

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VESNA RIZVIC
Claimant

APPEAL NO. 12A-UI-05810-WT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS
Employer

OC: 05/15/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a fact-finding decision dated May 11, 2012, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 13, 2012. Claimant participated through attorney, Jeff Walters. Employer participated by H.R. Clerk, Dzemaal Grcic.

ISSUES:

Whether the claimant quit or was discharged.

If the claimant was discharged, whether claimant was discharged for misconduct.

If the claimant quit, whether the claimant quit for good cause attributable to the employer.

Whether the claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds:

Claimant began working on September 9, 1999. She went off work on a leave of absence originally on April 29, 2011. She returned to work on March 5, 2012. On March 27, 2012, she went off work again and was granted a formal leave of absence. The claimant has never been discharged. She has never quit. She attempted to return to work on a couple of occasions but every time she attempted she was unable to do the work assigned.

REASONING AND CONCLUSIONS OF LAW:

The initial question raised in this case is the nature of the separation. Separations are categorized into four separate categories under Iowa law.

24.1(113) 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 labor-saving 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.

See Iowa Administrative Code 871—24.1.

The fact-finding decision regarded this matter as a quit and applied the good cause standard set forth for non-work-related injuries. Iowa Code §96.5(1)(d) (2009). The claimant, however, clearly never quit or evinced any intent to quit her job. In this case, the employer testified that claimant was on a leave of absence and, unfortunately, had very little additional information. Under the rules set forth above, this is an “Other Separation” as defined in subparagraph (d), failure to meet the physical standards required. As such, the quit analysis is reversed. See John DeWall v. Norsemen Trucking, Inc., 06B-UI-03451 (EAB, June 15, 2006); see also Wills v. Employment Appeal Board, 447 N.W.2d 137 (Iowa 1989). The burden is upon the employer to prove a disqualifying reason for the separation.

Further guidance is provided by Iowa Administrative Code 871—24.22(2).

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee—individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the individual, the individual is considered laid off and eligible for benefits.

(2) If the employee—individual fails to return at the end of the leave of absence and subsequently become unemployed the individual is considered having voluntarily quit and is therefore ineligible for benefits.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

Iowa Administrative Code 871—24.22(2).

In this case, the employer did not present a great deal of evidence. Based upon the evidence presented, it appears that the employer placed the claimant on a leave of absence involuntarily due to a work-related injury. In other words, Ms. Risvic attempted to return to work. The claimant could not perform the work that Tyson offered her in April 2012. She was in such excruciating pain that she was forced to leave in a wheel chair. Based upon the evidence in the record, the leave of absence was neither voluntary nor negotiated. She was compelled to go on a leave of absence by the employer due to her medical condition. As such, there is no disqualification based upon the separation.

The remaining issue is whether the claimant is able to work.

24.22(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.

b. Interpretation of ability to work. The law provides that an individual must be able to work to be eligible for benefits. This means that the individual must be physically able to work, not necessarily in the individual's customary occupation, but able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual lives.

Iowa Administrative Code 871—24.32(1).

In this case, no competent medical evidence was presented regarding claimant's ability to work. It appears from the evidence that her medical condition causes her significant limitations. Inability to work is a week-by-week disqualification. The claimant testified credibly that there is work that she could perform in a reasonably suitable, comparable, gainful, full-time endeavor. She is able to work since April 11, 2012. The employer only attempted to place claimant in unrestricted, full-duty jobs which the claimant could not perform. The employer knew ability to work was an issue in the case yet presented no evidence of the claimant's work restrictions or her inability to work. The greater weight of evidence demonstrates that claimant is able and available within the meaning of Iowa law.

It should be noted that claimant has apparently made a claim for workers' compensation benefits and likely has a claim for temporary disability benefits for the period of time in question. If claimant receives workers' compensation benefits, other than through a section 85.35 contested case settlement, she should report such payments to the Unemployment Division of Iowa Workforce Development for a determination of eligibility for any weeks of unemployment receives which coincides with weeks of temporary disability benefits she receives through workers' compensation. See Iowa Code section 96.5(5)(a)(2) (2011).

DECISION:

The fact-finding decision dated May 11, 2012, reference 02, is reversed on the separation issue. It is further held claimant is able and available for work from her additional claim date through the date of hearing. The claimant is entitled to receive benefits commencing on her April 8, 2012 (additional claim date) if otherwise eligible.

Joseph L. Walsh
Administrative Law Judge

Decision Dated and Mailed

jlw/pjs