IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARK A LEE
Claimant

IOC SERVICES LLC
Employer

APPEAL NO. 09A-UI-16693-VS

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/27/09
Claimant: Appellant (2)

Section 96.5-1 – Voluntary Quit
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated October 28, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on March 3, 2010, in Dubuque, Iowa. Claimant participated. Employer participated by Mike Benzing, gaming manager; Mark Witter, human resources manager; and Rachel Morrissey, risk and benefits manager. The record consists of the testimony of Mark Witter; the testimony of Rachel Morrissey; the testimony of Mike Benzing; the testimony of Mark Lee; Claimant's Exhibits A-I; and Employer's Exhibits 1-2.

ISSUES:

Whether the claimant voluntarily left for good cause attributable to the employer; and
Whether the claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is the Lady Luck Casino located in Marquette, Iowa. The claimant is a dealer and has worked for the employer since April 3, 1995. On July 19, 2009, the claimant had a non-work-related injury to his left knee. The claimant was unable to work until September 11, 2009. On September 11, 2009, the claimant was released to return to work. The only restriction he had was that he could only work from four to six hours a day. The employer did not accommodate these restrictions.

The claimant was placed on Family Medical Leave (FMLA), which expired on October 6, 2009. The claimant was a valued employee and so additional leave was given by the employer from October 7, 2009, to November 6, 2009. The claimant was still not fully released and so the claimant's employment was terminated on November 7, 2009. The restrictions were lifted on January 18, 2010, and the claimant returned to work for the employer on February 2, 2010. The claimant was able to do all the requirements of his job from September 11, 2009, with the

exception of being able to work more than a six-hour shift. The claimant was capable of doing sit down work as well.

REASONING AND CONCLUSIONS OF LAW:

The first issue presented in this case is the nature of the claimant's separation. Iowa law states that if a claimant meets the eligibility requirements of Iowa Code section 96.4, he or she can received benefits unless they are disqualified by Iowa Code section 96.5, If an eligible claimant is separated from employment in a way that cannot be characterized either as a termination or a voluntary quit, then, absent some special provision the claimant will not be disqualified from benefits. Stated another way, if the claimant does not quit, he cannot be disqualified because of a voluntary quit and if the claimant is not terminated, he cannot be disqualified because of a termination for misconduct.

In this case, the claimant was able to return to work with restrictions on September 11, 2009 and presented that release to return to work to the employer. The employer had no work for the claimant with the restriction. The claimant was willing to work with this restriction and the employer did keep a spot open for the claimant, even after expiration of the claimant's FMLA leave. However, the employer eventually removed the claimant from his employment. The question becomes whether the claimant quit or was terminated.

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.

"[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." FLC Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990), accord Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992). Since the employer has the burden of proving disqualification the employer has the burden of proving that a quit rather than a discharge has taken place. Iowa Code section 96.6(2); 871 IAC 24.25. On the issue of whether a quit is for good cause attributable to the employer, claimant has the burden of proof. Iowa Code section 96.6(2).

The evidence in this case established that the claimant did not quit his job. He went on leave and even while on leave was still an employee of the employer. He never intended to quit his job. He wanted to work and felt that there were part time jobs at the employer that he could do even with his restriction. The separation only occurred when the employer insisted upon a full release to return to work and the claimant was unable to provide it. This is not a quit. Even if the evidence is interpreted in a way most favorable to the employer, the highest level to which the evidence arises is that there was an "other separation, that is the parties mutually decided to sever the employment relationship because the claimant had not obtained a full release and therefore failed "to meet the physical standards required." 871 IAC 24.1) This is not a disqualifying quit nor a disqualifying termination. There is no showing of misconduct in this case and therefore the claimant cannot be disqualified due to termination.

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 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.

In this case, even though the treating physician released the claimant to return to work, with restrictions, the claimant has established the ability to work. Because the employer had no work available or was not willing to accommodate the work restrictions, benefits are allowed.

DECISION:

The decision of the representative dated October 28, 2009, reference 01, is reversed. The claimant was able and available for work effective September 27, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

_____
Decision Dated and Mailed

vls/pjs