IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TAWNY M. GROTE
Claimant

MENARD INC
Employer

APPEAL NO. 09A-UI-17604-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/25/09
Claimant: Respondent (2R)

Section 96.5-1 – Voluntary Quit
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated November 17, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 4, 2010. Claimant participated. The claimant was represented by John W. Kocourek, attorney at law. Employer participated by Ed Kohanek, maintenance manager; Bob Rankin, assistant general manager; and Mike Plautz, second shift manager. The record consists of the testimony of Tawny Grote; the testimony of Ed Kohanek; the testimony of Bob Rankin; and the testimony of Mike Plautz.

ISSUE:

Whether the claimant voluntarily left for good cause attributable to the employer.

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 a distribution center located in Shelby, Iowa. The claimant was hired as a general laborer on September 18, 2008. The claimant was scheduled to work on the second shift, which ran from 3:30 p.m. to 12:00 a.m. The claimant worked 40 hours a week. Although her job title was general laborer, she was assigned to janitorial and housekeeping duties.

The claimant had severe osteoarthritis in her right knee that was aggravated by two non-work-related incidents. Her physician restricted her to six hours of work per day in a note dated July 24, 2009. Although the claimant's right knee problem was not work related, the employer accommodated those restrictions. The claimant's physician initially believed that if the claimant worked only six hours a day, she could build up the strength in her knee so that she could return to an eight-hour per shift day. After the initial period of lesser hours, the claimant did try to return to an eight-hour day and was unable to do so due to pain. The claimant's physician then continued the restriction of working only six hours a day.

The employer had a policy that full-time pay with benefits required an employee to work eight hours a day for 40 hours a week. If an individual could not work full-time hours, part-time status was available. A part-time employee could have a flexible schedule but at a lesser rate of pay and no benefits. In an effort to help the claimant, however, the employer continued to let her work six hours a day and retain her full-time status. The mutual hope was that the claimant could return to her full duty status and work the required hours.

On October 14, 2009, the claimant's right knee became so painful that she could not walk. The employer asked if she would like to be taken to the hospital or go home. She elected to go home. The employer took her home. The claimant saw her physician, who took her off work completely with a tentative release on October 30, 2009. The employer realized that some decisions needed to be made and a meeting was scheduled with the claimant on October 23, 2009.

At the meeting on October 23, 2009, it was explained to the claimant that in order to continue to receive the full-time rate of pay, that she needed to be able to work a full-time schedule. Four options were presented to the claimant: 1. Return to work at a full-time schedule; 2. Take full or intermittent Family Medical Leave (FMLA); 3. Go to part time status; or 4. Resign. The claimant elected to resign. Her resignation was effective October 23, 2009.

REASONING AND CONCLUSIONS OF LAW:

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.

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;
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> (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 quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). 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 evidence in this case established that the claimant had a non-work-related condition in her right knee that caused severe pain. Because of this right knee problem, the claimant's physician restricted her to work only six hours a day. The claimant's physician and the claimant hoped that if she worked less hours for a few weeks, and was able to build up the strength in her knee, that she would be able to tolerate her regular work schedule. That never happened. The claimant's right knee pain persisted and in turn, the restriction on hours continued. On October 14, 2009, severe pain prevented the claimant from even walking and she was taken off work entirely.

The employer had attempted to work with the claimant's restrictions for at least three months. During that time she was permitted to work only six hours a day and keep her rate of pay and benefits as if she was a full-time employee. When she was taken off work entirely on October 14, 2009, the employer requested a meeting with the claimant to discuss her options as the employer could no longer continue with the arrangement that had been in place previously. The claimant was given four different options, three of which would have permitted her to keep her job. She elected to resign. She was under the impression that she would be granted unemployment insurance benefits if she did so. The reason she resigned was that she could not work full time due to the condition in her knee.

Although the claimant may have desired to keep working, she only wanted to work for the employer if she could have her full-time pay and benefits and only work six hours a day. This was an option only if she went on intermittent FMLA leave. The claimant had a non-work-related condition that prevented her from working full time. The employer's policy was that in order to obtain full-time benefits and pay, an individual had to work full time. The claimant was offered part time work as well, but she did not want the reduction in pay or benefits. Despite her professed desire to keep working, the option she selected was a voluntary resignation, even though resignation would not offer her the benefits and pay she wanted and would not preserve her option to return to full-time duty at a future date if her knee condition improved.

After carefully considering all of the evidence in this case, the administrative law judge concludes that the claimant voluntarily quit her job without good cause attributable to the employer. Accordingly, benefits are denied.

The next issue is overpayment of benefits. Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

This matter is remanded to the claims section for the determination of any overpayment.

DECISION:

The decision of the representative dated November 17, 2009, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. This matter is remanded to the claims section for the determination of any overpayment.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs