

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARIA E ORELLANA**  
Claimant

**APPEAL NO. 08A-UI-01994-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KIMCO CORPORATION**  
Employer

**OC: 01/13/08 R: 02**  
**Claimant: Respondent (2)**

Iowa Code § 96.5(1)d – Voluntary Leaving/Illness or Injury  
Iowa Code § 96.4(3) – Able and Available  
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 22, 2008, reference 02, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on March 27, 2008. Claimant participated through interpreter Sara Gardner. Employer participated through Kim Kramer.

**ISSUE:**

The issue is whether claimant quit the employment without good cause attributable to the employer, if she is able to and available for work effective January 13, 2008 and whether she is overpaid benefits as a result.

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a part time porter (custodian) from January 22, 2007 until March 12, 2008 when she quit. Her last day of work was December 24 or 26, 2007 because of complications of an injury to her foot in August 2006 with a former employer. Employer's March 3 letter notified her if she failed to present Family Medical Leave Act (FMLA) paperwork or return to work by March 12 she would be considered to have voluntarily quit. She failed to do either. While the letter was in English, an interpreter with the company spoke with her to explain the contents. Claimant argues she is able to work her regular four-hour shift but has not obtained a medical release from her physician for either employer or Iowa Workforce Development (IWD). Employer will allow her to return to work upon submission of a medical release to work her regular shift and duties.

The claimant has received unemployment benefits since filing a claim with an effective date of January 13, 2008.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work and quit her employment without good cause attributable to the employer.

Iowa Code § 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.

871 IAC 24.23(35) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

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

Iowa Code § 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 § 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 § 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.

Inasmuch as the medical condition was not work-related and the treating physician has not released the claimant to return to work with or without restriction, the claimant has not established her ability to work. Employer is not obligated to accommodate a non-work-related medical condition, thus until claimant is released to perform her full work duties, she is not considered able to or available for work. Claimant's failure to provide the requested medical information to employer by the reasonable deadline or alternatively return to work renders her separation without good cause attributable to the employer and benefits must be denied.

The administrative law judge further concludes claimant has been overpaid benefits.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying and she is not considered able to work, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The February 22, 2008, reference 02, decision is reversed. Claimant's separation was without good cause attributable to the employer and she has not established her ability to or availability for work. Benefits are withheld until such time as claimant works in and has been paid wages equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,206.00.

The claimant is urged to obtain a medical release to work her regular job and hours with this employer when medically prudent and provide such release to this employer, which is willing to employ her again upon receipt of that release.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs