

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DEBRA K ANDERSON**

Claimant

**APPEAL NO. 07A-UI-08234-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IA DEPT OF PUBLIC DEFENSE**

Employer

**OC: 05/20/07 R: 02  
Claimant: Appellant (1)**

Section 96.5(1) – Voluntary Quit  
Section 96.4(3) – Able & Available

**STATEMENT OF THE CASE:**

Debra Anderson filed a timely appeal from the August 27, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was commenced on September 12, 2007 and concluded on September 26, 2007. Ms. Anderson participated on both dates. On September 12, Robert Winn of TALX UC eXpress represented the employer and presented testimony through Richard Scheuermann, Plant Operations Manager, and Human Resource Officer Cheryl Munson. The administrative law judge took official notice of documents that were submitted in connection with the fact-finding interview and contained in the Agency's administrative file.

The record was reopened to address the additional issue of whether the employer's protest was timely. On September 26, Toni McColl, Chicago Claims Manager for TALX UC eXpress, represented the employer. Exhibit One and Department Exhibit D-1 were received into evidence.

**ISSUES:**

Whether the claimant voluntarily quit or was discharged from the employment. The administrative law judge concludes that the claimant voluntarily quit by failing to return at the end of an approved leave of absence.

Whether the voluntary quit was for good cause attributable to the employer.

Whether the claimant has been able to work and available for work since establishing her claim for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Debra Anderson commenced her employment with the Iowa Department of Public Defense in December 22, 2005 and performed work as a full-time custodial worker until March 14, 2007. Though Plant Operation Manager Rick Scheuermann was Ms. Anderson's supervisor,

Mr. Scheuerman assigned a lead worker, Tim, to directly monitor the quality and quantity of work performed by Ms. Anderson. Ms. Anderson consistently performed basic cleaning tasks in a substandard fashion. Ms. Anderson felt attacked by the lead worker when the lead worker pointed out problems with cleaning tasks Ms. Anderson had performed poorly or omitted entirely.

Ms. Anderson has a history of suicidal gestures and related hospitalizations.

On March 9, 2007, Ms. Anderson met with Katherine Bremer, L.I.S.W., Clinical Social Worker at Mercy Psychiatric Services in Des Moines. In connection with that appointment, Ms. Bremer prepared a memo that read as follows:

To Whom It May Concern:

After having evaluated Debra Anderson on 3/9/07, I would recommend that she pursue short-term disability employment options due to difficulty with depression and anxiety related to work stressors and work environment.

When Mr. Scheuermann received the memo from Ms. Anderson, he forwarded it to the employer human resources personnel. Mr. Scheuermann asked Ms. Anderson to obtain additional documentation from her doctor.

On March 14, Ms. Anderson met with Psychiatrist Scott Easton, M.D. Dr. Easton had been treating Ms. Anderson since August 2004. In connection with March 14 appointment, Dr. Easton prepared a handwritten memo on a prescription pad that read as follows:

Medical leave 3/14/07  
4/15/07, will be reassessed

Ms. Anderson provided the employer with the note from Dr. Easton on March 14. Ms. Anderson then commenced an approved absence. On April 2, Ms. Anderson submitted a written request for medical leave without pay. On April 3, Mr. Scheuermann sent Ms. Anderson a letter indicating that the employer wanted a second opinion before it approved an extended leave of absence.

On April 10, 2007, at the request of the employer, Ms. Anderson met with Philip Ascherman, Ph.D., Licensed Psychologist, for a one-hour evaluation. Dr. Ascherman prepared a three-page report in connection with the evaluation. The report was based largely on Ms. Anderson's self-report of her mental health history and current symptoms. Ms. Anderson reported that she had twice attempted suicide and been hospitalized prior to her employment with the Iowa Department of Public Defense. Ms. Anderson reported that the suicide attempts had occurred in connection with work-related stress. Ms. Anderson reported that she would kill herself if she had to return to her custodial work or was fired from the employment. Ms. Anderson reported that she was taking Effexor 225 mg. and Zyprexa, a medication used to treat bipolar disorder and schizophrenia. Ms. Anderson provided Dr. Ascherman with "disability papers" prepared by Dr. Easton, who had been treating Ms. Anderson since August 2004. In Dr. Ascherman's report, he commented on Dr. Easton's assessment of Ms. Anderson as follows:

The form completed by the attending physician indicated diagnoses of Major Depression, Severe, and Rule Out Schizoaffective Disorder. The physician also indicated that the nature of the medical impairment/limitation included depression, anxiety, decreased concentration, decreased memory, increased irritability, fatigue and

anhedonia. He concluded that the patient “should not be working due to overall decline in cognitive functioning and inability to think clearly.” After the forms were reviewed, the patient was asked [by Dr. Ascherman] about any history of hallucinations or delusions, and she denied any symptoms. As such, Schizoaffective Disorder is contraindicated. The patient denied any feelings of anxiety unless she goes to work. She denied difficulties with concentration or memory, and brief cognitive testing did not support those symptoms. The patient denied irritability, fatigue, or anhedonia. There was no evidence to support that the patient had a decline in cognitive functioning.

Based on the one-hour assessment, Dr. Ascherman concluded as follows:

In my opinion, the patient’s presentation supports a diagnosis of Depressive Disorder NOS. As previously indicated she does not meet full criteria for a diagnosis of Major Depressive Disorder. Symptoms are certainly not severe, although it is possible that they improved with the medication change. She does not have a psychotic disorder or an anxiety disorder. Her presentation suggests a significant passive aggressive personality trait. She reports that she is depressed only when she thinks about going back to her job, and she is making a threat of suicide only if she is forced to return or if she is fired. She claims that she is entirely capable of doing clerical work, and in the absence of any medical conditions, she can also be presumed to be capable of doing her current janitorial duties. At this point, I do not believe that she meets criteria for Family Medical Leave. At the same time, she has a history of two previous suicide attempts, apparently related to her dissatisfaction with previous employment, and it would be reasonable to assume that she would make another suicidal display if she is mandated to return to work. As such, it may be in her employer’s best interest to allow her FMLA to expire and she can seek other employment. If, in the interim, she decides to return to work, it would be appropriate to ask her for documentation indicating that her reported symptoms have remitted, and that there is no foreseeable threat to herself or others.

On April 13, Ms. Anderson was seen by Dr. Eastin. On August 18, Dr. Easton drafted a letter to Mr. Scheuermann that read as follows:

Debra has been a patient of mine since August 2004, and she was seen 4/13/2007 most recently. She has a diagnosis of depression, and in the past has had severe exacerbations requiring hospitalization. Increased stress appears to lead to worsening depression, and currently she feels she cannot return to her most recent position due to stress and perceived conflict with her supervisor or lead-worker. Although her symptoms are now relatively well controlled, while off work on medical leave, I am concerned that returning to that position will very likely lead to worsening of her depressive symptoms. If it is possible for her to transfer to a different position I would strongly support that.

When Mr. Scheuermann received the April 18 letter from Dr. Eastin, he forwarded the letter to the Iowa Department of Personnel and to the Iowa Department of Public Defense human resources personnel. The employer approved a 12-week leave under the Family and Medical Leave Act (FMLA) and backdated the start date of the leave to March 14, 2007. Based on advice received from human resources staff, Mr. Scheuermann intended to allow Ms. Easton to continue on FMLA leave status until she indicated she wanted to return to work or apply for a transfer, or until the FMLA expired. The FMLA leave would expire on June 5, 2007.

On May 17, the employer mailed a certified letter to Ms. Anderson. Ms. Anderson signed for the letter on or about May 23. The letter, prepared by Human Resource Officer Michael Staebler, read as follows:

This is to inform you that on June 5, 2007, you will exhaust your FMLA leave of 12 weeks (480 hours) for the current fiscal year. Your accrued vacation and sick leave are exhausted.

On April 2, 2007 you requested a 90 day medical leave without pay per the AFSCME bargaining contract. This leave was made effective March 26, 2007 following exhaustion of all your leave. The medical leave without pay will expire on June 21, 2007.

Per the AFSCME bargaining contract, extensions may be granted for up to 90 day increments not to exceed a total of one year. You must request any such extension of leave within fourteen (14) calendar days of your receipt of this notice.

You will be expected to return to work on June 22, 2007. Failure to report to work will result in abandonment of your position as Custodial Worker with the Department of Public Defense, and you will be removed from the State of Iowa payroll.

Ms. Anderson did not respond to the May 17 letter. Ms. Anderson had established a claim for unemployment insurance benefits that was effective May 20, 2007. Ms. Anderson continued to receive unemployment insurance benefits until August 18, 2007.

On June 28, 2007, Human Resource Officer Michael Staebler sent Ms. Anderson another certified letter, which Ms. Anderson signed for on July 10. The letter read as follows:

This letter is to inform you that as of 27 June 2007 you have been absent from work without authorization for a period of more than three consecutive workdays. You were expected to return to work on 22 June 2007, following the expiration of your authorized medical leave without pay.

According to Iowa Department of Administrative Services – Human Resources Enterprise rules, employees who are absent from duty for three consecutive workdays without authorization from the appointing authority are considered to have voluntarily terminated their employment.

If you fail to report to work within two workdays following your receipt of this notification, you will be considered to have voluntarily resigned from employment, and you will be removed from the payroll. If you feel there are extenuating circumstances that need to be considered, contact Cheryl Munson, 252-4689 or myself, 252-4279 immediately.

Ms. Anderson did not respond to the June 28 letter.

#### **REASONING AND CONCLUSIONS OF LAW:**

The administrative law judge has considered the issue of whether the employer's protest was timely and concludes that the issue is moot, since the employer had initially challenged Ms. Anderson's availability for work while she was on leave and Ms. Anderson was obliged to demonstrate her work availability to Iowa Workforce Development regardless of whether the employer submitted a protest. See Iowa Code sections 96.6(2) and 96.4(3). In addition, the administrative file indicates that the employer protested liability in connection with the separation

from the employment as soon as it became aware that benefits had been assessed against its account. See Iowa Code section 96.7(2)(a)(6).

Iowa Code section 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".

871 IAC 24.22(1)a and (2) provide:

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.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Pursuant to Workforce Development rule 871 IAC 24.23, the following are reasons for a claimant being disqualified for being unavailable for work:

24.23(1) An individual who is ill and presently not able to perform work due to illness.

24.23(6) If an individual has a medical report on file submitted by a physician, stating such individual is not presently able to work.

24.23(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

24.23(19) Availability for work is unduly limited because the claimant is not willing to accept work in such claimant's usual occupation and has failed to establish what other types of work that can and will be performed at the wages most commonly paid in the claimant's locality.

24.23(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

The greater weight of the evidence indicates that the claimant was on an approved medical leave of absence at the time she established her claim for benefits and continued on the approved leave of absence until June 22. The evidence indicates that Ms. Anderson was under the care of a doctor at the time she commenced her leave of absence and was never been released to return to work. The evidence further indicates that Ms. Anderson has not been willing to work in her usual occupation since establishing her claim for benefits. Though Ms. Anderson identified clerical work as an additional field for which she is qualified, and though Ms. Anderson had the ability to pursue such work through her employer, Ms. Anderson in fact took no steps to pursue such work. The greater weight of the evidence indicates that Ms. Anderson had not been available for work since establishing her claim for unemployment insurance benefits. Accordingly, Ms. Anderson had been ineligible for benefits since May 20, 2007.

Iowa Code section 96.5-1 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.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

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. 871 IAC 24.22(2)(j). If at the end of a period of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits. 871 IAC 24.22(2)(j)(1). On the other hand, if the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit. 871 IAC 24.22(j)(2).

The greater weight of the evidence indicates that Ms. Anderson was on an approved leave of absence until June 22, 2007. Accordingly, Ms. Anderson is deemed to have been voluntarily unemployed until June 22 and ineligible for unemployment benefits for the period of May 20,

2007 to June 22, 2007. The greater weight of the evidence indicates that Ms. Anderson failed to return to the employment or otherwise make meaningful contact with the employer after she was approved for an FMLA leave of absence. Accordingly, Ms. Anderson is deemed to have voluntarily quit effective June 22, 2007.

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.

Pursuant to Workforce Development rule 871 IAC 24.25(35), the following reason for a voluntary quit shall be presumed to be without good cause attributable to the employer:

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 evidence in the record indicates that Ms. Anderson voluntarily quit the employment due to a non-work-related mental health disorder. The evidence is sufficient to show that the separation from the custodial position was recommended by a licensed and practicing physician, Dr. Eastin. However, the evidence indicates that Ms. Anderson was never deemed to have fully recovered, was never released to return to the employment, and never attempted to return to the employment.

Ms. Anderson is disqualified for unemployment insurance benefits until she fulfills the requirements referenced in 871 IAC 24.25(35), above, or until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Anderson.

#### **DECISION:**

The Agency representative's August 27, 2007, reference 01, decision is affirmed. The claimant voluntarily quit the employment without good cause attributable to the employer. The claimant is disqualified for benefits until she (1) fully recovers so that she can perform all of the duties of her previous employment, (2) obtains certification of release for work from a licensed and practicing physician, and (3) returns to the employer and offer services upon recovery and certification for work by a licensed and practicing physician. The claimant is otherwise

disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged.

The claimant has not been available for work since establishing her claim for benefits and, therefore, has been ineligible for benefits since May 20, 2007.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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