, 2010 through April 3, 2010.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs