

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATTHEW BREUER
Claimant

APPEAL NO: 16A-UI-06536-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

J K RIVER BOTTOM INC
Employer

OC: 05/08/16
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 June 3, 2016, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 28, 2016. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Gerald Keeler, Office Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the claimant voluntarily left his employment.

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 welder for J K River Bottom, Inc. from September 28, 2015 to May 25, 2016. He voluntarily quit his job by failing to call or show up for three consecutive workdays.

The claimant scheduled a non-work related surgery May 9, 2016 and was expected to be off work until May 23, 2016. The claimant requested light-duty work before the surgery and the employer told him it would see if it had anything available but did not guarantee him light-duty work.

On May 10, 2016, the claimant went in to the employer's office and asked for light-duty work. He was in obvious pain as he just had surgery the day before. The claimant had a doctor's excuse restricting him to lifting no more than five pounds for two weeks and the employer could not accommodate that restriction given the type of work it performs and the heavy lifting required. The employer was also concerned the claimant would further injure himself and did not want to accept the potential liability for that situation.

The claimant called in at 6:00 a.m. May 11, 12, and 13, 2016, to ask if the employer had any work he could do. Under the employer's policy employees are required to call in and speak to someone in person. Texting and voice mail are not allowed. The claimant knew or should have known that the employer did not open until 6:30 a.m. and consequently he could not speak to an employee at 6:00 a.m. when he was calling in. Additionally, two weeks prior to his surgery the claimant lost the cell phone the employer provided to him. The claimant replaced it by buying his own cell phone but then refused to provide the employer with his new phone number. He stated he paid for the phone and the employer did not need his number. The claimant did not call in and report his absences May 16 through May 18, 2016, and filed for unemployment with an effective date of May 8, 2016. He did not return to work May 23, 2016 or contact the employer after May 13, 2016.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,947.00 for the seven weeks ending June 25, 2016.

The employer participated personally in the fact-finding interview through the statements of Office Manager Gerald Keeler.

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.

Iowa Admin. Code r. 871-24.25(4) 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:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The claimant was off work from May 9 through May 23, 2016, due to a non-work-related medical procedure. He asked for light-duty work during the two weeks he was excused from work and restricted to lifting five pounds, and the employer could not accommodate his restrictions. Additionally, because it was not a work-related injury, the employer is not required to provide light-duty work for the claimant.

The claimant called in to ask for light-duty work on May 11 through May 13, 2016 but called before 6:30 a.m.; when the employer opened. The employer's policy requires employees to call in and speak with someone personally rather than leaving a voice mail message and consequently it would seem the claimant's early morning calls, as well as his refusal to provide the employer with his current phone number, were decisions designed to avoid speaking with the employer.

It is unclear if the claimant was excused from work from May 9 through May 23, 2016 or if he was simply restricted to lifting five pounds. If he was not excused from work for those two weeks his three no-call/no-show absences began accumulating May 16, 2016. If he was excused from work for those two weeks his three no-call/no-show absences began May 23, 2016. Either way the fact remains the claimant stopped reporting his absences and did not show up for work for three consecutive workdays in violation of Iowa law.

Inasmuch as the claimant failed to report for work or notify the employer for three consecutive work days in violation of the employer's policy, he is considered to have voluntarily left his employment without good cause attributable to the employer. 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 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 Office Manager Gerald Keeler. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$2,947.00 for the seven weeks ending June 25, 2016.

DECISION:

The June 3, 2016, reference 02, 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 within the meaning of the law. The claimant is overpaid benefits in the amount of \$2,947.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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