

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BARBARA J STUKERJURGEN
Claimant

APPEAL NO. 17A-UI-04608-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADVANCE SERVICES INC
Employer

OC: 12/04/16
Claimant: Respondent (5)

Iowa Administrative Code rule 871-24.22(2)(j) – End of Leave of Absence

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 27, 2017, reference 02, decision that allowed benefits to claimant Barbara Stukerjurgan provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that Ms. Stukerjurgan had left work due to illness or injury, had recovered and returned to the employer, but that no work was available. After due notice was issued, a hearing was held on May 25, 2017. Ms. Stukerjurgan was not available at the telephone number she registered for the hearing and did not participate. Steve Volle, Risk Management, represented the employer and presented additional testimony through Kellene Wheeler, Office Assistant. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 6 into evidence. The administrative law judge took official notice of the fact-finding documents for the limited purpose of documenting the employer's participation in the fact-finding interview.

ISSUE:

Whether Ms. Stukerjurgan separated from the employment for a reason that disqualifies her for benefits or that relieves the employer of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Advance Services, Inc. (ASI) is a temporary employment agency. Barbara Stukerjurgan applied for work with ASI on January 19, 2017. At that time, ASI had Ms. Stukerjurgan electronically sign a policy statement document that included the ASI Assignment Policy and the ASI End of Assignment Policy. ASI did not give Ms. Stukerjurgan a copy of the document that she had electronically signed. Instead, ASI had several employee policy packets sitting out on a counter and invited Ms. Stukerjurgan to take one of the packets if she liked. The packets contained in an unsigned copy of the above-referenced policy statement document along with pages of other employment-related materials. ASI office staff knows that most applicants will not take a copy of the packet from the counter and that those applicants will leave the ASI office without a copy of the ASI Assignment Policy and the ASI End of Assignment Policy.

On January 20, 2017, Ms. Stukerjurgan commenced a full-time temporary work assignment at Jabil, a plastic container manufacturer. The work hours in the assignment were 7:45p.m. to 8:00 a.m. The work days rotated. Ms. Stukerjurgan's work duties at Jabil could include working on any one of 24 production lines. On the evening of February 23, 2017, Ms. Stukerjurgan left early from her shift that was to end at 8:00 a.m. on Friday, February 24, 2017. Before Ms. Stukerjurgan left, she notified her supervisor of her need to leave work early due to back pain. On the morning of February 24, Kellene Wheeler, ASI Office Assistant, received an email message from a human resources representative at Jabil. The Jabil representative asked Ms. Wheeler to follow up with Ms. Stukerjurgan. Ms. Wheeler then spoke with Ms. Stukerjurgan that morning by telephone. Ms. Stukerjurgan explained that she had begun to experience back pain during her shift the night before the last, took an over-the-counter pain medication when she got home, returned to work the next night, and soon began to experience back pain. Ms. Stukerjurgan told Ms. Wheeler that she had notified the supervisor at 10:15 p.m. on February 23 that she would need to leave work due to the pain. Ms. Wheeler directed Ms. Stukerjurgan to report to the ASI office to complete paperwork regarding her work-related back pain. Ms. Stukerjurgan complied.

On February 24, 2017, Ms. Wheeler arranged for Ms. Stukerjurgan to be evaluated by a medical doctor chosen by the employer. The doctor completed an ASI Return to Work Form. The form released Ms. Stukerjurgan to return to work on February 24, 2017, but restricted her from lifting or carrying more than five pounds on a frequent basis and from lifting or carrying more than 25 pounds. The doctor restricted Ms. Stukerjurgan from reaching. The doctor placed no restrictions on Ms. Stukerjurgan's ability to stand, walk or sit. The doctor indicated on the form that the restrictions would be in place until Ms. Stukerjurgan was reevaluated in a week.

Ms. Stukerjurgan returned to ASI on February 24, 2017, and waited while Ms. Wheeler contacted the Jabil human resources director to see whether Jabil had any work that would fit Ms. Stukerjurgan's medical restrictions. The Jabil human resources director notified Ms. Wheeler that Jabil had no such work. Ms. Wheeler then offered Ms. Stukerjurgan a light-duty assignment at the ASI office. Ms. Wheeler indicated that the work would include "filing, cleaning, listening to [competitors'] radio ads, and walking [with a] now hiring sign." Ms. Stukerjurgan signed a Modified Duty Offer to indicate her acceptance of the light-duty assignment. The offer document set forth the work hours as 8:30 a.m. to 5:00 p.m., Monday through Friday and set the pay at \$11.10 per hour. The wage was the same wage Ms. Stukerjurgan received at Jabil. At the time Ms. Stukerjurgan and Ms. Wheeler executed the light-duty assignment agreement, they did so under the mutual understanding that Ms. Stukerjurgan would be unable to return to the assignment at Jabil for a week.

Ms. Stukerjurgan began the light-duty assignment on Monday, February 27, 2017 as directed. On that day, Ms. Wheeler had Ms. Stukerjurgan listen to local radio stations for ASI competitors' advertising. When Ms. Stukerjurgan returned on February 28, Ms. Wheeler directed her to walk downtown with the ASI "now hiring" sign. The sign contained the ASI phone number. The sign is a corrugated plastic sign the size of a political yard sign. Ms. Wheeler told Ms. Stukerjurgan that she could sit when she got tired of walking. Ms. Stukerjurgan walked around carrying the "now hiring" sign for a few hours and then notified Ms. Wheeler that she no longer wanted to walk with the sign. Ms. Wheeler told Ms. Stukerjurgan that the work was within the light-duty parameters set by the doctor. Ms. Stukerjurgan reiterated that she no longer wanted to perform the work. though the modified duty agreement included filing, cleaning, listening to competitors radio ads as other duties to which Ms. Stukerjurgan could be assigned, Ms. Wheeler elected not to offer such duties at that time,. Ms. Stukerjurgan elected to go off work, rather than continue to walk and carry the now hiring sign.

On March 8, 2017, Ms. Stukerjurgan returned to the doctor for reevaluation of her medical condition. At that time, the doctor completed an Attending Physician's Report that diagnosed Ms. Stukerjurgan with a work-related right scapula strain. The doctor referred Ms. Stukerjurgan for physical therapy. The doctor released Ms. Stukerjurgan to "continue light work" effective March 8, 2017 and indicated Ms. Stukerjurgan would be reevaluated in two weeks. Ms. Stukerjurgan promptly provided Ms. Wheeler with a copy of the doctor's report.

On March 22, 2017, Ms. Stukerjurgan returned to the doctor for reevaluation of her medical condition. At that time, the doctor completed an Attending Physician's Report that diagnosed Ms. Stukerjurgan with a work-related thoracic muscle strain. The doctor indicated that Ms. Stukerjurgan should continue physical therapy and use heat and Advil for pain. The doctor released Ms. Stukerjurgan to "continue light work" effective March 22, 2017 and indicated Ms. Stukerjurgan would be reevaluated in two weeks. Ms. Stukerjurgan promptly provided Ms. Wheeler with a copy of the doctor's report. Ms. Wheeler directed Ms. Stukerjurgan to stop by after the next doctor's appointment. Ms. Wheeler told Ms. Stukerjurgan that if the doctor released Ms. Stukerjurgan to return to work without restrictions, Ms. Wheeler would need that specific document.

On April 5, 2017, Ms. Stukerjurgan returned to the doctor for reevaluation of her medical condition. At that time, the doctor released Ms. Stukerjurgan to return to regular duty without restrictions. Ms. Stukerjurgan promptly provided Ms. Wheeler with a copy of the medical release and asked if she could return to work at Jabil. Ms. Wheeler told Ms. Stukerjurgan that she would have to check with Jabil. Ms. Wheeler directed Ms. Stukerjurgan to stop by first thing the following morning if Ms. Stukerjurgan had not heard from Ms. Wheeler. When Ms. Stukerjurgan stopped in to the ASI office on the morning of April 6, 2017, Ms. Wheeler told Ms. Stukerjurgan that Jabil did not have any work for her. Ms. Wheeler asserts that Jabil elected not to allow Ms. Stukerjurgan to return to the assignment at Jabil because Ms. Stukerjurgan had refused to continue in the modified duty assignment at ASI. Ms. Wheeler told Ms. Stukerjurgan that ASI had no other work for her at that time.

REASONING AND CONCLUSIONS OF LAW:

Workforce Development rule 871 IAC 24.1(113) provides as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

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.

The employer views this case as a run-of-the-mill failure to complete a temporary work assignment and/or voluntary quit from a temporary work assignment, but the facts in evidence indicate something quite different from that was happening in the employment relationship. The weight of the evidence indicates that Ms. Stukerjurgan was compelled to separate from the temporary work assignment with Jabil on February 24, 2017, when Jabil declined to provide work for Ms. Stukerjurgan that met her temporary medical restrictions that arose from a work-related injury. The employment relationship with ASI continued at that time.

On February 24, Ms. Stukerjurgan and ASI entered into a "Modified Duty" agreement with the mutual understanding that Ms. Stukerjurgan would need light-duty work for a week and presumably would be released to return to regular work. On the first day in the light-duty assignment, the employer provided Ms. Stukerjurgan with sedentary work listening to competitors' radio advertizing. The employment relationship took a turn the next day, when Ms. Wheeler assigned Ms. Stukerjurgan to walk downtown carrying the "now hiring" sign. Apparently, Ms. Stukerjurgan was supposed to continue walking with the sign all day except for required rest periods. Ms. Wheeler testified that Ms. Stukerjurgan walked with the sign for a few hours. A reasonable person would seriously question whether the physician intended to release Ms. Stukerjurgan to work that required her to walk all day with a sore, injured back. After Ms. Stukerjurgan had walked with the sign for a few hours, she reported back to Ms. Wheeler and indicated that she was no longer willing to do that work, meaning no longer willing to walk downtown with the sign for hours on end. Rather than provide Ms. Stukerjurgan with one the other three categories of work set forth in Modified Duty Offer, Ms. Wheeler elected to treat the matter as Ms. Stukerjurgan refusing to continue in the stop-gap light-duty assignment. There is no indication in the record that Ms. Stukerjurgan or that Ms. Wheeler at the time interpreted the situation as Ms. Stukerjurgan voluntarily quitting ASI. Rather, there is every indication that both parties thereafter treated time off as an approved, unpaid leave of absence, while they waited for the doctor to release Ms. Stukerjurgan to return to work at Jabil. Ms. Wheeler continued to require updates in connection with medical appointments. Ms. Stukerjurgan continued to provide the medical updates. The conduct of both parties between February 28 and April 5 is consistent with a leave of absence and inconsistent with a purported February 28, 2017 voluntary quit.

The separation from ASI occurred on April 5, 2017, when Ms. Stukerjurgan complied with the directive to present a medical note releasing her to return to regular work. The leave of absence ended at that time because Ms. Stukerjurgan had been released to return to work. However, ASI did not provide Ms. Stukerjurgan with work at that time. This situation is addressed and governed by Iowa Administrative Code rule 871-24.22(2)(j) as follows:

Iowa Admin. Code r. 871-24.22(2)(j)(1)(2)(3) provides:

Benefit 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.

j. Leave of absence. 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.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) 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 and therefore is ineligible for benefits.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

The weight of the evidence establishes that Ms. Stukerjurgan was laid off effective April 5, 2017, when the employer failed to make work available at the end of a requested and approved leave of absence. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The April 27, 2017, reference 02, decision is modified as follows. The claimant was laid off effective April 5, 2017, when the employer failed to make work available at the end of a requested and approved leave of absence. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs