IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TIFFANY VANDERBUSCH Claimant **EXPRESS SERVICES INC** Employer	**APPEAL 17A-UI-02615-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/29/17** **Claimant: Respondent (5)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the February 28, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 31, 2017. Claimant participated. Employer participated through staffing consultant Kayla Hase. Sonya Kockler registered for the hearing on behalf of the employer, but she did not attend the hearing. Official notice was taken of the administrative record of the fact-finding documents for the purpose of employer participating with no objection. Official notice was taken of the administrative record of claimant's benefit payment history with no objection.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a staffing agency. Claimant started with the employer on February 15, 2016, and only had one assignment with the employer.

Claimant was employed temp-to-hire full-time as a support team last assigned at Winnebago from February 15, 2016, and was separated from the assignment on November 2, 2016. The work claimant was doing at the assignment involved too much weight and her doctor placed her

on maternity leave early. On November 2, 2016, claimant brought a copy of her doctor's note to the employer. The doctor's note placed claimant out of work from November 2, 2016 until was until she was cleared by her doctor to return to work. When claimant brought in the doctor's note, the employer told her that this was ok and they would keep her active. The employer told claimant to let it know when she could return to work. Claimant also provided the doctor's note to Winnebago.

On December 20, 2016, claimant had her baby. On December 22, 2016, claimant provided a new doctor's note to the employer that stated she had the baby and she had a follow up appointment in six weeks. The December 22, 2016 doctor's not did not release claimant to return to work. The employer told claimant to let it know when she had her follow up appointment and was released back to work.

On January 19, 2017, claimant had a follow up appointment with her doctor and was released to return to work with no restrictions. On January 19, 2017, a doctor's note releasing claimant back to work without restrictions was faxed to the employer and claimant also brought a copy of the doctor's note to the employer. The employer told claimant it would call Winnebago and see if claimant could return to this assignment.

On January 20, 2017, claimant called the employer and was told that there were no open positions at Winnebago. The employer also told claimant that someone at the employer had placed her as inactive after she had given her November 2, 2016 doctor's note. Claimant requested an additional assignment. The employer set up an appointment with claimant for January 26, 2017 regarding an additional assignment; however, after claimant received the information about the assignment, she discovered the assignment was located too far from her. The new assignment was approximately 45 minutes away and when claimant was hired she informed the employer that her area of availability was Forest City or surrounding towns. The new assignment was not located in a surrounding town.

Claimant called the employer around January 23, 2017 to cancel her appointment for January 26, 2017 and to see if the employer could get her back at Winnebago. The employer was not able to get her at Winnebago. Claimant requested an additional assignment in her area, but the employer did not provide her with another assignment. Claimant has also used the employer's website to apply for jobs/assignments.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant voluntarily left the employment for no disqualifying reason. Benefits are allowed.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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:
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> 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.

Iowa Admin. Code r. 871-24.25(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 section 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 section 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:
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> (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;
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> (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.

Iowa Admin. Code r. 871-24.26(6)b provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(6) Separation because of illness, injury, or pregnancy.

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.

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. Emp't 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)).

Subsection d of Iowa Code § 96.5(1) provides an exception. The statute 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 *Gilmore* case he was not fully recovered from his injury and was unable to show that he fell within the exception of section 96.5(1)(d). Therefore, because his injury was not connected to his employment and he had not fully recovered, he was considered to have voluntarily quit without good cause attributable to the employer and was not entitled to unemployment benefits. See *White*, 487 N.W.2d at 345; *Shontz*, 248 N.W.2d at 91.

On November 2, 2016, claimant's provided a doctor's note to the employer that precluded her from working due to her pregnancy. Between November 2, 2016 and January 19, 2017, claimant updated the employer with her work status and was told by the employer to let it know when she was released to return to work. Thus, claimant essentially went on a leave of absence until she was released to return to work January 19, 2017.

Unlike in *Gilmore*, claimant has fully recovered from her pregnancy, presented the employer a release to return to work without restrictions, and the employer did not have any assignments available for her in her travel area. Furthermore, claimant attempted to find other assignments in her travel area through the employer by applying through its website.

Since claimant offered to return to work after her pregnancy without restrictions and no work was available in her travel area, the separation was with good cause attributable to the employer. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The February 28, 2017, (reference 01) unemployment insurance decision is modified with no change in effect. Claimant voluntarily left the employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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