IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ELIZABETH K HERBERT Claimant **DIVERSIFIED SERVICES FOR INDUSTRY** Employer	**APPEAL 16A-UI-09774-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/14/16** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the August 30, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 27, 2016. Claimant participated. Former employee Linda Aldridge participated on behalf of claimant. Employer participated through hearing representative Linda Green, director of operations Tony McMillin, and regional operations manager Denise McDonald. Employer exhibits one and two were admitted into evidence with no objection.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 employed full-time as a supervisor from July 10, 2012, and was separated from employment on August 17, 2016, when she quit.

The employer promoted claimant to supervisor in November 2015. After claimant was promoted, she received training with Ms. McDonald on being a supervisor. Claimant also had access to Ms. McDonald or other employees if she had questions. From November 2015 until late May 2016, the employer felt claimant was performing her job adequately. Mr. McMillin

thought claimant's behavior changed in June 2016 due to issues between claimant and the day matron. The employer received multiple complaints from its customers about claimant's job performance starting in June 2016. Employer Exhibit One.

On June 15, 2016, Ms. McDonald and Mr. McMillin sat down with claimant and went over the employer's list of expectations. Employer Exhibit Two. The employer e-mailed it to claimant and requested her to respond to the list of expectations. Employer Exhibit Two ("Please reply that you received and understand the items listed below"). When the employer asked claimant about the list of expectations, she responded that she was reviewing the documents. On June 15, 2016 and August 10, 2016, Ms. McDonald and Mr. McMillin requested claimant to return the acknowledgment of the list of expectations. Claimant did not respond regarding the list of expectations until August 15, 2016. Employer Exhibit Two.

Approximately a week prior to claimant being suspended, Mr. McMillin requested the acknowledgment for the list of expectations. Claimant indicated to Mr. McMillin, "why don't you just fire me, why don't we just get this done." Mr. McMillin told claimant the employer is "not looking to fire you, we are looking to better you."

On August 15, 2016, Ms. McDonald and Mr. McMillin met with claimant regarding the list of expectations claimant had not acknowledged from June 15, 2016 (also given to her again on August 10, 2016) and to present e-mails from customers about work that had not been getting done. Claimant explained to the employer that it was not her fault that the some tasks were not getting done. The employer suspended claimant pending a management review. The management review was going to evaluate everything that had taken place with claimant (poor performance issues from June 2016 to August 11, 2016). Employer Exhibit One. The employer specifically instructed claimant to contact the employer on August 16, 2016. The employer did not know when the management review was going to be completed, but they would have a better idea on August 16, 2016 of the next steps. The employer made it clear to claimant that she was to contact the employer on August 16, 2016. Ms. McDonald gave claimant a business card with Ms. McDonald's contact information on it. During this meeting, Mr. McMillin saw claimant had a personal cell phone and requested the number so the employer could contact her, but she declined to provide her personal cell phone number to the employer. At the August 15, 2016, meeting the employer took the company cell phone claimant had and her badge. When an employee is suspended, they are required to turn in the company property and customer property, even if it is a one day suspension. The employer needed the company cell phone in case there were any customer issues that happened while claimant was on suspension. The company cell phone number is what the customers would use to contact the employer with any issues. The employer did not tell claimant she was being discharged. Claimant turned in her badge and company cell phone on August 15, 2016.

Claimant did not contact Ms. McDonald or the employer on August 16, 2016. Claimant did not contact the employer after August 15, 2016.

On August 15, 2016 prior to being suspended, claimant was given a written warning because of attendance issues. The written warning did not cover the performance issues that resulted in her suspension.

Ms. Aldridge testified that claimant did not tell her that claimant was fired; claimant only told her that claimant was walked off the premises on August 15, 2016.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,131.00, since filing a claim with an effective date of August 14, 2016, for the six weeks ending September 24, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

It is the duty of an administrative law judge and 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, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa 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*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's 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*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits that were admitted. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

The first issue that must be determined is whether claimant's separation was a discharge or a voluntary quit. For the reasons that follow, the administrative law judge concludes claimant's separation was a voluntary quit. The employer presented credible evidence that although claimant was suspended on August 15, 2016, it clearly instructed her to contact the employer on August 16, 2016 to discuss the next steps. The employer did not tell claimant she was being discharged. The employer had to instruct claimant to contact the employer because she refused to provide the employer with her phone number. Claimant failed to have any contact with the employer after August 15, 2016, despite clear instructions to contact the employer; therefore, claimant's separation is considered a voluntary quit.

The next issue is whether claimant voluntarily quit the employment with good cause attributable to employer. For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was without good cause attributable to the employer. Benefits are denied.

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(6), (21), (22), (27) and (28) 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:
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> (6) The claimant left as a result of an inability to work with other employees.
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> (21) The claimant left because of dissatisfaction with the work environment.
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> (22) The claimant left because of a personality conflict with the supervisor.
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> (27) The claimant left rather than perform the assigned work as instructed.
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> (28) The claimant left after being reprimanded.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). 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).

On August 15, 2016, the employer met with claimant and gave her a written warning for attendance issues. The employer then met with claimant to discuss the list of expectations it had given her and present e-mails from customers about work that had not been done. After discussing these issues with claimant, the employer told her she was suspended pending a management review. Because claimant had to turn in the company cell phone (that is the number customers would call if there were any issues), the employer specifically instructed claimant to call it on August 16, 2016 about the next steps. The employer gave claimant a business card with the contact information. Mr. McMillin observed that claimant had a personal cell phone and requested her number so the employer could contact her, but she declined to provide the cell phone number to the employer; therefore, the employer had to rely on claimant to contact it. Claimant never contacted the employer after the meeting on August 15, 2016. Claimant's leaving the employment without notice or reason, and the failure to return to work or contact the employer renders the separation job abandonment without good cause attributable to the employer.

Claimant's argument that she was discharged is not persuasive. The employer never told claimant she was discharged and Ms. Aldridge testified that claimant did not tell her that claimant was discharged. Claimant only told Ms. Aldridge she had been walked off the premises and Ms. Aldridge assumed claimant had been discharged. Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. Since claimant did not follow up with management

personnel and her assumption of having been fired was erroneous, her failure to continue reporting to work or contacting the employer was an abandonment of the job. While claimant's leaving the employment may have been based upon good personal reasons, it was not for a good-cause reason attributable to the employer according to Iowa law. Benefits must be denied.

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

> 7. Recovery of overpayment of benefits.
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> 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.
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> 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.
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> (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.
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> (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 she 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), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The August 30, 2016, (reference 01) unemployment insurance decision is reversed. Claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of $1,131.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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