IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DENISE L CARKHUFF SMITH
Claimant

KUM & GO LC
Employer

APPEAL NO. 09A-UI-15189-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/13/09
Claimant: Appellant (1)

Iowa Code § 96.5(1)d – Voluntary Leaving/Illness or Injury

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 7, 2009 (reference 01) decision that denied benefits. After due notice was issued, a telephone conference hearing was held on November 10, 2009. Claimant participated. Employer participated through general manager (store number 22) Mark McCann.

ISSUE:

The issue is whether claimant voluntarily left the employment with good cause attributable to the employer.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as an overnight cashier and was separated on September 13, 2009. She had a nervous breakdown and felt unable to work overnight shifts. Physician's assistant Casie Riney wrote an excuse on September 8 for her absences from September 6 through September 10 "due to illness and medication changes" but did not write that she was not medically able to work overnight shifts. McCann said he would work with her but it would be difficult to remove her from overnight shifts for the following weekend when she had said she would be on vacation and weekends off were reserved for those working overnight shifts. She had also said she would return to work for her shift on September 14 but was a no call-no show. Claimant had not reported to McCann or to police her concerns of being groped by truck driver customers or robberies at other convenience stores. Nor did she text (as she had done about her schedule) or otherwise communicate with McCann about her complaints of kitchen manager Shanna reporting to work late or clocking in and not wanting claimant to leave until she got her coffee.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant is separated from the employment without good cause attributable to the employer.

Iowa Code § 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.

Iowa Code § 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.

871 IAC 24.25(35) provides:

> Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:
>
> (a) Obtain the advice of a licensed and practicing physician;
>
> (b) Obtain certification of release for work from a licensed and practicing physician;
>
> (c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
>
> (d) Fully recover so that the claimant could perform all of the duties of the job.

The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that:

> "Insofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits."

White v. Employment Appeal Bd., 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

The statute provides an exception where:

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. Iowa Code § 96.5(1)(d).

Section 96.5(1)(d) specifically requires that the employee has recovered from the illness or injury, and this recovery has been certified by a physician. The exception in section 96.5(1)(d) only applies when an employee is fully recovered and the employer has not held open the employee's position. *White*, 487 N.W.2d at 346; *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985); see also *Geiken v. Lutheran Home for the Aged Ass'n*, 468 N.W.2d 223, 226 (Iowa 1991) (noting the full recovery standard of section 96.5(1)(d)).

In the present case, 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. See *White*, 487 N.W.2d at 345; *Shontz*, 248 N.W.2d at 91.

The claimant has not established that the injury was work related, as is her burden. Thus, she must meet the requirements of the administrative regulation cited above. Claimant did not present evidence in writing to the employer or for this hearing that a physician suggested leaving the employment and no work restrictions were in force. The employer attempted to find the claimant other shifts but claimant simply stopped reporting for work when she had agreed to and quit before the schedule could be rearranged. Since the employer was not reasonably aware of the other issues and claimant did not call the police about customers who touched her without permission, her decision to quit was without good cause attributable to the employer. Benefits are denied.

DECISION:

The October 7, 2009 (reference 01) decision is affirmed. The claimant temporarily separated from the employment without good cause attributable to the employer. Benefits are withheld until such time as the claimant works in and has been paid wages equal to ten times her weekly

benefit amount, provided she is otherwise eligible or until such time as claimant obtains a full release to return to regular duties without restriction, offers services to the employer, and the employer has no comparable, suitable work available.

_____
Dévon M. Lewis
Administrative Law Judge

_____
Decision Dated and Mailed

dml/pjs