IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ERIKA R SAWVEL-STOLTZ
Claimant

MANOR CARE WATERLOO
Employer

APPEAL NO. 11A-UI-01822-JT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/14/10
Claimant: Appellant (4)

Section 96.5(2)(a) – Discharge for Misconduct
Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Erika Sawvel-Stoltz filed a timely appeal from the February 10, 2011, reference 01, decision that denied benefits. Ms. Sawvel-Stoltz requested an in-person hearing. After due notice was issued, an in-person hearing was held on March 3, 2011 at the Dubuque Workforce Development Center. Ms. Sawvel-Stoltz participated. The employer did not appear for the hearing or otherwise participate in the hearing. The employer did not request postponement of the hearing. The administrative law judge took official notice of the Agency's record of the claimant's weekly report to the Agency via the telephonic automated claims reporting system. Exhibits A through I were received into evidence.

ISSUES:

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

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Erika Sawvel-Stoltz was employed by ManorCare as a full-time registered nurse from 2006 and last performed work for the employer on February 22, 2010. At the start of the employment, Ms. Sawvel-Stoltz was a nurse supervisor/float nurse. In 2009, Ms. Sawvel-Stoltz became a hospice treatment nurse. The employer subsequently eliminated the hospice treatment nurse position and Ms. Sawvel-Stoltz became a floor nurse. Ms. Sawvel-Stoltz's immediate supervisor was Sheila Cullen, director of nursing.

In 2008, Ms. Sawvel-Stoltz tripped at home and suffered injury to her right shoulder and arm. Ms. Sawvel-Stoltz returned to work, but continued to experience pain in her shoulder and arm. Ms. Sawvel-Stoltz sought medical treatment in Dubuque and Iowa City. A doctor referred Ms. Sawvel-Stoltz for intensive physical therapy. Ms. Sawvel-Stoltz did not immediately follow

up on the physical therapy referral because the appointment times would conflict with her work hours and she desired to remain in the employment. Ms. Sawvel-Stoltz was prescribed multiple medications for pain, inflammation, and depression. Ms. Sawvel-Stoltz started on a new pain medication, Lyrica, in November 2009. This followed a diagnosis of neuropathic pain syndrome in October 2009. Ms. Sawvel-Stoltz continues on the various medications at this time. Ms. Sawvel-Stoltz was frequently tired after she started on Lyrica. Ms. Sawvel-Stoltz's health condition resulted in her performing her duties less efficiently. For example, passing medications was a primary duty, but the shoulder and arm issues made it more difficult for Ms. Sawvel-Stoltz to push the medication cart. In addition, the shoulder and arm issues caused Ms. Sawvel-Stoltz to more slowly dispense the medications from the medication cart to the patient.

On December 30, 2009, Director of Nursing Sheila Cullen summoned Ms. Sawvel-Stoltz to a meeting. Also present were the two assistant directors of nursing, Jenni McCann and Barb (last name unknown). At the meeting, the employer expressed a desire to place Ms. Sawvel-Stoltz on a 30-day performance improvement plan. Ms. Sawvel-Stoltz asked the employer to change her duties to treatment nurse duties, which Ms. Sawvel-Stoltz believed would be less physically taxing. The employer denied the request. The employer suggested that Ms. Sawvel-Stoltz take time off while she adjusted to an increase in the Lyrica dosage. At the employer's suggestion, Ms. Sawvel-Stoltz used two weeks of accrued vacation benefit.

While Ms. Sawvel-Stoltz was off work, she returned to her doctor. Ms. Sawvel-Stoltz's doctor told her that her shoulder and arm condition would not improve unless and until Ms. Sawvel-Stoltz participated in the physical therapy the doctor had earlier recommended. The doctor recommended three physical therapy sessions per week. The doctor provided Ms. Sawvel-Stoltz with a medical excuse to support Ms. Sawvel-Stoltz's need to leave work early so that she could participate in physical therapy when such appointments were available. When Ms. Sawvel-Stoltz presented the doctor's note to the employer, the employer denied Ms. Sawvel-Stoltz's request to leave work early for physical therapy. When the employer denied Ms. Sawvel-Stoltz's request to leave work early for physical therapy, Ms. Sawvel-Stoltz's doctor provided a medical excuse that took Ms. Sawvel-Stoltz off work entirely. All of this took place toward the beginning of January 2010.

In connection with being taken off work by her doctor, Ms. Sawvel-Stoltz applied for short-term disability benefits through the employer's third-party benefits administrator, MetLife. MetLife denied Ms. Sawvel-Stoltz's January 2010 initial application for short-term disability benefits. After her application for short-term disability benefits was denied, Ms. Sawvel-Stoltz attempted to return to work. Ms. Sawvel-Stoltz worked four consecutive days, but concluded by the end of the fourth day that she could not perform the work duties. Ms. Sawvel-Stoltz made a new application for short-term disability benefits, the application was approved, and Ms. Sawvel-Stoltz went off work under the short-term disability benefits program administered by MetLife. The employer approved a medical leave of absence subject to medical certification.

At the time Ms. Sawvel-Stoltz went off work and commenced what was treated as a leave of absence, the employer was experiencing a change in human resources personnel. Ms. Sawvel-Stoltz found it difficult to obtain appropriate information from the employer, and appropriate follow-up from the employer, with regard to her leave of absence and extending the leave of absence.

Ms. Sawvel-Stoltz provided written correspondence and medical documentation concerning approval of her leave of absence, extension of the leave of absence and termination of the employment. Effective January 4, 2010, Leave Administrator Cassandra Johnson approved a

leave of absence under the Family and Medical Leave Act (FMLA). In doing so, the employer acknowledged that Ms. Sawvel-Stoltz had a serious health condition that made her unable to perform the essential functions of her job. Ms. Johnson provided Ms. Sawvel-Stoltz with medical certification materials for Ms. Sawvel-Stoltz to present to her doctor and imposed a January 14, 2010 deadline for return of the completed medical certification materials.

On January 19, 2010, Human Resources Representative Marcia Rako sent Ms. Sawvel-Stoltz a letter indicating that the medical certification she had submitted did not release her from work. The letter said Ms. Johnson had discussed this with Ms. Sawvel-Stoltz on January 12, that Ms. Sawvel-Stoltz had indicated at that time that she had an appointment with a specialist on January 14, that Ms. Sawvel-Stoltz had agreed to provide new medical certification, but that the employer had not received the new medical certification as of January 19. The letter said Ms. Sawvel-Stoltz was on an unauthorized leave and that she needed to contact Ms. Johnson immediately to continue her employment. The letter was erroneously dated January 19, *2009*.

Ms. Sawvel-Stoltz spoke with Ms. Rako by telephone on January 21, 2010 regarding the required medical certification form. On that day, Ms. Rako sent Ms. Sawvel-Stoltz another medical certification form and directed Ms. Sawvel-Stoltz to return the completed form no later than January 29, *2009*. The correct year in question was 2010. Ms. Rako warned in her January 21 letter that failure to comply with the employer's leave policy "may result in termination of employment and loss of benefits."

On April 5, 2010, Ms. Rako sent Ms. Sawvel-Stoltz a letter indicating that, pursuant to the "approved Leave of Absence Request form," the leave would expire on April 10, 2010 and the employer expected Ms. Sawvel-Stoltz to return to work at that time. This represented the end of the 12-week FMLA leave. The letter directed Ms. Sawvel-Stoltz to contact Ms. Rako or Ms. Johnson if she needed to extend the leave. The letter warned that if Ms. Sawvel-Stoltz failed to return to work by April 10 and was not approved for an extension of the leave, she would be considered to have voluntarily resigned from the employment. Ms. Sawvel-Stoltz took the required steps to extend her leave. The employer told Ms. Sawvel-Stoltz at that point that the employer could no longer guarantee Ms. Sawvel-Stoltz would be able to return to the same nursing position she had held prior to commencing the leave.

On May 6, 2010, Ms. Rako sent Ms. Sawvel-Stoltz a letter indicating that pursuant to the "approved Leave of Absence Request form," the leave would expire on May 6, 2010 and the employer expected Ms. Sawvel-Stoltz to return to work at that time. The letter warned that if Ms. Sawvel-Stoltz failed to return to work by May 6, 2010 and was not approved for an extension of the leave, she would be considered to have voluntarily resigned from the employment. Ms. Sawvel-Stoltz took the required steps to extend her leave. Ms. Sawvel-Stoltz was still undergoing physical therapy at the time.

Ms. Sawvel-Stoltz met with the employer at the workplace in June 2010. Ms. Sawvel-Stoltz noted at that time that her name was not on the schedule. The employer approved another extension of the leave of absence. Thereafter, there was no more contact between the parties until July 7, 2010, when Ms. Sawvel-Stoltz received a letter stating that her employment had terminated effective July 6, 2010 based on alleged failure to return from the leave of absence. Unlike the letters the employer had sent in January, April, and May, the employer had sent nothing to indicate the date upon which the employer expected Ms. Sawvel-Stoltz to return to avoid having the employer conclude that she had voluntarily quit the employment. Instead, the July 7, 2010, Ms. Rako sent Ms. Sawvel-Stoltz states the following:

> Dear Ericka
> Because you did not return to work at the expiration of your approved leave of absence and you do not qualify for an extension to your approved leave, your employment with HCR ManorCare, of Dubuque, IA unit 455 has ended effective July 6, 2010.

Though Ms. Sawvel-Stoltz received the employer's July 7, 2010 letter on July 7, she delayed responding to the letter. Ms. Sawvel-Stoltz was getting ready to travel to Davenport for a family wedding. Ms. Sawvel-Stoltz telephoned the workplace on July 12, 2010 and spoke with Human Resources Representative Marcia Mako. Ms. Sawvel-Stoltz asked Ms. Mako the meaning of the letter, why the employment had been terminated, why the employer had not spoken to her before sending the letter, and why the employer had not at least given her to the opportunity to resign from the employment. Ms. Mako told Ms. Sawvel-Stoltz that the employment had been terminated because she had no more approved leave and did not come back to work. Ms. Sawvel-Stoltz said that she did not know that she had to come back to work by some date certain because the employer had never told her that. Ms. Sawvel-Stoltz explained that she was still going to therapy and that as far as she had known, she was still on an approved leave. Ms. Mako agreed to speak with upper management and get back to Ms. Sawvel-Stoltz, but Ms. Sawvel-Stoltz did not hear back from the employer.

Soon after the telephone call to Ms. Mako, Ms. Sawvel-Stoltz also contacted Director of Nursing Sheila Cullen. D.O.N. Cullen told Ms. Sawvel-Stoltz that she had been unaware that the employer deemed the employment terminated.

Ms. Sawvel-Stoltz continued to undergo physical therapy until the physical therapist discharged her August 26, 2010. The discharge summary indicates that Ms. Sawvel-Stoltz had made "poor" progress toward the therapy goals. The physical therapist indicated that the reason for the discharge was "Ineffectiveness of Rx." The discharge summary documented Ms. Sawvel-Stoltz's self-reported pain rating at 6 on a scale from 0 to 10. In the Goal Assessment/Recommendations section of the discharge summary, the physical therapist wrote:

> Pt presents c [with] inconsistencies in ROM [range of motion] + slow to improve strength. Pain has remained unchanged throughout rehab progression. No obj [objective] findings to support pain intensity. Discharge due to ineffectiveness of Rx [treatment]. STG's [short-term goals] met. LTG's [long-term goals] o [not] met.

Ms. Sawvel-Stoltz established a claim for unemployment insurance benefits that was effective November 14, 2010. This was more than four months after the employer sent her the July 7, 2010 letter indicating that the employer deemed the employment terminated and a little more than two and a half months after Ms. Sawvel-Stoltz was discharged from the unsuccessful physical therapy. Workforce Development records indicate that Ms. Sawvel-Stoltz reopened her claim effective January 16, 2011, meaning there was some lapse in making the weekly claim for benefits between November 14, 2010 and January 16, 2011. Ms. Sawvel-Stoltz then claimed benefits for just two weeks before she discontinued making a weekly claim for benefits with the week that ended January 29, 2011. At the time of the March 3, 2011 appeal hearing, Ms. Sawvel-Stoltz had gone four weeks without making a weekly claim for benefits. When asked about this, Ms. Sawvel-Stoltz offered that her life has been "chaotic."

REASONING AND CONCLUSIONS OF LAW:

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

> Separations. 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.

The employer failed to participate in the hearing and thereby failed to present any evidence to indicate that Ms. Sawvel-Stoltz voluntarily quit the employment or was discharged for misconduct.

A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period. 871 IAC 24.22(2)(j). If at the end of a period of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits. 871 IAC 24.22(2)(j)(1). On the other hand, if the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed, the individual is considered as having voluntarily quit and therefore is ineligible for benefits. 871 IAC 24.22(j)(2).

The weight of the evidence in the record establishes that Ms. Sawvel-Stoltz commenced an approved leave of absence that started in January 2010 and that continued into July 2010. The leave of absence was based on a non-work-related health condition. The evidence fails to establish that the employer compelled Ms. Sawvel-Stoltz to commence or continue the leave of absence. In other words, this was not a discharge in January 2010 under the guise of compelling Ms. Sawvel-Stoltz to commence a leave of absence.

Ms. Sawvel-Stoltz asserts that she did not know the date certain by which she was to return to work in connection with the final extension of the leave of absence in June. Though the July 7, 2010 letter from the employer asserts that the return to work date was July 6, 2010, there is insufficient evidence in the record to establish that Ms. Sawvel-Stoltz was aware of the July 6, 2010 expected return to work date prior to July 7, 2010.

Ms. Sawvel-Stoltz's delay in responding to the employer's July 7, 2010 letter regarding termination of the employment is problematic. A reasonable person desiring to continue in the employment would not have delayed responding to the termination letter for five days. Ms. Sawvel-Stoltz's plans to attend a wedding in Davenport do not explain the delay. Despite the delay, the evidence fails to establish that Ms. Sawvel-Stoltz intended to permanently sever the employment relationship or that she ever communicated this to the employer. Based on the evidence in the record, the administrative law judge concludes that the employer, not Ms. Sawvel-Stoltz, ended the employment and did so without communicating to Ms. Sawvel-Stoltz the extended return to work date of July 6, 2010. The administrative law judge notes that the employer had told Ms. Sawvel-Stoltz back in April, at the end of the FMLA leave, that the employer could no longer guarantee reinstatement to the prior nursing position. Based on the evidence in the record, the administrative law judge concludes that the employer laid Ms. Sawvel-Stoltz off effective July 7, 2010. A layoff would not prevent Ms. Sawvel-Stoltz from being eligible for unemployment insurance benefits. Ms. Sawvel-Stoltz is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Sawvel-Stoltz.

The remaining set of issues concern whether Ms. Sawvel-Stoltz has been able to work and available for work since she established the claim for unemployment insurance benefits that was effective November 14, 2010.

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 and (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.
>
> (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.

> (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.

Iowa Administrative Code rule 871 IAC 24.23 provides, in relevant part, as follows:

> Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
>
> 24.23(1) An individual who is ill and presently not able to perform work due to illness.
>
> 24.23(34) Where the claimant is not able to work due to personal injury.
>
> 24.23(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

Ms. Sawvel-Stoltz had presented insufficient evidence to establish that she has met the work ability and availability requirements since she established her claim for benefits. The evidence indicates that a physician took Ms. Sawvel-Stoltz off work in January 2010 due to medical issues that remained unresolved as of the August 26, 2010 discharge from physical therapy. Ms. Sawvel-Stoltz appears to want to treat the discharge from the unsuccessful physical treatment as a doctor discharging her to return to work, but that is not at all the nature of physical therapy discharge document. Aside from the August 26, 2010 discharge summary concerning the discharge from unsuccessful physical therapy, Ms. Sawvel-Stoltz has presented no medical documentation at all concerning her ability to perform work and availability for work. Ms. Sawvel-Stoltz has presented no documentation to support the notion that she has been released to return to work after her several-month-long medical leave of absence. In addition, Ms. Sawvel-Stoltz's casual approach to continuing her claim via the telephonic weekly reporting system suggests that Ms. Sawvel-Stoltz is not motivated, for whatever reason, to obtain new employment. The administrative law judge concludes that Ms. Sawvel-Stoltz has failed to meet her burden of proving that she has been able to work and available for work at any point since she established her claim for benefits. For this reason, benefits are denied effective November 14, 2010. This disqualification remains in effect as of the March 3, 2011 appeal hearing and will continue into the future until Ms. Sawvel-Stoltz provides medical documentation indicating that she has been released to return to full-time work and otherwise demonstrates that she is able and available for full-time work.

DECISION:

The Agency representative's February 10, 2011, reference 01, decision is modified as follows. The employer laid off the claimant effective July 7, 2010. The layoff does not prevent the claimant from being eligible for benefits and the claimant would be eligible for benefits if she were able to satisfy all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

The claimant has not met the requirements that she demonstrate ability to work and availability for work since she established her claim for benefits. For this reason, benefits are denied effective November 14, 2010. This disqualification remains in effect as of the March 3, 2011 appeal hearing and will continue into the future until the claimant provides medical documentation indicating that she has been released to return to full-time work and otherwise demonstrates that she is able and available for full-time work.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/kjw