

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DEAGELOW D DUDLEY
Claimant

DOHERTY STAFFING SOLUTIONS
Employer

APPEAL 16A-UI-12936-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 11/06/16
Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Leaving
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed an appeal from the November 28, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 22, 2016. Claimant participated. Employer participated through Glenda Niemiec, unemployment insurance administrator and Eric Simmer, onsite supervisor. Employer's Exhibit 1 was entered and received into the record.

ISSUES:

Did the claimant voluntarily quit his employment without good cause attributable to the employer?

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 last assigned to work at Cargill, Inc. full-time beginning on January 26, 2016 through July 1, 2016 when he voluntarily quit his job. Continued work was available for the claimant if he had not quit.

The claimant's payroll record found at Employer's Exhibit 1 is accurate. The claimant last worked on July 1, 2016. On June 27 and June 28 the claimant and some of his coworkers were questioned by onsite supervisor Ms. Simmer at about damaged product on a line they had all been working on. At no time was the claimant told he was suspended or that he would not be allowed to work. He was told that at some point in the future he might not be allowed to work in the area where the damaged product was found but he was never told he was discharged or suspended. After that conversation the claimant worked on June 30 and July 1.

The claimant and other employees were expected to obtain their own upcoming work schedule for the next week each Friday. Prior to July 1, 2016 the claimant had demonstrated the ability to obtain his own work schedule each week. The claimant worked on Friday July 1 and could have obtained his work schedule for the next week but did not do so. Monday, July 4 was a holiday and Cargill was closed. The claimant was scheduled to work on July 5, 6 and 7. At the latest the claimant was to work at 9:00 a.m. on July 5. He called Ms. Simmer at approximately 2:00 p.m. on July 5, at least four hours after he was to have been at work, to find out his schedule for the week. Ms. Simmer told the claimant he was to be to work that day. Claimant had no response for Ms. Simmer other than to tell her he did not know his work schedule. The claimant asked Ms. Simmer for his work schedule for the rest of the week, indicating he knew that he could continue to work. Ms. Simmer did not have the work schedule with her at the time, so she told the claimant she would call him back and give him his work schedule. Ms. Simmer called the claimant back on July 5, and because he did not answer the phone, she left him a message indicating he was to work on July 6 and July 7. The claimant never showed up for work or called in to report his absence from work on July 6 or July 7. The claimant did not return to the employer again until sometime in August to turn in his door badge.

The claimant has received unemployment benefits after the separation on a claim with an effective date of November 6, 2016.

The employer did participate personally in the fact-finding interview through Ms. Niemiec who provided essentially the same information to the fact-finder as was provided at the appeal hearing.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant voluntarily left the 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.

Iowa Admin. Code r. 871-24.25(27) 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:

- (27) The claimant left rather than perform the assigned work as instructed.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). 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).

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 Ct. 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. *State v. Holtz*, 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. *State v. Holtz*, Id.

The claimant was not a credible witness. The employer's records show the claimant worked after June 27 when he was questioned by Ms. Simmer about damaged product. The claimant was never told he was suspended. If the claimant had been suspended or discharged, there would have been no reason for Ms. Simmer to give him his work schedule on July 5, for July 6 and 7. His allegation that he worked through late July is simply not believable in light of the business payroll records submitted by the employer. If the claimant had been suspended or discharged, the employer would never have let him keep his door badge. All of the employer's actions show they expected the claimant to keep working. Continued work was available for the claimant. For whatever reason, the claimant simply stopped reporting to work after July 1 despite the fact that he was not suspended or discharged. The employer did not hear from him again for several weeks. Under these circumstances the claimant is considered to have voluntarily abandoned his job which is a voluntary quit without good cause attributable to the employer. Benefits are denied.

Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if

the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. 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. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer participated in the fact-finding interview the claimant is obligated to repay the benefits he received to the agency and the employer's account shall not be charged.

DECISION:

The November 28, 2016, (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 claimant has been overpaid unemployment insurance benefits in the amount of \$887.00 and he is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs