

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUSANNA M MILLER
Claimant

APPEAL NO: 12A-UI-01043-DT

**ADMINISTRATIVE LAW JUDGE
NUNC PRO TUNC DECISION**

KWIK SHOP INC
Employer

OC: 11/20/11

Claimant: Respondent (2/R)

Section 96.5-1 - Voluntary Quit
871 IAC 24.27 - Voluntary Quit of Part-time Job
871 IAC 26.14(7) – Late Call
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Kwik Shop, Inc. (employer) appealed an unemployment insurance decision dated January 18, 2012, (reference 02), that concluded Susanna M. Miller (claimant) was eligible after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 21, 2012. The claimant received the hearing notice and responded by calling the Appeals Section on February 6, 2012. She indicated that she would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, she did not participate in the hearing. Connie McMorran appeared on the employer's behalf. Administrative notice is being taken of the Agency's wage records. The record was closed at 9:18 a.m. At 9:21 a.m., the claimant called the Appeals Section and requested that the record be reopened. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the claimant voluntarily quit for a good cause attributable to the employer?

FINDINGS OF FACT:

The claimant received the hearing notice prior to the February 21, 2012 hearing. The instructions inform the parties that they are to be available at the specified time for the hearing, and that if they cannot be reached at the time of the hearing at the number they provided, the judge may decide the case on the basis of other available evidence. The reason the claimant was not available when the administrative law judge called for the hearing was that she had been in the restroom when the call came, and then she was busy watching after her young children.

The claimant worked part-time approximately 24 hours per week for the employer as a part-time clerk at the employer's Davenport, Iowa store. Her first day of work was July 18, 2011, and her last day of work was November 22, 2011. She was a no-call, no-show for scheduled work on November 23, 2011. She spoke to the store manager, McMorran, on November 25, and acknowledged that she had quit and that she would turn in her shirts. She did not explain any reason for quitting or missing work on November 23.

The claimant established an unemployment insurance benefit year effective November 20, 2011. Her claim is based upon an alternative base period, which does include wages from the employer in the third quarter 2011.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied. After a hearing record has been closed the administrative law judge may not take evidence from a non-participating party but can only reopen the record and issue a new notice of hearing if the non-participating party has demonstrated good cause for the party's failure to participate. 871 IAC 26.14(7)b. The record shall not be reopened if the administrative law judge does not find good cause for the party's late contact. Id. Failing to read or follow the instructions on the notice of hearing are not good cause for reopening the record. 871 IAC 26.14(7)c.

The claimant was not available for the February 21, 2012 hearing was after the hearing had been closed. Although the claimant intended to participate in the hearing, she failed to read or follow the hearing notice instructions to be available at the scheduled time for the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

If the claimant voluntarily quit her employment, she is not eligible for unemployment insurance benefits unless it was for good cause attributable to the employer. Iowa Code § 96.5-1. Rule 871 IAC 24.25 provides that, 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. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. *Bartelt v. Employment Appeal Board*, 494 N.W.2d 684 (Iowa 1993); *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The claimant did express or exhibit the intent to cease working for the employer and did act to carry it out. The claimant would be disqualified for unemployment insurance benefits unless she voluntarily quit for good cause.

The claimant has the burden of proving that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. The claimant has not satisfied her burden. Benefits are denied.

871 IAC 24.27 provides:

Voluntary quit of part-time employment and requalification. An individual who voluntarily quits without good cause part-time employment and has not requalified for benefits following the voluntary quit of part-time employment, yet is otherwise monetarily eligible for benefits based on wages paid by the regular or other base period employers, shall not be disqualified for voluntarily quitting the part-time employment. The individual and the part-time employer which was voluntarily quit shall be notified on the Form 65-5323

or 60-0186, Unemployment Insurance Decision, that benefit payments shall not be made which are based on the wages paid by the part-time employer and benefit charges shall not be assessed against the part-time employer's account; however, once the individual has met the requalification requirements following the voluntary quit without good cause of the part-time employer, the wages paid in the part-time employment shall be available for benefit payment purposes. For benefit charging purposes and as determined by the applicable requalification requirements, the wages paid by the part-time employer shall be transferred to the balancing account.

The claimant voluntarily quit employment without good cause attributable to the employer. The job, however, was part-time. It is not clear, however, that since the claimant is utilizing an alternative base period whether the claimant has sufficient wages from other employers to qualify to receive unemployment insurance benefits. The matter is remanded to the Claims Section for a determination as to whether, without including the wage credits from the employer, the claimant has sufficient wages from other employers to be eligible for benefits and, if so, the adjusted amount of that eligibility. The employer's account will not be subject to charge for any benefits that might be paid to the claimant.

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 whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The unemployment insurance decision dated January 18, 2012 (reference 02), is modified in favor of the employer. The claimant voluntarily quit part-time employment without good cause attributable to the employer. The matter is remanded to the Claims Section for investigation and determination whether the claimant has sufficient wage credits to be otherwise eligible and, if so, at what benefit level, and for the investigation and determination of the resulting overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw