IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CEDRIC D READUS
Claimant

IOWA PAPER INC
Employer

APPEAL NO: 14A-UI-09110-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/27/14
Claimant: Respondent (3)

Section 96.4-3 – Able and Available
Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer's Account
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Iowa Paper, Inc. (employer) appealed a representative's August 25, 2014 (reference 02) decision that concluded Cedric D. Readus (claimant) was not qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on December 3, 2014. This appeal was consolidated for hearing with related Appeal No. 14A-UI-09111-DT. The claimant participated in the hearing. Vernon Squires, Attorney at Law, appeared on the employer's behalf and presented testimony from one witness, Ed Sobaski. One other witness, Cheryl Sobaski, was available on behalf of the employer but did not testify. During the hearing; Employer's Exhibits One, Two, and Three were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

Is the employer's account subject to charge?

FINDINGS OF FACT:

The claimant started working for the employer on April 1, 2014. He worked full time as a warehouse delivery person. His last day of work was July 15, 2014.

Since about July 7; the claimant had been having serious health issues which were affecting his ability to perform his work. On July 15 he came in for work but was so ill that the claimant and the employer agreed that the claimant should go to the hospital, which he did. On July 16 the claimant was diagnosed with multiple sclerosis; this information was communicated to the employer. The claimant remained in the hospital for several days. He had a doctor's note indicating that as of July 18 he needed to remain off work until he was seen by a neurologist, which was not scheduled until August 21, 2014. On July 21 the claimant advised the employer that he was out of the hospital and that he planned to come in on July 22 to discuss what he could do for work, but he was feeling too ill on July 22 and did not come in. On July 24 he called the employer and indicated that he could come to the employer's parking lot if Mr. Sobaski, the vice president, could come out to the parking lot to talk.

In their conversation it was mutually understood that there was currently no work with the employer that the claimant would be able to perform. The employer needed someone to perform the work the claimant had been performing and was not able to keep the position open for the claimant for the possibility of the claimant sufficiently recovering so as to be able to return to work. Mr. Sobaski asked the claimant to provide a written statement and the claimant wrote and signed a statement:

> Medical Leave:
> I, Cedric Readus, cannot
> return to work due to medical condition.

The claimant did see the neurologist on August 21. He was to avoid excessive or strenuous work; but must also avoid heavy lifting, excessive walking, excessive standing, and excessive sitting. The claimant estimated that as of the date of the hearing he could only work at best two or three hours per day, even in a non-strenuous job, as he still was suffering fatigue. He is currently pursuing social security disability eligibility.

The claimant established an unemployment insurance benefit year effective July 27, 2014. His base period is the second quarter 2013 through the first quarter 2014. His employment during that period is all from full-time employment. The claimant has received unemployment insurance benefits in the amount of $3211 since July 27, 2014.

REASONING AND CONCLUSIONS OF LAW:

The separation from employment occurred on July 24, 2014. Considering the claimant's status as of that date, there are only three provisions in the law which disqualifies claimants from unemployment insurance benefits (until they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount). An individual is subject to such a disqualification if the individual (1) is discharged for work-connected misconduct (Iowa Code § 96.5-2-a); (2) "has left work voluntarily without good cause attributable to the individual's employer." (Iowa Code § 96.5-1); or (3) refuses to accept an offer of suitable work without good cause (Iowa Code § 96.5-3). Here, there is no question of an actual offer of work or refusal of work, so the focus will be on whether there was a disqualifying separation from employment.

Separations are categorized into four separate categories under Iowa law. Rule 871 IAC 24.1(113) defines "separations" as:

> 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.
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> 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.

As the employer asserts the separation in this case is a voluntary quit, I will first determine whether Iowa Code § 96.5-1 regarding voluntary quits applies in this case. Rule 871 IAC 24.25 provides that, 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 claimant had been willing to continue working had the employer had suitable work or had been willing to wait for him to recover, but the employer was unable or unwilling to hold the claimant's position open for him.

Further, Iowa Code § 96.5-1-d provides an exception that an individual who otherwise could be subject to disqualification is not disqualified:

> If the individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of 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.

The Agency rule implementing this section explains that "[r]ecovery is defined as the ability of the claimant to perform all of the duties of the previous employment." Rule 871 IAC 24.26(6)a.

The issue then is whether a person is subject to voluntary quit disqualification under Iowa Code § 96.5-1 under the following circumstances: The person is actively working but then is suffers a medical condition that prevents him from performing his normal job duties for an indefinite period of time, and the employer determines it cannot hold the position open for the employee. The person has never stated that he is quitting the employment. The employer has not formally discharged the claimant from employment but has stated that the employee's position cannot be held.

The problem is that the case law points in several directions and has not addressed this issue head on. Additionally, the statute and rules are unclear as to this issue. For example, in *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989), the Iowa court considered the case of a pregnant certified nursing assistant (CNA) who went to her employer with a physician's release that limited her to lifting no more than 25 pounds. Wills filed a claim for benefits because the employer would not let her return to work because of its policy of never providing light-duty work. The court ruled that Wills became unemployed involuntarily and was able to work because the weight restriction did not preclude her from performing other jobs available in the labor market. *Id*. at 138. The court characterized the separation from employment as a termination by the employer, but in essence the employer informed the claimant that it did not have any jobs available meeting her restrictions and would not create a job to accommodate her restrictions. The court does not mention Iowa Code § 96.5-1-d at all. Perhaps significantly, the facts do not indicate that the claimant had stopped working at any point, and it was the employer who requested that she go to her doctor to get a release to continue working.

On the other hand, in *White v. Employment Appeal Board*, 487 N.W.2d 342, 345 (Iowa 1992), the Iowa court considered the case of the truck driver who was off work due to a heart attack for about three months, returned to work for a month, and then was off work for seven months after a second heart attack. He then returned to his place of employment and informed management that his doctor had instructed him that he was unable to drive because of his pacemaker device. The employer told the claimant that there was no available work for him with his restriction. The claimant then applied for unemployment insurance benefits. *Id*. at 343. The facts did not indicate whether the claimant stated that he was quitting employment or intended to permanently sever the employment relationship at any point. In *White*, the court reversed the district court's decision that the claimant quit work involuntarily due to a physical disability and stated that "unemployment due to illness raises policy considerations which call for a continuation of the rules laid out in cases antedating [the cases relied on by the district court]. Under these rules, if White's disability was not work-related, the agency properly imposed the disqualification. If, however, the cause of White's disability was work related, the disqualification was improper." *Id*. at 345. The court decided that there had been no finding as to whether the disability was or was not work-related and remanded the case. The court does not refer to or distinguish the *Wills* case. It does not explain how the first prong of the voluntary quit disqualification test set forth earlier in its decision—"it must be demonstrated that the individual left work voluntarily"—had been met.

To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship, and chooses to leave the employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. *Wills* supra at 138; *Peck v. Employment Appeal Board*, 492 N.W.2d 438, 440 (Iowa App. 1992). In my judgment, the facts of the *Wills* case more closely resemble this case. The claimant was actively employed until the restrictions from his non-work-related medical condition prevented him from performing his normal job duties. He did not intend to quit his employment. The parties agreed that no other work was available for the claimant after July 24, 2014 and that the employer could not keep the claimant's position open for him. The action initiating the separation was therefore taken by the employer, and the separation therefore could be considered for unemployment insurance purposes as a discharge, but not for disqualifying misconduct.[1]

[1] In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material

Perhaps this type of separation would meet the definition of "other separations" found in Rule 871 IAC 24.1(113)(d): "Termination of employment for military leave lasting or expecting to last longer than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required." The problem with this definition section is that it does not provide guidance on whether such a separation is qualifying or disqualifying. Obviously, if a person terminates employment because he decides to retire, it is a voluntary quit and a disqualification would be imposed. On the other hand, if the employer mandates that an employee retire due to reaching a certain age, the termination is involuntary and initiated by the employer and is a discharge for reasons other than misconduct and no disqualification is imposed. Likewise, if a claimant decides that he no longer meets the physical standards required by the job and leaves employment, it should be treated a quit and benefits will only be awarded if the person meets the exceptions to the voluntary quit statute.

Further guidance is provided by Rule 871 IAC 24.22(2) which provides:

> 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.

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breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer has not asserted the claimant committed conduct that could be characterized as misconduct under these criteria.

Because the restrictions imposed by the claimant's doctor prevented the claimant from performing his normal job duties, the employer declined to hold his position open for him. As such, even though the separation is considered an "Other Separation," it is ultimately treated as a layoff, because it was initiated by the employer. There is no valid reason to disqualify the claimant from benefits for being laid off for a lack of work upon.

The claimant, therefore, is not subject to the voluntary quit statute since he has not quit. He is not disqualified under the discharge statute since his separation was not due to misconduct. The refusal of suitable work statute does not apply here.

The remaining question is whether the claimant is eligible to receive unemployment insurance benefits after July 24, 2014 by being able and available for work. Iowa Code § 96.4-3. To be found able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). "A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required." Rule 871 IAC 24.22(2)1(a). A claimant must remain available for work on the same basis as when his base period wages were accrued. Rule 871 IAC 24.22(2)f.
As of July 17 and continuing at least through the date of the hearing the claimant had such significant physical or medical restrictions that he has not been able to demonstrate that he is as able and available for work as he was during his base period. Unemployment insurance benefits are not intended to substitute for health or disability benefits. *White v. Employment Appeal Board*, 487 N.W.2d 342 (Iowa 1992).

The next issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The employer did not employ the claimant during the claimant's base period and, therefore, the employer is not currently chargeable for any benefits that might be paid to the claimant.

Finally, 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. Iowa Code § 96.3-7. In this case, because the claimant was not adequately able and available for work after July 24, 2014 to be eligible for benefits, the claimant has received benefits but was ineligible for those benefits.

Even though those benefits were received in good faith, the overpaid benefits must be recovered in accordance with the provisions of Iowa law. The administrative law judge concludes that the claimant is overpaid benefits of $3211 pursuant to Iowa Code § 96.3-7.

DECISION:

The representative's August 25, 2014 decision (reference 02) is modified in favor of the employer. As to the July 24, 2014 permanent separation from employment, the claimant did not voluntarily quit and was not discharged for misconduct. As of July 18, 2014 the claimant is not able and available for work and is not eligible to receive unemployment insurance benefits. The employer's account is not subject to charge in the current benefit year. The claimant is overpaid benefits of $3211.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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