

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

EMMANUEL S MALUAL
Claimant

NEHRING CONSTRUCTION INC
Employer

APPEAL 17A-UI-01250-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/01/17
Claimant: Respondent (1)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant filed an appeal from the January 25, 2017 (reference 01) unemployment insurance decision that held claimant was eligible for unemployment insurance benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 23, 2017. Claimant, Emmanuel S. Malual, participated personally and through witness Earl Agan. Employer, Nehring Construction Inc., participated through witness Justin Nepper. The administrative law judge took administrative notice of the claimant's unemployment insurance benefits records including the fact-finding documents.

ISSUES:

Did claimant voluntarily quit his employment with good cause attributable to employer?
Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

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 laborer from June 13, 2016 and was separated from employment on October 25, 2016, when he voluntarily quit. Claimant is an hourly employee and was paid on a weekly basis. He typically earned wages between \$600.00 - \$800.00 per week. His immediate supervisor was Ben Parson.

On Friday, October 21, 2016 claimant received his pay for the week and his pay was \$300.00 less than what he should have received based upon the hours he had worked that week. Claimant did not understand why he was receiving \$300.00 less in pay for that week. Claimant spoke to his supervisor Mr. Parson, the office manager Katie Sears, and the operations manager, a man named Louin. All three of these individuals failed to explain to claimant why he

was receiving \$300.00 less in pay for the week. In fact, Ms. Sears, kept telling claimant “you know what is going on” when in fact, claimant did not know what was going on. Claimant had Mr. Parson telephone Ms. Sears and speak to her about the issue and she still would still not explain the situation and told Mr. Parson that claimant “knew what was going on” as well. After trying to get an explanation for five days about why his pay was \$300.00 less, claimant decided that he had to voluntarily quit due to his belief there was an unauthorized reduction in his pay. Claimant tendered his verbal resignation on Tuesday, October 25, 2016 to Mr. Parson.

The reason claimant received \$300.00 less in pay for the week ending October 21, 2016 was because there was an error in claimant’s payroll in September of 2016. Claimant had actually been overpaid by \$300.00 in September. The employer learned of this when the records were reconciled at the end of September. The claimant did not realize that he had been overpaid \$300.00 in September because the payment was deposited into a second bank savings account that Claimant did not routinely check. No documents were given to claimant about how the employer intended to recoup this overpayment and the situation was never sufficiently explained to claimant verbally.

Claimant received benefits in the gross amount of \$3,129.00 for the seven weeks between January 1, 2017 and February 18, 2017. Employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge finds that the claimant voluntarily quit with good cause attributable to the employer.

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.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp’t Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980); *Peck v. Emp’t Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

In this case, the claimant voluntarily quit his employment when he tendered his verbal resignation to Mr. Parson on October 25, 2016. As such, claimant must prove that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). “Good cause” for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm’n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973).

The decision in this case rests, at least in part, upon the credibility of the parties. The issue must be resolved by an examination of witness credibility and burden of proof. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of

any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds that the claimant's first-hand account of the conversations he had with Ms. Sears is more credible than that of Mr. Nepper's hearsay testimony. It was clear that the situation regarding claimant's reduction in pay for the week was not sufficiently explained to claimant.

Iowa Admin. Code r. 871-24.26(4) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(4) The claimant left due to intolerable or detrimental working conditions.

Generally notice of an intent to quit is required by *Cobb v. Employment Appeal Board*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Employment Appeal Board*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Employment Appeal Board*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). These cases require an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. Accordingly, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added, however, to rule 871-24.26(6)(b), the provision addressing work-related health problems. No intent-to-quit requirement was added to rule 871-24.26(4), the intolerable working conditions provision. Our supreme court concluded that, because the intent-to-quit requirement was added to 871-24.26(6)(b) but not 871-24.26(4), notice of intent to quit is not required for intolerable working conditions. *Hy-Vee, Inc. v. Employment Appeal Bd.*, 710 N.W.2d 1 (Iowa 2005).

"Good cause attributable to the employer" does not require fault, negligence, wrongdoing or bad faith by the employer. *Dehmel v. Employment Appeal Bd.*, 433 N.W.2d 700, 702 (Iowa 1988)("[G]ood cause attributable to the employer can exist even though the employer is free from all negligence or wrongdoing in connection therewith"); *Shontz v. Iowa Employment Sec. Commission*, 248 N.W.2d 88, 91 (Iowa 1976)(benefits payable even though employer "free from fault"); *Raffety v. Iowa Employment Security Commission*, 76 N.W.2d 787, 788 (Iowa 1956)("The good cause attributable to the employer need not be based upon a fault or wrong of such employer."). Good cause may be attributable to "the employment itself" rather than the employer personally and still satisfy the requirements of the Act. *Raffety*, 76 N.W.2d at 788 (Iowa 1956). Therefore, claimant was not required to give the employer any notice with regard to the intolerable or detrimental working conditions prior to him quitting. However, claimant contacted three separate individuals to determine what the problem was, to no avail.

The key question in determining whether the claimant voluntarily quit with good cause attributable to the employer is what a reasonable person would have believed under the circumstances. *Aalbers v. Iowa Dept. of Job Service*, 431 N.W.2d 330 (Iowa 1988); *Hill v. Department of Employment Servs.*, 442 N.W.2d 128, 133 (Iowa 1989). Under the reasonable

belief standard, it is not necessary to prove the employer violated the law, only that it was reasonable for the employee to believe so. *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660, 662 (Iowa 1993).

It is reasonable to the average person that one should not have to work without being paid the wages that were agreed to between the parties. While the circumstances in this matter ultimately proved that claimant was not actually due wages because he was overpaid a month prior in September; claimant reasonably believed in October that he was being paid \$300.00 less than was due in pay (almost half of his normal weekly paycheck). Claimant has proven that his working conditions were intolerable and detrimental because of the shortage in wages for the week ending October 21, 2016 and employer's failure to adequately explain to claimant that there was a shortage for the week due to an overpayment the month prior. Thus, the separation was with good cause attributable to the employer. As such, benefits are allowed. Because benefits are allowed, the issues of overpayment and chargeability are moot.

DECISION:

The January 25, 2017 (reference 01) unemployment insurance decision is affirmed. The claimant voluntarily left the employment with good cause attributable to the employer. Benefits are allowed, provided the claimant is otherwise eligible.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

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