

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ZEMIRA DIZDAREVIC
Claimant

APPEAL NO. 10A-EUCU-00301-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOC SERVICES LLC
Employer

OC: 07/05/09
Claimant: Appellant (4-R)

871 IAC 24.1(113) – Other Separations
871 IAC 26.8(5) – Decision on the Record

STATEMENT OF THE CASE:

Zemira Dizdarevic appealed from an unemployment insurance decision dated April 7, 2010, reference 03, that denied benefits based on an Agency conclusion that she had voluntarily quit on March 7, 2010 in connection with a non-work-related medical issue. A telephone hearing was scheduled for May 27, 2010. Ms. Dizdarevic did not respond to the hearing notice instructions and did not participate in the hearing. The employer provided a telephone number for the hearing, and had been in another hearing with the same judge several minutes before this one was scheduled, but was not available for this hearing at the number the employer provided for the hearing. Based on the parties' failure to participate in the hearing, the administrative file, Exhibits One and Two, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUE:

Decision on the record.

Whether Ms. Dizdarevic separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

Whether Ms. Dizdarevic has been able to work and available for work since she established her claim for unemployment insurance benefits.

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal by notice mailed on April 23, 2010. The appellant, Zemira Dizdarevic, failed to provide a telephone number at which she could be reached for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. There is no evidence the hearing notice was returned by the postal service as undeliverable for any reason. The employer provided a representative's name and a telephone number at which the representative could be reached for the hearing: John Stanford, Sr., at 319-833-2233. Mr. Stanford had just been in another hearing with the same judge several minutes before this one. At the scheduled

start of the hearing, the administrative law judge made two attempts to contact Mr. Stanford, was routed to Mr. Stanford's voice mailbox and left two messages. Mr. Stanford did not respond.

The administrative law judge has conducted a careful review of the administrative file to determine whether the unemployment insurance decision should be affirmed. Ms. Dizdarevic was employed by Isle of Capri Casino as a full-time housekeeper from January 4, 2010 and last performed work for the employer on March 3, 2010. On March 3, after Ms. Dizdarevic finished work and went home, she slipped on ice and broke three bones in her left hand. Ms. Dizdarevic is right-handed. Ms. Dizdarevic's left hand was initially in a cast. Ms. Dizdarevic contacted the employer after she injured her hand, but was told she needed to come back when she was better. In other words, the employer had no work for her. Ms. Dizdarevic did not intend to leave the employment and her separation from the employment was not voluntary. Ms. Dizdarevic was forced to separate from the employment because she could not meet the physical requirements of the employment with only one functioning hand.

The parties participated in a fact-finding interview with a Workforce Development representative on April 5, 2010. Ms. Dizdarevic had returned to the employer the week before and requested work. Ms. Dizdarevic no longer had a cast on her hand, but her hand still hurt. The employer told Ms. Dizdarevic that the employer did not have work she could perform with only one hand.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 26.8(3), (4) and (5) provide:

Withdrawals and postponements.

(3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.

(4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.

(5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

The administrative law judge has carefully reviewed evidence in the record and concludes that the unemployment insurance decision previously entered in this case is incorrect and cannot be affirmed.

Workforce Development rule 871 IAC 24.1(113), provides as follows:

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 laborsaving 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.

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 available evidence indicates that Ms. Dizdarevic did not voluntarily quit the employment. The available evidence indicates that Ms. Dizdarevic never formed the intention to voluntarily sever the employment relationship and never communicated to the employer that she wanted to voluntarily sever the employment relationship. Ms. Dizdarevic's conduct and her statements at the fact-finding interview indicate that she desired to continue in the employment and return as soon as she was able. The evidence indicates instead that Ms. Dizdarevic's separation from the employment was based solely on the fact that she could no longer meet the physical requirements of the work. Ms. Dizdarevic's separation from the employment falls into the category of "other separations." The separation did not disqualify Ms. Dizdarevic for unemployment insurance benefits. Ms. Dizdarevic is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged. Pursuant to 871 IAC 26.8(5), a party must make a written request to the administrative law judge that the hearing be reopened within 15 days after the mailing date of this decision. The written request should be mailed to the administrative law judge at the address listed at the beginning of this decision and must explain the emergency or other good cause that prevented the party from participating in the hearing at its scheduled time.

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".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. 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.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

There is insufficient evidence in the record upon which to enter a ruling regarding whether and when Ms. Dizdarevic has been both able to work and available for work since filing her claim for benefits. For that reason, this matter will be remanded to a claims representative for determination of those issues.

DECISION:

The Agency representative's April 7, 2010, reference 03, decision is modified as follows. The claimant neither quit nor was discharged from the employment. The claimant's separation falls into the category of "other separations" and was due her inability to meet the physical requirements of the employment. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant. This decision will become final unless a written request establishing good cause to reopen the record is made to the administrative law judge within 15 days of the date of this decision.

This matter is remanded to the Claims Division for determination of whether the claimant has been able to work and available for work since she established her claim for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs