

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMBER J NESMOE
Claimant

APPEAL NO. 15A-UI-09717-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DOLGENCORP LLC
Employer

OC: 07/26/15
Claimant: Respondent (2)

871 IAC 24.25(38) – Discharge Prior to Proposed Date of Resignation
Iowa Code § 96.5-1 – Voluntary Quit

STATEMENT OF THE CASE:

Dolgencorp LLC filed a timely appeal from a representative's decision dated August 18, 2015, reference 03, (amending reference 01), which held the claimant eligible to receive unemployment insurance benefits finding that the claimant was dismissed from work on July 10, 2015 under non disqualifying conditions. After due notice was provided, a telephone hearing was held on September 15, 2015. Claimant participated. Participating as a witness for the claimant was Ms. Shiela Nesmoe, claimant's mother-in-law. The employer participated by Ms. Dawn Walders, Store Manager.

ISSUE:

At issue is whether the claimant resigned, whether she was discharged prior to the effective date of her resignation and if the claimant left, was her leaving good cause attributable to the employer?

FINDINGS OF FACT:

Having considered all the evidence in the record, the administrative law judge finds: Amber Nesmoe began employment with Dolgencorp LLC on February 7, 2014, and was most recently employed as a full-time assistant manager for the company and paid by the hour. Her immediate supervisor was Dawn Walders.

Amber Nesmoe had been off work on a medical leave of absence from June 25, 2015 through June 30, 2015. Ms. Nesmoe had called off work on July 3, 4, and 5 but was released to work by her primary physician with a full release effective July 6, 2015. Ms. Nesmoe reported for her next scheduled work day on July 9, 2015. On that date Ms. Nesmoe gave her two-week notice of her intention to quit her employment at Dolgencorp LLC effective July 17, 2015. The claimant had elected to resign her position with the company because of ongoing neck and shoulder pain associated with an injury that had not been determined to be work related. The claimant's intention was to quit and later attempt to return to her job when she was more physically able to do the duties.

Because the claimant's manager was concerned about the amount of pain that the claimant appeared to be having when she returned to work on July 9, 2015, the store manager contacted upper management to inform them. On July 10, 2015, management decided that the claimant be offered the option of returning to a medical leave of absence status until her pain subsided, or in the alternative, the employer would accept her resignation from employment on that same day. When Ms. Nesmoe was not willing to go back on a medical leave of absence her employment was ended by the employer on July 10, 2015. The claimant was not paid through the remainder of the notice period. The employer's witness agrees that the claimant was not separated early for misconduct.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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. 871-24.25(38) 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 section 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 section 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:

(38) Where the claimant gave the employer an advance notice of resignation which caused the employer to discharge the claimant prior to the proposed date of resignation, no disqualification shall be imposed from the last day of work until the proposed date of resignation; however, benefits will be denied effective the proposed date of resignation.

In the case at hand, the evidence in the record establishes that on July 9, 2015, Ms. Nesmoe submitted her resignation from employment to be effective July 17, 2015 because of pain associated with a non-work-related injury. The claimant's reason is a personal good-cause reason, but it is not a good cause reason attributable to the employer. Accordingly, Ms. Nesmoe is disqualified for benefits until she has worked in, and has been paid for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

Before the date that Ms. Nesmoe's resignation was to become effective, the employer elected to end her employment on July 10, 2015. She was not terminated because of misconduct, but because the employer considered it to be in the best interests of the company and of Ms. Nesmoe to do so. Ms. Nesmoe had engaged in no misconduct.

Under the provisions of 871 IAC 24.25(38), an employee who is discharged for no disqualifying reason prior to the effective date of resignation is not subject to a benefit disqualification for leaving the employment for the time between the claimant's last day of work until the proposed date of resignation. If good cause for leaving attributable to the employer is not shown, the claimant is subject to a benefit disqualification effective the proposed date of the resignation that had been given.

In this case, the claimant did not leave her employment for good cause that was attributable to Dolgencorp LLC, but because of a non-work-related injury.

Because the claimant's reason for quitting her employment was not attributable to the employer, the claimant is disqualified for unemployment insurance benefits effective July 17, 2015 and until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and meets all other eligibility requirements of Iowa law. A review of claimant's administrative file shows that Ms. Nesmoe has not received unemployment insurance benefits since opening her claim with an effective date of July 26, 2015, because she has not been able and available for work, a requirement of the Iowa Employment Security Law.

DECISION:

The representative's decision dated August 18, 2015, reference 03, is reversed. The claimant quit employment without good cause attributable to the employer. Claimant is eligible to receive unemployment insurance benefits for the period of July 10, 2015, until July 17, 2015 provided that she meets all other eligibility requirements. The claimant is disqualified for benefits thereafter until she has worked in and been paid for insured work equal to ten times her weekly benefit amount, and meets all other eligibility requirements of Iowa Law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs