

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES A FLOGEL

Claimant

APPEAL NO. 11A-UI-03624-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BE & K CONSTRUCTION COMPANY

Employer

OC: 01/23/11

Claimant: Respondent (2-R)

Section 96.5-1 – Voluntary Quit
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated March 15, 2011, reference 05, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was held on May 23, 2011. The claimant participated during the beginning portion of the hearing. After the call was disconnected, the administrative law judge was unable to reach the claimant. Two messages were left on the claimant's answering machine. Mr. Flogel did not recall the Appeals Section to be reconnected with the call. The employer participated by Ms. Cheryl Clark, office manager, and Mr. Josh Erickson, field superintendent.

ISSUE:

At issue is whether the claimant quit employment by failing to report or provide notification for three or more consecutive workdays.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: James Flogel was employed by BE & K Construction Company from May 6, 2010, until October 26, 2010, when he was separated for job abandonment. Mr. Flogel worked as a full-time helper and was paid by the hour. His immediate supervisor was Dick Schultz.

Mr. Flogel separated from his employment with BE & K Construction Company after he failed to report for work and did not provide required notification on October 21, 22, 25, and 26, 2010. Mr. Flogel had called in on October 18, 19, and 20, but had discontinued calling in although he was aware that he was required to do so. After the claimant had failed to report for work or provide notification for three or more consecutive workdays, the employer considered that Mr. Flogel had voluntarily abandoned his job per company policy. The claimant was aware of the policy and had previously been warned about his poor attendance.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes that the claimant's separation from employment took place under disqualifying conditions. It does.

Iowa Code section 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.

871 IAC 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 evidence in the record establishes that Mr. Fogel was aware of the company policy that required him to provide notification to the employer before the beginning of the work shift each day that he was unable to report for work. Mr. Fogel had complied with the rule in the past but discontinued notifying the employer of his impending absences after October 20, 2010. The claimant did not report or provide notification on October 21, 22, 25, or 26 as required by company policy. Mr. Fogel had been warned about his attendance and was aware of the requirement that he provide notification each day.

Inasmuch as the evidence in the record establishes that the claimant failed to report or provide notification for three or more consecutive workdays, the administrative law judge concludes that the claimant voluntarily quit employment without good cause attributable to the employer. Benefits are withheld.

Iowa Code section 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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.

The matter of whether the claimant has been overpaid unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

DECISION:

The representative's decision dated March 15, 2011, reference 05, is reversed. The claimant quit employment without good cause attributable to the employer. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he meets all other eligibility requirements of Iowa law. The matter of whether the claimant has been overpaid unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw