

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLY K SCHWALLER
Claimant

APPEAL NO. 07A-UI-02825-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HORIZONS UNLIMITED OF PALO ALTO CO
Employer

**OC: 02/11/07 R: 01
Claimant: Respondent (1)**

Section 96.5-1-d – Voluntary Leaving/Illness or Injury
871 IAC 24.25(35) – Separation Due to Illness or Injury

STATEMENT OF THE CASE:

Horizons Unlimited of Palo Alto County (employer) appealed a representative's March 15, 2007 decision (reference 02) that concluded Kimberly K. Schwaller (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 5, 2007. The claimant participated in the hearing. Deb Hughes appeared on the employer's behalf. 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.

FINDINGS OF FACT:

The claimant started working part time for the employer on February 27, 2003. Beginning July 15, 2005, she worked full time as a residential instructor in the employer's program providing in-home daily living assistance to persons with mental disabilities. Her last day of work was May 4, 2006.

The claimant was pregnant with a due date of May 29, 2006. Due to complications, she began maternity leave early and was placed on FMLA status. Her baby was born by caesarean section May 18, 2006. The claimant's FMLA expired as of June 11, 2006. She went into the employer on June 12 with a doctor's note indicating that she could not return to work as of June 28 but then with restrictions which would not have allowed her to completely return to her prior work duties. The employer indicated that since she had not fully recovered to be able to return to her regular duties by the end of her leave, her employment was considered ended, but told her that she should contact the employer to seek to return to work when she was fully recovered so that she could return to her full duties.

On July 12, 2006, the claimant did recontact the employer and applied to return to her full duties; the employer did not question the claimant's release, but accepted that she was fully recovered. The employer did not respond to the claimant until July 25, when Ms. Hughes, the residential director, left a message on a phone number she had for the claimant seeking to schedule an interview appointment. The claimant did not get that message until early August, as she no longer lived at the residence which Ms. Hughes had called. When she returned the

call August 5 or August 6, Ms. Hughes had already filled the initial position. The employer did not subsequently contact the claimant with any other openings for the claimant to return to her prior position.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant voluntarily quit, and if so, whether it was for good cause attributable to the employer.

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.

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 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.

A "recovery" under Iowa Code section 96.5-1-d means a complete recovery without restriction. Hedges v. Iowa Department of Job Service, 368 N.W.2d 862 (Iowa App. 1985). While the claimant did not present a formal doctor's release to return without restriction, when the claimant

reapplied for her job in response to the employer's instruction that she do so when she was able to return without restriction, the employer accepted that claimant had been released to return to full work duties. The claimant did seek to return to work with the employer as of July 12, 2006, but her position was not available to her. Accordingly, the separation is with good cause attributable to the employer and benefits are allowed.

DECISION:

The representative's March 15, 2007 decision (reference 02) is affirmed. The claimant voluntarily left her employment with good cause attributable to the employer. Benefits are allowed, if the claimant is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw