

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUSAN M WILLEY

Claimant

APPEAL NO. 11A-UI-07464-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BELLE PLAINE IA INC
CAR QUEST OF BELLE PLAINE**

Employer

OC: 04/24/11

Claimant: Respondent (2-R)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Code § 96.5(1)d – Voluntary Leaving/Illness or Injury
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed an appeal from the May 26, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on February 27, 2012. Claimant Susan Willey participated. Employer Car Quest participated through Co-Owner Dave Babourek and Store Manager Mike O'Hara and was represented by Jennifer Zahradnik, attorney at law. The parties waived fact-finding and notice of the separation issue. The administrative law judge took judicial notice of the administrative record. Claimant's Exhibit A was admitted to the record.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to employer and, if so, was she overpaid benefits as a result?

Was the claimant able to and available for work effective April 24, 2011?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an auto parts delivery driver and was separated from employment on June 3, 2011. Her last day of work was February 1, 2011, when she broke her right ankle away from work. She called the employer about the injury and was told to provide a doctor's note upon her release to perform her required duties. Her job required her to have a valid driver's license. She wore a boot for a few days, had surgery, and was placed in a cast for about two months. She was unable to drive while wearing the cast. On March 25, 2011, treating physician G.L. Marsh, M.D., released her to regular activities and job duties on April 25. (Administrative record) In late March she called the employer and said she could return to work in late April. The employer requested a copy of the release. It was not provided. On April 18, 2011, Marsh modified the release to use of a regular shoe but limited her to working four hours per day. (Administrative record) She notified the employer and was asked for a copy of the

release but, again, did not provide it. Her last verbal communication with the employer was on May 26, 2011, the day after the fact-finding interview. Babourek called her to see if she had seen her doctor about returning to her regular duties. She said she had not, although she had. The next communication was the unemployment insurance benefits notice of claim. There was no further communication until the employer delivered claimant the June 2 letter and offered to allow her to provide a medical release by June 3 and return to work the week of June 6. Claimant responded on June 3 and indicated, as she did in her testimony, that in May she decided she did not want to work there because she believed the employer should trust her and not require her to provide medical documentation, since there were only six employees. (Claimant's Exhibit A) Employer's policy considers an employee to have quit if they do not call to report their absence or report for work for three consecutive scheduled work days. Claimant was a no-call, no-show from June 6 through 10, 2011. Ten days after the separation, on June 21, the employer received the June 17 letter from Dr. Marsh. This was the first written medical documentation provided to the employer. Claimant most recently saw a doctor in November 2011 who said it would take up to another year before the nerve damage would go away. There was no discussion of release or restriction.

Claimant received unemployment benefits since filing a claim with an effective date of April 24, 2011.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant voluntarily left the employment without good cause attributable to the employer.

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)).

Subsection d of Iowa Code § 96.5(1) 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.

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.

Since claimant's injury was not work-related, she must meet the requirements of the administrative rule cited above, and the employer is not obligated to accommodate a non-work-related medical condition. Since claimant failed to provide the employer with evidence of her medical release after multiple reasonable requests and notified the employer on June 3 that she had decided she would not return because she was, essentially, offended by the employer's request for the medical documentation, the separation is without good cause attributable to the employer and benefits must be denied.

Iowa Code § 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".

Claimant is not considered able to work, as she has not provided any written medical information about her ability to work to date.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because claimant's separation was disqualifying, benefits were paid to which claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment may

not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. If so, the employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The May 26, 2011 (reference 01) decision is reversed. Claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw