IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

HALEY J POE
1304 ROLLING MEADOWS
MARSHALLTOWN IA 50158

THEISENS INC
4949 CHAVENELLE RD
DUBUQUE IA 52002-2630

Appeal Number: 05A-UI-11582-JTT
OC: 10/16/05 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

871 IAC 24.1(113) – Other Separations
Section 96.4(3) – Able and Available

STATEMENT OF THE CASE:

Claimant Haley Poe filed a timely appeal from the November 4, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 15, 2005. Ms. Poe participated and presented additional testimony through her mother, Betty Poe. Director of Human Resources Cindy Burdt represented the employer and presented additional testimony through Store Manager Rod Lorenzen. Exhibits A through F were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On April 21, 2005, Haley Poe commenced working as a part-time cashier at the Theisen's store in

Marshalltown. On August 25, 2005, Ms. Poe commenced an approved leave of absence due to complications associated with her pregnancy. On August 25, Ms. Poe had come to work and was experiencing swelling in her legs that a coworker identified as indicating a possible blood clot. A coworker alerted Store Manager Rod Lorenzen and Mr. Lorenzen suggested, through the coworker, that Ms. Poe seek medical attention. Ms. Poe was unable to speak directly with Mr. Lorenzen before she left work that day. Ms. Poe did, in fact, have a blood clot that ran the length of her leg and was admitted to the hospital that day. Ms. Poe contacted Mr. Lorenzen immediately after placement of an I.V. to address the blood clot. Mr. Lorenzen advised Ms. Poe not to worry about being absent from work the next day and to keep him informed of her progress. On August 26, Ms. Poe contacted Mr. Lorenzen to ask whether her sister could collect her paycheck and to advise that she would be in the hospital for three to five days. Upon being released from the hospital, Ms. Poe went to the workplace, where she advised Mr. Lorenzen that she would have to receive injections twice a day to address the blood clot and would need to continue off work. Ms. Poe advised the employer that she wished to return to work and had argued with her doctor over the doctor's decision not to release her to return to the employment. Mr. Lorenzen advised Ms. Poe not to worry about her job. Thereafter, Ms. Poe kept the employer informed after each doctor appointment. Ms. Poe advised Mr. Lorenzen that on September 26, the doctor would induce labor so that Ms. Poe could deliver her baby. Ms. Poe did, in fact, give birth on September 26. As of the delivery date, Ms. Poe's blood clot had diminished, but was not completely resolved. Ms. Poe was not released to return to work.

On October 3, 2005, Ms. Poe received a letter from Director of Human Resources Cindy Burdt. The letter advised Ms. Poe that the employer was granting Ms. Poe an eight-week leave of absence, beginning August 25 and ending October 20. The letter advised Ms. Poe that if she was not released to return to the employment by October 20, the employment would terminate and Ms. Poe would have to re-apply. The letter instructed Ms. Poe to contact Mr. Lorenzen no later than one week prior to October 20 to advise whether she would be returning to the employment. Ms. Poe provided the employer's letter to her doctor.

On October 3, Dr. Steve Scurr, D.O. sent a letter to Ms. Burdt, in which he advised the employer that he would not be able release Ms. Poe to return to return to the employment by the October 20 deadline imposed by the employer. Dr. Scurr advised Ms. Burdt that due to the complications Ms. Poe experienced in connection with the pregnancy, including the blood clot, he would not be able to release her until six week after the delivery date. Dr. Scurr included in his letter a statement that Ms. Poe was "very much interested in returning to work at Theisen's."

Ms. Poe contacted Mr. Lorenzen exactly one weekly prior to October 20, 2005. At that time, Ms. Poe indicated that she wanted to return to the employment, could not obtain a release from her doctor that would allow her to return by October 20, but was willing to return to work without the doctor's release. Mr. Lorenzen advised that Ms. Poe would not be allowed to return to work without the doctor's release. Ms. Poe advised Mr. Lorenzen that it would be two more weeks before she could obtain a release from her doctor. Mr. Lorenzen advised Ms. Poe that she would have to direct her concerns to Ms. Burdt.

Ms. Poe contacted Ms. Burdt the same day. Ms. Poe advised Ms. Burdt that she was "broke," living with her mother, and needed to come back to work. During this discussion, Ms. Burdt referenced for the first time the employer's written policy regarding leaves of absence. Ms. Poe had not reviewed the policy and the policy had not been referenced in any prior discussions between Ms. Poe and the employer. A copy of the policy was set forth in the employee handbook Ms. Poe received at the time of hire. Since Ms. Burdt was not eligible for leave under

the Family and Medical Leave Act, the employer's written policy limited Ms. Poe to a 30-day leave of absence. Ms. Burdt advised Ms. Poe that the employer had made an exception to the policy by granting Ms. Burdt the eight-week leave.

On October 20, Ms. Poe contacted Assistant Manager Shane Skala, who advised that the employer had terminated Ms. Poe's employment. On November 8, Ms. Poe received a full release to return to work. On December 5, Ms. Poe commenced a program to become a certified nursing assistant.

REASONING ANC CONCLUSIONS OF LAW:

The first question for the administrative law judge is whether the evidence in the record establishes a separation from the employment that would allow Ms. Poe to be eligible for benefits. It does.

All separations from or terminations of employment are generally classifiable as layoffs, quits, discharges, or "other separations." See 871 IAC 24.1(113). The "other separations" classification includes separations based on permanent disability or the claimant-employee's failure to meet the physical standards required for the work. See 871 IAC 24.1(113)(d).

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 608, 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 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. See 871 IAC 24.25.

The evidence in the record establishes that Ms. Poe at no time formed an intention to sever the employment relationship. Ms. Poe did not quit the employment. The evidence in the record does establish that Ms. Poe commenced an approved leave of absence on August 25. The evidence further establishes that Ms. Poe did not learn of the employer's deadline for her return until October 3. The evidence establishes that Ms. Poe was at all relevant times willing to return to the employment with or without a doctor's release. The employer would not allow her to return without the release and the doctor would not provide the release. The evidence in the record establishes that the approved leave of absence ended on October 20. This case is similar to a case decided by the Supreme Court of Iowa. In Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989), an employee attempted to return to work with lifting restrictions associated with her pregnancy and the employer terminated the employment. The Iowa Supreme Court found the separation from employment was not a quit since the employee had not intended to quit. The evidence in the record establishes that Ms. Poe did not quit the employment, but was discharged by the employer.

The question, then, is whether the evidence in the record establishes that Ms. Poe was discharged for misconduct in connection with the employment. It does not.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The evidence establishes that the employer terminated the employment at the end of the leave of absence due to Ms. Poe's inability to meet the physical standards required for the work. The evidence fails to establish any misconduct on the part of Ms. Poe.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Poe was discharged for no disqualifying reason. Accordingly, Ms. Poe is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Poe.

The remaining question is whether the evidence in the record establishes that Ms. Poe has been able and available since establishing her claim for benefits, which was effective October 16, 2005.

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".

In order for Ms. Poe to be eligible to receive benefits, the evidence in the record must establish that she is able to work, available for work, and earnestly and actively seeking work. See Iowa Code section 96.4(3) and 871 IAC 24.22. 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. See 871 IAC 24.22(1). Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. See 871 IAC 24.22(1)(a). A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. See 871 IAC 24.22(1)(a). An individual must be able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market in which the individual resides. See 871 IAC 24.22(1)(b).

The evidence in the record establishes that Ms. Poe was not able and available for work prior to November 8, 2005, the date on which her doctor released her to return to work. The evidence in the record establishes that Ms. Poe has been able and available for work since November 8, 2005.

DECISION:

The Agency representative's decision dated November 4, 2005, reference 01, is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

The claimant was not able and available for work prior to November 8, 2005, and is therefore disqualified for benefits for the period of October 16, 2005, the effective date of her claim, through November 7, 2005. The claimant has been able and available for work since November 8, 2005, and is, therefore, eligible for benefits effective November 8, provided she is otherwise eligible.

jt/kjw