IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SHELLY A MORTON Claimant **B R STORES INC** Employer	**APPEAL 19R-UI-08898-S1-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/01/19** **Claimant: Respondent (2/R)**

Iowa Code § 96.5(1)d – Voluntary Leaving (Illness/Injury)
Iowa Code § 96.3-7 – Overpayment

STATEMENT OF THE CASE:

B R Stores (employer) appealed a representative's September 18, 2019 decision (reference 01) that concluded Shelly Morton (claimant) was discharged and there was no evidence of willful or deliberate misconduct. Administrative Law Judge Elder issued a decision on October 18, 2019, reversing the representative's decision. A decision of remand was issued by the Employment Appeal Board on November 8, 2019. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 5, 2019. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Donna Bristol, Vice President of Human Resources. The employer offered and Exhibit One was received into evidence. The administrative law judge took official notice of the administrative file.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on November 9, 2018, as a part-time cashier. She signed for receipt of the employer's handbook on November 9, 2018. The handbook states that employees must telephone a manager to report an absence at least two hours prior to the start of a shift. An employee is assumed to have quit work if the procedures are not followed. The employer did not issue the claimant any warnings during her employment.

The claimant sustained a work-related injury and was seen by the employer's physician on August 15, 2019. She was placed on restrictions from August 15, 2019, until her next appointment on August 20, 2019. The claimant spoke with Ms. Bristol and requested time off through August 20, 2019. Her request was approved. The claimant was released to return to work with restrictions on August 20, 2019. Again, the claimant requested that she be allowed to have extended time away from work. The employer granted the claimant's request. Ms. Bristol and the claimant agreed she should return to work on August 29, 2019, for a 9:00 a.m. shift.

The claimant would work 9:00 a.m. shifts on August 29, 30, and 31, 2019. The employer would discuss the claimant's accommodations when she arrived.

While the claimant was taking time off for her medical condition, she received an anonymous telephone call from a female. The claimant thought it might be a co-worker who like to cause problems. The person said, "You might as well not come back to work because you're going to be fired anyway".

Ms. Bristol prepared a "B & R Stores Return to Work Agreement" for the claimant to sign on August 29, 2019. It included the claimant's schedule through September 15, 2019, and the claimant's restrictions. It provided her accommodations, reminded her not to work outside her restrictions and gave her contact people if she needed assistance.

On her way to work on August 29, 2019, the claimant was in pain. She decided to, instead, visit her personal physician. Her physician gave her pain medication and told her not to work. The claimant did not notify the employer of her absence. The employer called the claimant three times and left messages. The claimant did not respond or because she was afraid to call the employer. She did not think she could perform any work for the employer.

On August 30 or September 1, 2019, the claimant did not appear for her 9:00 a.m. shift or notify the employer of her absence. At about noon on September 1, 2019, the claimant talked to a woman who works in the office. The claimant asked for the store manager. The store manager told the claimant to try back on September 2, 2019. The claimant told the co-worker that she was still in pain.

On September 2, 2019, the claimant called the store manager to discuss her injury. The store manager was completing exit paperwork for her. The employer had assumed she had resigned when she did not follow the proper call in procedures in the handbook.

The claimant did not notify the employer of her concerns prior to leaving employment. Nor did the claimant request any accommodation. Continued work was available. She has not been released to return to work by her personal doctor since August 29, 2019. The claimant is scheduled for back surgery in December 2019.

The claimant filed for unemployment insurance benefits with an effective date of September 1, 2019. She received $372.00 in benefits after the separation from employment. The employer participated personally at the fact finding interview on September 16, 2019, by Donna Bristol.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left the employment without good cause attributable to the employer.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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. 871-24.26(6)b provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (6) Separation because of illness, injury, or pregnancy.
>
> b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with the employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.
>
> In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

An individual who voluntarily leaves their employment due to an alleged work-related illness or injury must first give notice to the employer of the anticipated reasons for quitting in order to give the employer an opportunity to remedy the situation or offer an accommodation. *Suluki v. Employment Appeal Board*, 503 N.W.2d 402 (Iowa 1993). An employee who receives a reasonable expectation of assistance from the employer after complaining about working conditions must complain further if conditions persist in order to preserve eligibility for benefits. *Polley v. Gopher Bearing Company*, 478 N.W.2d 775 (Minn. App. 1991).

Inasmuch as the claimant did not give the employer an opportunity to resolve her complaints prior to leaving employment, the separation was without good cause attributable to the employer. Benefits are denied.

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 section 96.3(7)a, b.

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 claimant has received unemployment insurance benefits that the claimant was not entitled to receive. The employer participated personally in the fact finding interview and is not chargeable. The claimant is overpaid unemployment insurance benefits.

The issue of whether the claimant is able and available for work is remanded for determination.

DECISION:

The representative's September 18, 2019, decision (reference 01) is reversed. The claimant voluntarily left employment without good cause attributable to the employer. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The claimant has received unemployment insurance benefits that the claimant was not entitled to receive. The employer participated personally in the fact finding interview and is not chargeable. The claimant is overpaid unemployment insurance benefits.

The issue of whether the claimant is able and available for work is remanded for determination.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/scn