IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BLAKE HANSEN
Claimant

NOELS TREE & CRANE SERVICE INC
Employer

APPEAL NO: 15A-UI-02128-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/18/15
Claimant: Respondent (2)

Section 96.5-1 – Voluntary Leaving
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 5, 2015, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a telephone hearing was held before Administrative Law Judge Julie Elder on March 17, 2015. The claimant participated in the hearing. David Noel and Deborah Noel, Owners, participated in the hearing on behalf of the employer.

ISSUE:

The issues are whether the claimant voluntarily left his employment with good cause attributable to the employer and whether he is overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time ground laborer/truck driver for Noel's Tree & Crane Service from November 17, 2014 to January 14, 2015. He voluntarily left his employment because he was dissatisfied with the work environment.

The claimant submitted his two-week resignation notice January 12, 2015, with an effective date of January 23, 2015. He told the employer he was experiencing serious family issues and planned to move back to Newton. The claimant's actual last day worked was January 14, 2015.

The employer was working on a tree job at the University of Iowa January 14, 2015. The claimant was assigned to drive the chip truck with the chipper towed behind it from the shop to the job site. Before leaving the shop the claimant again asked Co-Owner Randy Noel how to start the chipper, despite the fact Mr. Noel had shown him on several previous occasions. Once they reached the job site Mr. Noel directed the claimant to move the loader off the street to the tree and then Mr. Noel observed the claimant standing around while others were getting the equipment out to start the job. Mr. Noel instructed the claimant to get saws out and ready for the job by sharpening them because they had been cutting firewood the day before and the claimant complained that the saws needed to be sharpened. The claimant got out two saws but

not the ones that needed to be sharpened and the employer asked where they were and the claimant started yelling at him that it was a hostile work environment and he felt he could be injured. Mr. Noel was concerned about the claimant's behavior, finding it erratic, and told the other ground man not to let the claimant run a chainsaw because he was concerned about having him handle power tools while in that frame of mind. Mr. Noel then instructed the claimant and the other ground man to come to the brush chipper with the other ground man for a short safety meeting about the chipper during which the claimant was told to feed the chipper only while standing on a flat dry sidewalk. A few minutes later the claimant got in the chipper truck, standing on the running boards, and made a phone call to his fiancée, asking her to pick him up from the job site. He repeatedly looked at Mr. Noel and then down the street before he left the job site and started walking down the street. He did not tell Mr. Noel he was leaving or ask permission to do so and Mr. Noel determined the claimant voluntarily quit his job before the conclusion of his notice period.

The claimant listed several reasons for his leaving besides family issues and his decision to move back to Newton. He stated on December 17, 2014, Mr. Noel used a racial slur against African Americans, a charge Mr. Noel vehemently denies. The claimant also said he made a racially insensitive comment about what a Hispanic employee might say if he got drunk, which Mr. Noel also denies.

The claimant stated that on December 23, 2014, he was on the top of a loader greasing the zerks on top of the tool box area and he told Mr. Noel one of the zerks was broken and needed to be fixed. Mr. Noel replied, "Okay. We will get to it" and then told the claimant not to stand on the top of the cab or "I'll break your fucking legs." The claimant stated the comment came "out of the blue" and he does not know if Mr. Noel was joking. The claimant acknowledged profanity was commonly used in the work place and he did not find it offensive. There was no one else in the shop to corroborate the claimant's recounting of those events and Mr. Noel denies ever threatening the claimant or any other employee.

The claimant alleges the workplace was unsafe because he was not formally trained on the equipment he was expected to use and if he made an error Mr. Noel yelled at him and called him "stupid" or "dumb." Mr. Noel stated that while potentially dangerous, the equipment was not complicated, and he held a brief safety meeting and trained each of them when it was their turn to use the various pieces of equipment. The employer indicated that when he tried to show the claimant how to use the lifts and a chain saw the claimant stated he was "not a fucking idiot." He said he and the other full-time employee he worked with were driving an older Dodge truck and the accelerator would stick occasionally which caused the claimant to nearly rear-end another vehicle on one occasion. He informed Mr. Noel of the incident and the truck was repaired. The claimant also believed the employer did not maintain the business's two dump trucks or its equipment, including the wood chipper, properly but the employer has a part-time mechanic who retired as the head of the electrical department for West Liberty, Iowa. The employer replaces parts as needed and "no shortcuts are taken." The wood chipper was purchased for $54,000.00 and was bought specifically because of its safety features. The claimant complained about the wood chipper being dangerous and said a safety bar was broken. The bar was dented but did not affect the performance of the machine and the chipper would not work if the safety features were not functioning properly. To be sure, however, the employer sent it to the dealer and was told one switch was worn but otherwise the chipper was in fine condition. The employer had the switch replaced. The claimant said brake lights were allowed to go out but upon further questioning by the employer admitted three of four brake lights were pushed back while on a job and either another employee or the employer simply pulled them out so they were in the correct place. The claimant criticized the fact that he was required to install insulation but was not provided a mask. He did install insulation one day and

placed it in a divided wall on two or three other occasions and asked the employer's wife for a mask. She promptly called Mr. Noel and he immediately provided masks but the claimant only wore his mask for approximately five minutes before continuing the insulation work without a mask.

The employer rented a shop next door to his shop to another small business. That lessee smoked cigarettes and occasionally used the employer's skid loader and smoked while in it. The claimant used the skid loader once in a while. One day the lessee came over to the employer's shop and was smoking. He came in the employer's shop door about 20 to 30 feet into the building. The shop is 70 by 170 feet and the claimant complained about that even though the lessee left after about one minute and the claimant was approximately 50 feet away. The claimant said he had sports induced asthma although he did not state that on his application and never told the employer but he complained about the smoke in the lessee's shop even though he spent time over there where all the lessee's employees smoked.

The claimant has claimed and received unemployment insurance benefits in the amount of $2,808.00 since his separation from this employer.

The employer participated personally in the fact-finding interview through the statements of Co-Owner Deborah Noel.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left his employment without 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.

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. 871 IAC 24.25. Leaving because of unlawful, intolerable, or detrimental working conditions would be good cause. 871 IAC 24.26(3),(4). Leaving because of dissatisfaction with the work environment is not good cause. 871 IAC 24.25(1). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code section 96.6-2.

The law presumes a claimant has left employment with good cause when he quits because of intolerable or detrimental working conditions. 871 IAC 24.26(4). It would be reasonable for the employee to inform the employer about the conditions the employee believes are intolerable or detrimental and to have the employee notify the employer that he intends to quit employment unless the conditions are corrected. This would allow the employer a chance to correct those conditions before a quit would occur. However, the Iowa Supreme Court has stated that a notice of intent to quit is not required when the employee quits due to intolerable or detrimental working conditions. Hy-Vee, Inc. v. Employment Appeal Board and Diyonda L. Avant, (No. 86/04-0762) (Iowa Sup. Ct. November 18, 2005).

Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 24.26(4). The test is whether a reasonable person would have quit under the circumstances. Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993). Aside from quits based on medical reasons, prior notification of the employer before a resignation for intolerable or detrimental working conditions is not required. Hy-Vee v. EAB, 710 N.W.2d (Iowa 2005).

The claimant cited several reasons for submitting his resignation notice during the hearing but only told the employer he was leaving due to serious family issues and because he was moving back to Newton. He submitted his resignation notice effective January 23, 2015, but walked off the job January 14, 2015, after being instructed to perform tree work at the University of Iowa. The crew was cutting firewood the day before and some of the saws were dull so Mr. Noel had told the claimant he would sharpen the saws the next morning before the tree job. Both parties became upset after the claimant brought two saws to Mr. Noel that did not need to be sharpened and Mr. Noel yelled at him and the claimant yelled back that the employer had created a hostile work environment and he could break his leg. Both men freely used profanity, as was common when the crew was speaking amongst themselves whether in regular conversation or in anger, and the claimant stated he was not offended by the use of salty language. After that exchange the claimant returned to the truck, called his girlfriend, and walked off the job site without permission and without returning to complete his notice period.

During the hearing the claimant cited a wide range of issues he had with the employer including safety of the equipment, training, racial slurs, smoking and insulation installation without a mask. He also stated the employer threatened him December 23, 2014. The employer's responses and denials were persuasive and credible. The employer satisfactorily and reasonably explained how important the safety of the equipment was to him and given that he used the equipment as well and was heavily financially invested in it, it is not logical to find he would allow the equipment to fall into disrepair. Parts wore out but were replaced and routine maintenance was performed. When the claimant complained about a safety feature of the wood chipper not working properly, the employer took it to the dealer for evaluation, even though the claimant had walked off the job by that time. The employer explained that training occurred when employees were getting ready to use the equipment, which was relatively simple to use once instructed in how to do so but did not train the claimant on each piece of equipment as soon as he started. Instead the employer waited until the claimant was ready to use that equipment so he did not have to try to remember what to do with each apparatus but could learn as he went along. The employer emphatically denied using racial slurs but if he did so that language was appalling and the claimant was right to be offended by it but the administrative law judge does not believe that was the reason the claimant left. The claimant brought up the employer's lessee's smoking. That however, only occurred at the employer's shop on one very brief occasion the day before the claimant walked off the job, well after he had submitted his resignation notice. Additionally, the claimant sometimes spent time in the lessee's shop voluntarily where every employee smoked and did not bring up that he previously experienced sport-induced asthma. The claimant also complained about being asked to install insulation on a very few occasions without a mask. As soon as he made the employer aware of the situation the employer immediately provided masks but the claimant removed his mask after five minutes and did not wear it again. The claimant further stated he was threatened by the employer December 23, 2014, when told not to stand on the top of the cab or "I'll break your fucking legs," but then admitted he did not know if the employer was joking.

The parties often spoke to each other in a harsh and profane manner. It was common for that work place and although it may appear to be unprofessional and inappropriate, because both parties engaged in the behavior, the claimant cannot now complain of the employer's use of profanity and the manner in which they both talked to each other and expect that to be considered a good cause reason for his leaving his job.

While the claimant made these complaints during the hearing, upon further review of his concerns, the administrative law judge finds that the reason the claimant gave the employer for leaving, serious family issues and a desire to move back to Newton, were the actual reasons the claimant left his employment. Under these circumstances, the administrative law judge concludes the claimant has not demonstrated that his leaving was for unlawful, intolerable, or detrimental working conditions or what would constitute leaving for good cause attributable to the employer as that term is defined by Iowa law. Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
>
> (1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.
>
> (2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Co-Owner Deborah Noel. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of $2,808.00.

DECISION:

The February 5, 2015, reference 01, decision is reversed. The claimant voluntarily left his employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer participated in the fact-finding interview. The claimant is overpaid benefits in the amount of $2,808.00.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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