

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLE B HIPSHUR
Claimant

APPEAL NO: 15A-UI-06838-LDT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 01/25/15
Claimant: Respondent (2)

Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available
Section 96.3-7 – Recovery of Overpayment of Benefits
871 IAC 24.10 – Employer Participation

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's June 3, 2015 decision (reference 04) that concluded Nichole B. Hlpsur (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 24, 2015. The claimant participated in the hearing. Alyce Smolsky appeared as representative on the employer's behalf and presented testimony from three witnesses, Brandon Kranovich, Linda Grinstead, and Sheila Wright. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

Was the claimant overpaid unemployment insurance benefits, and if so, is that overpayment subject to recovery based upon whether the employer participated in the fact-finding interview?

FINDINGS OF FACT:

The claimant started working for the employer on February 26, 2015. She worked full-time as a certified nursing aide (CNA) in the employer's Ottumwa, Iowa facility. Her last day of work was April 26, 2015. Her next scheduled day of work was April 29, 2015. Prior to that date she had been injured in a motorcycle accident and was on crutches. She informed the employer that she could not work at least until after she had had an MRI. The employer advised her that she would be placed on a medical leave of absence until she had been released by her doctor as able to work.

There were brief communications between persons for the employer and the claimant on May 6 and May 12. By May 12 the claimant was no longer on crutches but indicated she was still in pain and was limping; she had not yet been released by her doctor. She got an impression from something said by the director of nursing (DON), Grinstead, that she was being terminated from her employment. However, when on June 8 the administrator, Kranovich, called her and asked if she was going to be returning to work, he also responded to her question as to whether she had been terminated by telling her that no, she had not been terminated, that the employer was still waiting for her to return to work after she would be released by her doctor. As of June 8 the claimant still had not been released by her doctor; the doctor finally released her sometime around the end of June, approximately the week ending June 27, 2015. The claimant did not seek to return to work with the employer because she still believed that she had been discharged.

The claimant established a claim for unemployment insurance benefits effective January 25, 2015. She reactivated the claim by filing an additional claim effective May 10, 2015. A fact-finding interview was held with a Claims representative on May 28, 2015. The employer, through a Phyllis Farrell, participated directly in the fact-finding interview. The claimant has received unemployment insurance benefits after the separation in the amount of \$3,808.00.

REASONING AND CONCLUSIONS OF LAW:

A voluntary quit is a termination of employment initiated by the employee – where the employee has taken the action which directly results in the separation; a discharge is a termination of employment initiated by the employer – where the employer has taken the action which directly results in the separation from employment. Rule 871 IAC 24.1(113)(b), (c). A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

The claimant asserts that her separation was not “voluntary” as she had not desired to end the employment; she argues that she had been told on May 12 that she was being terminated and therefore the separation should be treated as a discharge for which the employer would bear the burden to establish it was for misconduct. Iowa Code § 96.6-2; Rule 871 IAC 24.26(21). Rule 871 IAC 24.25 provides that, 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 rule further provides that there are some actions by an employee which are construed as being voluntary quit of the employment, such as where an employee believes that she is going to be or has been discharged, but where the employer has not told the claimant that she is discharged. Rule 871 IAC 24.25(33).

Even though the facility administrator, higher ranking with the employer than the DON, had affirmatively told the claimant on June 8 that she was not discharged and that the employer was waiting for her to be released and return to work, the claimant failed to report for work after she was released by her doctor as able to work at the end of June; therefore, the separation is considered to be a voluntary quit. The claimant then has the burden of proving that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. The claimant has not satisfied his burden. Benefits are denied as of June 28, 2015.

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. To be found able to work, "[a]n 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." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). "A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required." Rule 871 IAC 24.22(2)1(a). A person is not able and available for work if the claimant is ill or injured and has not been released from a doctor's care as able to return to work. Rule 871 IAC 24.23(1), (6), (34), (35).

As of April 29, 2015 and continuing at least through the end of June the claimant had such physical or medical restrictions that she was not able and available for work. Unemployment insurance benefits are not intended to substitute for health or disability benefits. *White v. Employment Appeal Board*, 487 N.W.2d 342 (Iowa 1992). Benefits are denied for the period between the claimant's reactivation of her claim May 10, 2015 and June 27, 2015.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a,-b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The representative's June 3, 2015 decision (reference 04) is reversed. For April 29 through June 27, 2015, the claimant was not able and available for work, and was not eligible to receive unemployment insurance benefits. The claimant voluntarily left her employment without good cause attributable to the employer. As of June 28, 2015, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account is not subject to charge. The claimant is overpaid \$3,808.00, which is subject to recovery.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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