

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBBY K BUCK
Claimant

APPEAL NO. 14A-UI-11329-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CDS GLOBAL INC
Employer

OC: 10/05/14
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge
Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Debby Buck filed a timely appeal from the October 28, 2014, reference 02, decision that disqualified her for benefits and that relieved the employer of liability for benefits. After due notice was issued, a hearing was commenced on November 20, 2014 and concluded on December 9, 2014. Ms. Buck participated. Linda Burns represented the employer and presented additional testimony through Jill Murtaugh, Kris Pope and Anthony Wade. Exhibits One through Twelve and A through D were received into evidence.

ISSUES:

Whether Ms. Buck separated from the employment for a reason that disqualifies her for benefits or that relieves the employer of liability for benefits.

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Debby Buck was employed by CDS Global, Inc., as a full-time call center representative from 2008 and last performed work for the employer on March 28, 2014. Ms. Buck's regular work duties were entirely phone-based. Ms. Buck's usual work hours were 10:00 a.m. to 5:30 p.m., Monday through Friday. Early in 2014, Ms. Buck began to experience problems with her voice. In early February 2014, Ms. Buck's health care provider took her off work a few days, due to a diagnosis of acute sinusitis, laryngitis, and bronchitis. Ms. Buck's health care provider then released Ms. Buck to return to work full time, but restricted her to performing no more than four hours of phone work per day through February 15, 2014. The employer temporarily made other, non-phone based work available to Mr. Buck. The employer had Ms. Buck apply for leave under the Family and Medical Leave Act and deemed any time missed from February 3, 2014 onward to count against the FMLA 12-week maximum. Ms. Buck provided appropriate medical certification documentation to support her need to be away from work and her need for workplace accommodations. Ms. Buck's voice issues turned out to be chronic. Ms. Buck was

subsequently diagnosed with muscle tension dysphonia that placed her at risk of permanently losing her voice. Ms. Buck's phone work aggravated her medical condition such that Ms. Buck's voice sometimes faded during the four hours when she was performing phone-based duties. The medical restriction continued, and Ms. Buck and the employer continued under the same conditions until March 28, 2014.

On the morning of March 28, 2014, Ms. Buck was working at her station when she received an instant message from Kris Pope, Senior Manager. Ms. Pope directed Ms. Buck to appear for a meeting at noon. At the meeting, Ms. Pope told Ms. Buck that the employer was moving in its slow period, was no longer able to accommodate Ms. Buck's restrictions and no longer had work for Ms. Buck. Ms. Pope instructed Ms. Buck to get with the employer's human resources staff to apply for short-term disability benefits through the employer's third party benefits administrator, CIGNA Group Insurance. Ms. Buck complied with the directive. Ms. Buck completed an application for short-term disability benefits and provided medical documentation requested by the employer. In support of the application for short-term disability benefits, Ms. Buck's health care provider indicated that Ms. Buck was totally unable to work. Being totally unable to work was a disability benefits eligibility requirement. CIGNA approved Ms. Buck for short-term disability benefits not to exceed 180 days. Ms. Buck complied with the requirement that she periodically submit documentation indicating that she was totally unable to work to continue her eligibility for short-term disability benefits. The employer deemed Ms. Buck to have exhausted her 12 weeks of FMLA leave in June 2014, but continued to approve extensions of the medical leave through September 24, 2014, at which point Ms. Buck reached the 180-day maximum for short-term disability benefits under the CIGNA short-term disability benefits program.

On September 2, 2014, the employer had sent Ms. Buck a letter notifying her that her short-term disability benefits would end effective September 24, 2014. The employer told Ms. Buck in the letter that she could apply for benefits under CIGNA's long-term disability program, but that the employer would no longer hold her position. Though the employer's letter characterized the change in status as a leave of absence, the effect of the letter was to terminate the employment. The letter included notice that Ms. Buck's employment-based health care insurance would terminate effective September 30, 2014. The letter notified Ms. Buck of her right to continue insurance coverage through a COBRA.

On September 8, 2014, Ms. Buck applied for long-term disability benefits through CIGNA Group insurance. That application was still pending at the time of the unemployment insurance appeal hearing.

On September 26, 2014, Ms. Buck sent a Thank You card to the employer. The correspondence was addressed to Jill Murtaugh. Ms. Murtaugh, Workforce Manager, was the person with whom Ms. Buck had contact regarding her health condition, her need for accommodations, and her application for FMLA leave. Ms. Buck included Ms. Pope in the salutation that opened her note to the employer. Ms. Buck wrote:

Jill and Kris...

I want to thank you for your kindness through my throat situation. Effective September 29, 2014, I am resigning from my position as a call center representative. Please [sic] find my employee cards enclosed.

Ms. Buck enclosed her ID badge that she would need to enter the employer's facility and an ID she could scan to purchase snacks.

Ms. Buck's health care provider had recommended that Ms. Buck seek employment that did not require phone-based work.

Ms. Buck established a claim for benefits that was effective October 5, 2014. Since that time, Ms. Buck has sought new employment by making at least two job contacts per week. The only restriction on Ms. Buck's availability is the health care provider's restriction that Ms. Buck work in something other than a call center environment.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. 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 laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

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 employer had an obligation to provide the claimant with reasonable accommodations that would allow her to continue in the work. See Sierra v. Employment Appeal Board, 508 N.W. 2d 719 (Iowa 1993). The evidence indicates that the employer had the ability to accommodate Ms. Buck's medical restrictions under which she was to perform phone work only four hours per shift and perform non-phone work during the other four hours of the shift. The evidence further indicates that Ms. Buck's medical condition was aggravated by the employment.

The administrative law judge must first decide *when* the separation from employment occurred. The employer points to the resignation card that Ms. Buck mailed on September 26, 2014, as proof that Ms. Buck voluntarily quit the employment. Ms. Buck asserts that Ms. Pope compelled her to go off work effective March 28, 2014 and that Ms. Buck merely complied and then did what she could to maintain a source of income while she was off work. Ms. Buck testified with clarity and credibility regarding the instant message she received from Ms. Pope on the morning of March 28, 2014 and the directive that she appear for a meeting at noon that day. Ms. Buck testified credibly that Ms. Pope told her on that day that the employer was heading into a slow time and no longer had work for Ms. Pope. Ms. Pope did not deny that the conversation occurred, but instead indicated that she could not recall the conversation. Ms. Pope indicated that she did indeed use the instant message system to communicate daily with employees. Ms. Pope denied that she would tell an employee that they needed to go off work. The question remains, what suddenly changed on March 28, 2014? Ms. Buck's health had not suddenly changed. The weight of the evidence indicates that the change at that point was the employer's decision to no longer reasonably accommodate Ms. Buck's medical restrictions and no longer make work available for her. The employer discharged Ms. Buck from the employment at that

point. The separation that occurred at that time was not based on misconduct and would not disqualify Ms. Buck for unemployment insurance benefits. See Iowa Code section 96.5(2)(a) and Iowa Admin. Code rule 871 IAC 24.32(1)(a). Given that the actual separation from the employment took place on March 28, 2014, what followed is less important and does not alter the fact that the employer initiated the separation in March.

The disability benefits plan through a third-party provider muddled the waters somewhat with regard to the separation, but did not alter the fact that the separation occurred at the end of March. The employer points to Ms. Buck's health care provider's assertions in support of the short-term disability benefits, multiple assertions that Ms. Buck was totally unable to work from February onward, as proof that Ms. Buck, not the employer, initiated the time off from work and the separation. However, Ms. Buck had in fact returned to work in February 2014 and continued to perform work for the employer until March 28, 2014. The assertions of the health care provider have to be read in the context of the requirement that Ms. Buck assert that she was totally unable to work as a prerequisite to receiving short-term disability benefits. The assertions made in that context do not tell the whole story, or even the actual story.

Even if the evidence had not established that the employer discharged Ms. Buck in March, the evidence would have indicated that the employer discharged Ms. Buck in September 2014, when the employer told Ms. Buck that her short-term disability benefits would end as of September 24, 2014 and that the employer would no longer hold Ms. Buck's position. That language communicated a discharge. The fact that Ms. Buck was confused and felt the need to respond with a resignation letter did not alter the matter. Ms. Buck had already been discharged at the time she sent the resignation letter.

The claimant was discharge for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible.

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 § 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

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

Ms. Buck has been able to work and available for work since she established her claim for benefits. Ms. Buck has been released by her health care provider to work. The only restriction is that Ms. Buck not work in a call center. Ms. Buck has demonstrated an active and earnest search for new employment by making at least two employer contacts per week.

DECISION:

The October 28, 2014, reference 02, decision is reversed. The claimant was discharged on March 28, 2014 for no disqualifying reason. The claimant has been able to work and available for work since she established her claim for benefits. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css