IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NANCY A MOSER
Claimant

GREAT RIVER MEDICAL CENTER
Employer

APPEAL NO: 14A-UI-08224-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/13/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Great River Medical Center (employer) appealed a representative's August 4, 2014 (reference 01) decision that concluded Nancy A. Moser (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 September 11, 2014. The claimant participated in the hearing and was represented by Toby Gordon, Attorney at Law. Carrie Nudd appeared on the employer's behalf and presented testimony from one other witness, Cheryl Lambert. One other witness, Lora Stauffer, was available on behalf of the employer but did not testify. 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.

ISSUE:

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?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on July 21, 1976. She worked full time (60 hours per week during a two-week period) as a registered nurse in the employer's obstetrics department. Her last day of work was March 8, 2014.

The claimant sought a leave of absence for medical reasons; that leave of absence began March 10, 2014. The employer authorized an eight-week leave, through May 9. The claimant had a shoulder joint replacement surgery on April 14. The claimant had not yet been released to return to work by May 9 and the employer agreed to an additional four weeks of leave, to end on or about June 9. On or about May 30 it became clear that the claimant would not be

released by June 9. The employer determined that it could not extend the leave of absence and decided that it would be filling the claimant's position. Nudd, Human Resources Generalist, contacted the claimant on May 30 and informed her that her employment would be ended.

The claimant was upset by this and appealed to a vice president. That vice president agreed that while the claimant's regular position would be posted and filled, the claimant would be allowed to enter into a PRN (*Pro re nata* – commonly used in medicine to mean "as needed") position at such time as she was fully released.

The claimant was partially released with restrictions of no pushing, pulling, or lifting over 20 pounds in about mid-July. She then established an unemployment insurance benefit year effective July 13, 2014. On or about August 26 her doctor informed her that she would have permanent restrictions of no pushing, pulling, or lifting over 40 pounds. She provided this information to the employer and on August 27 the employer informed her that she would not be able to work for the employer even on the PRN basis with these restrictions.

REASONING AND CONCLUSIONS OF LAW:

The claimant's separation from her employment as a full time (average 30 hour per week) employee became effective as of June 9, 2014; after that date she no longer had an option to return to her position even if she had been fully released by her doctor. Considering the claimant's status as of that date, there are only three provisions in the law which disqualify claimants from unemployment insurance benefits (until they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount). An individual is subject to such a disqualification if the individual (1) is discharged for work-connected misconduct (Iowa Code § 96.5-2-a); (2) "has left work voluntarily without good cause attributable to the individual's employer." (Iowa Code § 96.5-1); or (3) refuses to accept an offer of suitable work without good cause (Iowa Code § 96.5-3). Here, there is no question of an actual offer of work or refusal of work, so the focus will be on whether there was a disqualifying separation from employment.

Separations are categorized into four separate categories under Iowa law. Rule 871 IAC 24.1(113) defines "separations" as:

> 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 labor-saving 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.

As the employer suggested that the separation in this case was a voluntary quit, I will first determine whether Iowa Code § 96.5-1 regarding voluntary quits applies in this case. 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 claimant had been willing to continue working, but the employer was unable or unwilling to provide work.

Further, Iowa Code § 96.5-1-d provides an exception that an individual who otherwise could be subject to disqualification is not disqualified:

> If the individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of 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.

The Agency rule implementing this section explains that "[r]ecovery is defined as the ability of the claimant to perform all of the duties of the previous employment." Rule 871 IAC 24.26(6)a.

The issue then is whether a person is subject to voluntary quit disqualification under Iowa Code § 96.5-1 under the following circumstances: The person is actively working but then suffers a medical condition that prevents her from performing her normal job duties and the employer determines there is no work available for her. The person has never stated that she is quitting the employment. The employer has not formally discharged the claimant from employment but ultimately determines it can no longer hold the position for the claimant.

The problem is that the case law points in several directions and has not addressed this issue head on. Additionally, the statute and rules are unclear as to this issue. For example, in *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989), the Iowa court considered the case of a pregnant certified nursing assistant (CNA) who went to her employer with a physician's release that limited her to lifting no more than 25 pounds. Wills filed a claim for benefits because the employer would not let her return to work because of its policy of never providing light-duty work. The court ruled that Wills became unemployed involuntarily and was able to work because the weight restriction did not preclude her from performing other jobs available in the labor market. *Id*. at 138. The court characterized the separation from employment as a termination by the employer, but in essence the employer informed the claimant that it did not have any jobs available meeting her restrictions and would not create a job to accommodate her restrictions. The court does not mention Iowa Code § 96.5-1-d at all.

On the other hand, in *White v. Employment Appeal Board*, 487 N.W.2d 342, 345 (Iowa 1992), the Iowa court considered the case of the truck driver who was off work due to a heart attack for about three months, returned to work for a month, and then was off work for seven months after a second heart attack. He then returned to his place of employment and informed management that his doctor had instructed him that he was unable to drive because of his pacemaker device. The employer told the claimant that there was no available work for him with his restriction. The claimant then applied for unemployment insurance benefits. *Id*. at 343. The facts did not

indicate whether the claimant stated that he was quitting employment or intended to permanently sever the employment relationship at any point. In *White*, the court reversed the district court's decision that the claimant quit work involuntarily due to a physical disability and stated that "unemployment due to illness raises policy considerations which call for a continuation of the rules laid out in cases antedating [the cases relied on by the district court] … Under these rules, if White's disability was not work-related, the agency properly imposed the disqualification. If, however, the cause of White's disability was work related, the disqualification was improper." *Id*. at 345. The court decided that there had been no finding as to whether the disability was or was not work-related and remanded the case. The court does not refer to or distinguish the *Wills* case. It does not explain how the first prong of the voluntary quit disqualification test set forth earlier in its decision—"it must be demonstrated that the individual left work voluntarily"—had been met.

To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship, and chooses to leave the employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. *Wills* supra at 138; *Peck v. Employment Appeal Board*, 492 N.W.2d 438, 440 (Iowa App. 1992). In my judgment, the facts of the *Wills* case more closely resemble this case. The claimant was actively employed until the restrictions from her presumably non-work-related medical condition prevented her from performing her normal job duties. She did not intend to quit her employment. The employer informed the claimant that no other regular work, only PRN work, was available for her after June 9, 2014 even if she became able to return without restrictions. The action initiating the separation was therefore taken by the employer, and the separation therefore could be considered for unemployment insurance purposes as a discharge, but not for disqualifying misconduct.[1]

[1] In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer has not asserted the claimant committed conduct that could be characterized as misconduct under these criteria. The administrative law judge further notes that Rule 871 IAC 24.32(5) provides, "A discharge solely due to an inability to perform work to the employer's satisfaction does not constitute misconduct."

Perhaps this type of separation would meet the definition of “other separations” found in Rule 871 IAC 24.1(113)(d): “Termination of employment for military leave lasting or expecting to last longer than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.” The problem with this definition section is that it does not provide guidance on whether such a separation is qualifying or disqualifying. Obviously, if a person terminates employment because she decides to retire, it is a voluntary quit and a disqualification would be imposed. On the other hand, if the employer mandates that an employee retire due to reaching a certain age, the termination is involuntary and initiated by the employer and is a discharge for reasons other than misconduct and no disqualification is imposed. Likewise, if a claimant decides that she no longer meets the physical standards required by the job and leaves employment, it should be treated a quit and benefits will only be awarded if the person meets the exceptions to the voluntary quit statute.

Further guidance is provided by Rule 871 IAC 24.22(2) which provides:

> 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 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 become unemployed the individual is considered having voluntarily quit and is therefore 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.

In this case, apparently there was a mutually agreed upon leave of absence, at least initially. The leave of absence extended beyond what the employer or the claimant initially anticipated for the length of the leave of absence. The employer determined that it could no longer wait for the claimant to recover. As such, even though the separation is considered an “Other Separation,” it is ultimately treated as a layoff, because it was initiated by the employer. There is no valid reason to disqualify the claimant from benefits for being laid off for a lack of work upon.

The claimant, therefore, is not subject to the voluntary quit statute since she has not quit. She is not disqualified under the discharge statute since her separation was not due to misconduct. The refusal of suitable work statute does not apply here.

There could be a lingering question is whether the claimant is eligible to receive unemployment insurance benefits after July 13, 2014 by being able and available for 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). As the issue of whether the claimant was able and available for work was not included on the hearing notice, the administrative law judge lacks jurisdiction to issue a binding decision on that issue, but would observe that it appears that the claimant has demonstrated that as of the benefit week beginning July 13, 2014 she was able to work in some

gainful employment, even if she could not perform the duties of her prior employment with the employer. However, if the employer wishes to obtain a binding determination on that issue, it should raise that issue by seeking a preliminary adjudication on that specific issue from the Agency.

DECISION:

The representative's August 4, 2014 (reference 01) decision is affirmed. As to the June 9, 2014 separation from employment, the claimant did not voluntarily quit and was not discharged for misconduct. Benefits are allowed, if the claimant is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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