

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHRYN M GISEL
Claimant

APPEAL NO. 09A-UI-04345-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SELECT MEDICAL CORPORATION
Employer

OC: 02/01/09
Claimant: Respondent (2-R)

Section 96.5(1) – Quit

STATEMENT OF THE CASE:

The employer, Select Medical, filed an appeal from a decision dated March 6, 2009, reference 01. The decision allowed benefits to the claimant, Kathryn Gisel. After due notice was issued, a hearing was held by telephone conference call on April 14, 2009. The claimant participated on her own behalf. The employer participated by Human Resources Coordinator Sara Busha and CEO Andy Bagnall. Exhibits A, B and C were admitted into the record.

ISSUE:

The issue is whether the claimant quit work with good cause attributable to the employer.

FINDINGS OF FACT:

Kathryn Gisel was employed by Select Medical from August 22, 2006 until January 13, 2009 as a full-time CNA. She suffered a work-related injury which resulted in her with permanent restrictions of not lifting more than 20 pounds frequently, 30 pounds occasionally and 40 pounds rarely. There were no other restrictions but she was unable to perform the essential functions of her job as a CNA with those restrictions. She had worked light duty since September 5, 2008.

On December 5, 2008, Human Resources Coordinator Sara Busha and CEO Andy Bagnall offered her a full-time job as a secretary working 12-hour shifts. It would have paid the same amount per hour as she was already earning. She said she could not work 12-hour shifts. When the employer asked if she had documentation from her physician regarding this, she said the insurance company had it. The employer indicated it would get the information. The insurance company responded with what documentation it had and there was nothing from a physician restricting the number of hours she could work.

On January 2, 2009, Ms. Busha again offered Ms. Gisel the secretarial position and again she said she could not work 12-hour shifts. She felt she could wait until her January 7, 2009, appointment with another doctor for a second opinion. That doctor assessed her and said it would be about 30 days before the report was issued but Ms. Gisel did not notify the employer of this and left town for a week.

The employer considered the information it had and determined the claimant had refused the job without good cause. She was notified in a letter dated January 13, 2009, her employment was ended. The doctor's report from the January 7, 2009, assessment only indicated Ms. Gisel told the doctor her symptoms were worse with sitting for prolonged periods of time and better with changing positions. The secretarial job did not require her to sit in one position during the entire shift and she would have been free to get up from her chair and move around the work area as she needed.

Kathryn Gisel has received unemployment benefits since filing a claim with an effective date of February 1, 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.

The claimant did not provide any evidence she was not able to work 12-hour shifts, which is the only reason she gave for not accepting the secretarial job. The employer would have accommodated her requirement to stand, move around and sit as needed, and would not have required her to violate her lifting restrictions.

Continuing work was available to her but she refused to accept the new position in order to maintain her employment. As she has provided nothing from any physician to support her contention she could not work 12-hour shifts, she had not met her burden of proof to establish she quit with good cause attributable to the employer. She is disqualified.

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.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of March 6, 2009, reference 01, is reversed. Kathryn Gisel is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css