**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**SABRIJA SMAJLOVIC**
Claimant

**SDH EDUCATION WEST LLC**
Employer

**APPEAL NO. 11A-UI-14607-LT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 09/25/11**
**Claimant: Appellant (1)**

Iowa Code § 96.5(1)d – Voluntary Leaving – Medical
Iowa Code § 96.4(3) – Ability to and Availability for Work

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the October 27, 2011 (reference 02) decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on December 6, 2011. Claimant participated through interpreter Janja Pavetic-Dicky. Employer participated through retail manager and immediate supervisor Colby Larsen and human resources manager Judy Jessen. Claimant's Exhibits A through D were admitted to the record. Employer's Exhibit One was admitted to the record. Claimant submitted an additional document just before the scheduled hearing time, too late to provide to the employer or consideration as part of the hearing record but are included in the appeal file.

**ISSUE:**

The issue is whether claimant voluntarily left the employment with good cause attributable to the employer and whether claimant is able to and available for work effective September 25, 2011.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a vending machine assistant from January 2010 and was separated from employment on September 29, 2011. Carl Meyer, M.D. referred claimant for further treatment with University of Iowa Hospitals and Clinics. In August 2011 Crozier copied claimant's medical records showing his medical restrictions related to a damaged urinary nerve and his appointments for medical treatment but did not give them to Jessen. Claimant thought he could get three months leave with unemployment benefits but Crozier only told him he could return and apply for work with the company when he was medically able. He spent three months in Iowa City but his condition worsened after treatment and his bladder stopped functioning completely. His physicians' permanent restrictions require a 25-minute break to manually empty his bladder every hour to hour and a half, a nerve in his right leg is damaged and he is unable to wear a sock or shoe on that foot, and all work must be sedentary. The employer does not have any jobs that fit those restrictions.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant is separated from the employment without good cause attributable to the employer.

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.

871 IAC 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. Employment 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 claimant has not established that the injury was work related, as is his burden. Thus, he must meet the requirements of the administrative regulation cited above. Claimant has not been released to return to full work duties and employer is not obligated to accommodate a non-work-related medical condition. Accordingly, the separation is without good cause attributable to the employer and benefits must be denied.

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 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".

Although this decision only applies to unemployment insurance benefits, it is the administrative law judge's conclusion that given the severity of the claimant's permanent restrictions that he is permanently disabled and unable to work in any meaningful, gainful employment and should seek Social Security disability (SSD or SSI) benefits. A private attorney or Iowa Legal Aid can assist with that claim or appeal.

**DECISION:**

The October 27, 2011 (reference 02) decision is affirmed. The claimant is separated from the employment without good cause attributable to the employer. Benefits are withheld as claimant is unable to work given his permanent medical restrictions.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs