IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

HASIE SELMANI Claimant **GOOD SAMARITAN SOCIETY INC** Employer	**APPEAL 17A-UI-06507-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/28/17** **Claimant: Appellant (1)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 16, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 13, 2017. Claimant participated. Employer participated through director of human resources K. D. Kalber.

Employer Exhibits 1, 2, 3, 5, 6, and 9 were admitted into the record with no objection. Employer Exhibit 4 was offered into evidence. Claimant objected to Employer Exhibit 4 because she did not understand the second page. Claimant's objection was overruled and Employer Exhibit 4 was admitted into evidence. Employer Exhibit 7 was offered into evidence. Claimant objected to Employer Exhibit 7 because she did not believe her doctor put her on the push/pull restriction that the hand written note states. Claimant's objection was overruled and Employer Exhibit 7 was admitted into evidence. Employer Exhibit 8 was offered into evidence. Claimant objected to Employer Exhibit 8 because she had a sick family member and she had to go out the country. Claimant's objection was overruled and Employer Exhibit 8 was admitted into evidence. Official notice was taken of the administrative record, including claimant's wage history, with no objection.

ISSUE:

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?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a CNA and then a dietary assistant from October 11, 2010, and was separated from employment on December 28, 2016.

On July 25, 2016, claimant provided the employer with work restrictions prohibiting her from lifting anything more that 25 to 30 pounds until further notice. Employer Exhibit 7. Claimant was

on work restrictions due to her pregnancy. Claimant was not able to perform her job duties as a CNA with her work restrictions in place. Claimant then went on an approved leave of absence from August 3, 2016 to September 15, 2016. Employer Exhibit 8.

Claimant was placed on a general leave of absence from September 16, 2016 to October 10, 2016. Employer Exhibit 6. During this time period, claimant requested light duty assignments at the employer. The employer looked for light duty assignments for claimant. On September 16, 2016, claimant and Ms. Kalber started a conversation about work she could perform when she returned to work. Claimant informed the employer during a meeting on September 16, 2016 (and again on September 20, 2016) that she could help certain residents, but she would not be able to help other residents. Claimant told the employer that she was not prepared or willing to rescue a resident whose legs gave out, which does happen on occasion at the employer, because she did not want to cause harm to her baby. The conversation continued to September 20, 2016. During the discussion on September 20, 2016, claimant expressed concern about pushing and pulling residents. The employer offered claimant the dietary assistant position. Employer Exhibits 3 and 4. Ms. Kalber met with claimant on October 10, 2016 to discuss the dietary assistant position. Employer Exhibits 3 and 4. On October 10, 2016, claimant signed an acceptance of the dietary assistant position, which included instructions that she would not have to perform job duties that would violate her work restrictions, even if someone asked her to. Employer Exhibit 3. The employer was going to modify the position as a three hour shift that would not have her performing job duties that violated her work restrictions despite the job description listing duties that would violate her work restrictions. Employer Exhibit 4. Claimant signed an acceptance of the position on October 10, 2016. Employer Exhibit 3.

As a dietary assistant, claimant was schedule to work every other weekend from 4:30 p.m. to 7:30 p.m. Claimant did not perform any work for the employer as a dietary assistant after she had accepted the position. Claimant failed to report for training on October 15 and 16, 2016. Claimant called off sick on October 22 and 23, 2016. Claimant called off sick on November 5 and 6, 2016.

On November 18, 2016, Ms. Kalber had a conversation with claimant on the phone. Ms. Kalber asked claimant if she was going to work as a dietary assistant and claimant reported no, because it would not make her happy. Claimant did not request a different position. Claimant never told Ms. Kalber that the dietary assistant would violate her work restrictions. After October 10, 2016, claimant never asked for another light duty assignment. After November 18, 2016, claimant did not ask Ms. Kalber about coming back to work. On November 19 and 20, 2016, claimant called off and the employer paid her vacation for the days. Claimant was considered absent and the absences were not approved on November 19 and 20, 2016.

The employer sent claimant a letter on December 28, 2016, because she was not reporting to work. Employer Exhibit 1. Ms. Kalber believed claimant quit because she failed to report to work as a dietary assistant and claimant informed her on November 18, 2016 that she would not work as a dietary assistant. The employer had work available for claimant as a dietary assistant. Claimant did not return to the employer to offer her services. Claimant testified her work restrictions ended in March 2017. Claimant has not provided the employer with documentation releasing her back to work with no restrictions.

The administrative record reflects that claimant does not have other full- or part-time employment in the base period.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was not discharged but voluntarily left the employment without good cause attributable to employer. Benefits are denied.

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 reviewed the exhibits submitted. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code section 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.

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.

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)).

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)).

On July 25, 2016, claimant provided the employer with work restrictions the prohibited her form lifting more than 25 to 30 pounds until further notice. Claimant then went on a leave of absence and when she returned, she agreed to a new position as a Dietary Assistant due to her work restrictions. Although the job description for a Dietary Assistant required claimant to be able to lift up to 50 pounds, the employer modified her job as a Dietary Assistant to meet her work restrictions. To make sure claimant's new position as a Dietary Assistant complied with her work restrictions, the employer had her sign an acceptance of the position that included "I understand and agree that I will not go beyond the restrictions set forth above even if anyone asks me to go beyond the restrictions." Employer Exhibit 3. Claimant also acknowledged in the agreement that she would immediately report to the employer any request for her to perform duties that would violate her work restrictions. Employer Exhibit 3. Even though claimant agreed to the modified Dietary Assistant position, she did not work any of her scheduled shifts. Furthermore, on November 18, 2016 claimant told Ms. Kalber she was not going to work as a dietary assistant because it would not make her happy. Claimant also did not request a different light duty assignment and she did not have any further communication with the employer after she told Ms. Kalber she was not going to work as dietary assistant. Finally, after claimant's work restrictions were lifted in March 2017, she did not return the employer to offer it her services. 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. Emp't Appeal Bd.*, 469 N.W.2d 256 (Iowa Ct. App. 1991).

While claimant's leaving the employment may have been based upon good personal reasons, it was not for a good-cause reason attributable to the employer according to Iowa law. Benefits must be denied.

DECISION:

The June 16, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs