

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHELE E SKIDMORE
Claimant

KUM & GO LC
Employer

APPEAL 16A-UI-09330-NM-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/31/16
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1)(d) – Voluntary Quitting/Illness or Injury
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available/Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 16, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her voluntary quit. The parties were properly notified of the hearing. A telephone hearing was held on September 14, 2016. The claimant Michele Skidmore participated and testified. The employer Kum & Go LC participated through District Supervisor Darin Nelson. Claimant's Exhibit A was received into evidence.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Is the claimant able to work and available for work effective August 16, 2016?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a general manager from February 5, 2007, until this employment ended on June 1, 2016, when she was discharged.

Claimant went on a medical leave of absence beginning January 5, 2016. Claimant remained in contact with the employer about her medical status throughout the duration of her leave. By June 1, 2016, claimant still had not been released to return to work. Claimant's Family Medical Leave Act (FMLA) leave expired and all other leave had been exhausted. The employer determined it needed to fill claimant's position and therefore terminate her employment. On June 1, 2016, Nelson notified claimant via telephone that she had been discharged from employment. On August 1, 2016 claimant's doctor released her to return to work, with the restriction that she remain seated while at work. On August 15, 2016, claimant was released to

return to work without restriction. (Exhibit A). Claimant testified she has no restrictions and there is nothing preventing her from working as of August 15.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not quit but was discharged for no disqualifying reason.

Iowa Code § 96.5(1)d 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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the 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, if so found by the department, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.25(35) provides:

Voluntary quit without good cause. 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 § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:

- (a) Obtain the advice of a licensed and practicing physician;
- (b) Obtain certification of release for work from a licensed and practicing physician;
- (c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
- (d) Fully recover so that the claimant could perform all of the duties of the job.

The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that:

"Insofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

The statute provides an exception where:

The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the 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, if so found by the department, provided the individual is otherwise eligible. Iowa Code § 96.5(1)(d).

Section 96.5(1)(d) specifically requires that the employee has recovered from the illness or injury, and this recovery has been certified by a physician. The exception in section 96.5(1)(d) only applies when an employee is fully recovered and the employer has not held open the employee's position. *White*, 487 N.W.2d at 346; *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa Ct. App. 1985); see also *Geiken v. Lutheran Home for the Aged Ass'n*, 468 N.W.2d 223, 226 (Iowa 1991) (noting the full recovery standard of section 96.5(1)(d)).

In the present case, the evidence clearly shows Gilmore was not fully recovered from his injury until March 6, 2003. Gilmore is unable to show that he comes within the exception of section 96.5(1)(d). Therefore, because his injury was not connected to his employment, he is considered to have voluntarily quit without good cause attributable to the employer, and is not entitled to unemployment ... benefits. See *White*, 487 N.W.2d at 345; *Shontz*, 248 N.W.2d at 91.

The Iowa Court of Appeals has informally interpreted the Iowa Code §96.5(1) subsection (d) exception not to require a claimant to return to the employer to offer services after a medical recovery if the employment has already been terminated. *Porazil v. IWD*, No. 3-408 (Iowa Ct. App. Aug. 27, 2003).

At most, claimant's separation from work from January 5 through June 1 was a temporary absence while she was medically unable to work. However, employer initiated the end of that voluntary leave period by terminating the employment prior to her medical release to return to work based upon a calendar measurement rather than the treating physician's opinion. Because claimant was still on indefinite, but temporary, medical leave and in reasonable communication with employer about her medical status, which indicated her intention to return to the employment when medically able to do so, and employer terminated the employment relationship before her August 1 partial release and August 15 full release, the separation became involuntary and permanent and is considered a discharge from employment. Since claimant was not released to return to work either with or without restriction as of the June 1, 2016 termination date, she was not required to return to the employer to offer services upon the partial release to return to work on August 1 or upon her eventual full release on August 15.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system, no-fault absenteeism policy or leave policy is not dispositive of the issue of qualification for benefits.

In spite of the expiration of the FMLA and other leave period, because the final cumulative absence for which she was discharged was related to properly reported illness or injury and related ongoing medical treatment, no misconduct has been established and no disqualification is imposed. Benefits are allowed, provided claimant is otherwise eligible.

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective August 16, 2016.

Iowa Code § 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 § 96.19, subsection 38, paragraph "b", subparagraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(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.

Iowa Admin. Code r. 871-24.22(2) 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.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Although employer is not obligated to accommodate non-work related medical restrictions and the medical condition was not established to be work-related, the separation took place before the treating physician released the claimant to return to work and she is not required to be able to perform the regular duties of the job from which she was fired. Claimant was given a medical release to return to work without restriction on August 15, 2016. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The August 16, 2016, reference 01, decision is reversed. The claimant did not quit but was discharged for no disqualifying reason. She is able to and available for work as of August 16, 2016. Benefits are allowed, provided the claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

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