

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARK J HINDS

Claimant

MERCY HEALTH SERVICES-IOWA CORP

Employer

APPEAL 18A-UI-02986-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/11/18

Claimant: Respondent (1R)

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, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 2, 2018. Claimant did not register for the hearing and did not participate. Employer participated through employee relations consultant Beckie Wahlberg and director of surgical services April Leigh. Official notice was taken of the administrative record with no objection.

ISSUE:

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

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: Claimant was employed full-time as a registered nurse from May 9, 2016, and was separated from employment on February 9, 2018.

November 10, 2017, was the last day claimant performed work for the employer. After November 10, 2017, claimant could not work due to a personal injury and surgery. Claimant was not eligible for Family and Medical Leave Act (FMLA) leave at this time. Claimant requested a personal leave of absence from the employer, which the employer granted. The employer granted claimant a personal leave of absence from November 13, 2017 to December 12, 2017.

On December 12, 2017, claimant was not able to return to work for the employer from his personal leave of absence because his doctor had not released him to return to work. The employer then granted/extended claimant a second personal leave of absence from December 13, 2017 to January 10, 2018.

On January 10, 2018, claimant was not able to return to work for the employer from his personal leave of absence because his doctor had not released him to return to work. As of January 10, 2018, claimant had used twelve weeks of a personal leave of absence, including a leave of absence prior to November 10, 2017. The employer has a policy that allows employees to take twelve weeks for a personal leave of absence, but if an additional extension is not provided by the employer after the twelve weeks, the employer may post the employee's position. The policy provides that the employee will be notified that the employee's position has been posted. The policy also provides that the employee will remain an active employee and may apply for any open position once the employee is released to return to work. Claimant was aware of the employer's policy.

The employer made the decision not to grant a third personal leave of absence to claimant. On January 26, 2018, the employer mailed claimant a letter notifying him that the employer did not grant him a third extension. The employer also notified claimant that his position will be posted and he may apply for any open positions once he is released to return to work.

On February 7, 2018, claimant contacted Ms. Leigh and informed the employer he had been released to return to work with no restrictions. Claimant told Ms. Leigh he wanted to return to work.

On February 9, 2018, Ms. Leigh informed claimant that he was not on the schedule to work and his position had already been posted. Ms. Leigh told claimant he could apply for any open positions.

On February 26, 2018, the employer received a doctor's note that claimant was unable to work for six weeks (starting February 26, 2018) and he was approved for short-term disability until April 4, 2018 (approximately five weeks from February 26, 2018). On February 27, 2018, claimant applied for an open position in the OB department at the employer, which was a full-time position. This was the first position claimant had applied for a position at the employer since Ms. Leigh's communication with him on February 9, 2018. Around February 28, 2018, claimant declined to interview for the position based on his February 26, 2018 doctor's note and he withdrew his application.

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.

Iowa Code section 96.5(1)d provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

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:

(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.

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(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.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in

particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

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

"[I]nsofar 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. Empl. 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.

Iowa Code section 96.5(1)(d) specifically requires that the employee has recovered from the illness or injury. 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 he was 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. An employee's failure to return to the employer and offer services upon recovery from an injury "statutorily constitutes a voluntary quit and disqualifies an individual from unemployment insurance benefits." *Brockway v. Empl. Appeal Bd.*, 469 N.W.2d 256 (Iowa Ct. App. 1991).

Here, claimant was unable to work due to a personal injury/illness and subsequent surgery until February 7, 2018. On January 26, 2018, the employer, knowing claimant's doctor had not yet released him to return to work, notified him that it was posting his position. Under Iowa Code § 96.5(1)(d), a claimant must generally return to offer services upon recovery. On February 7, 2018, claimant notified the employer that he had been released to return to work and was ready to return to work. On February 9, 2018, the employer informed claimant that he was not on the scheduled and if he wanted to return to work, he had to apply for an open position. Since claimant offered to return to work after he was released to return to work with no restrictions, the employer did not hold his position open, and the employer informed him on February 9, 2018 he had to apply for an open position, claimant is considered to have separated from employment with good cause attributable to the employer. Benefits are allowed.

DECISION:

The February 28, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant voluntarily left the employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

REMAND: The issue of whether claimant is able to and available for work since February 26, 2018 as delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for a fact-finding interview and unemployment insurance decision.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs