

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**EILEEN DIAZ**  
Claimant

**APPEAL NO. 11A-UI-06227-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HOLY SPIRIT RETIREMENT HOME**  
Employer

**OC: 04/25/10**  
**Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

Holy Spirit Retirement Home filed a timely appeal from a representative's decision dated May 2, 2011, reference 08, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was held on June 7, 2011. The claimant participated personally. The employer participated by Mr. John Beringer, human resource coordinator, and Mr. Pat Tomscha, administrator.

**ISSUE:**

At issue is whether the claimant left employment with good cause attributable to the employer.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Eileen Diaz was employed by Holy Spirit Retirement Home from January 17, 2011, until March 28, 2011, when she voluntarily relinquished her position with the organization. Ms. Diaz was employed as a full-time certified nursing assistant trainee and was paid by the hour. Her immediate supervisor was Lisa Turner.

At the time Ms. Diaz was hired by Holy Spirit Retirement Home, she was placed in a certified nursing assistant trainee position and it was specifically agreed that the claimant could remain in that provisional position for four months in a training classification but that the claimant would be required to successfully complete her training and pass the certified nursing assistant's examination by the expiration of the four-month period.

Ms. Diaz was provided training by Holy Spirit Retirement Home in addition to other training she was receiving from an educational institution for certified nursing assistant certification. During this time, Ms. Diaz had attempted and failed the examination in both January and February 2011.

On March 28, 2011, Ms. Diaz telephoned the organization's human resource coordinator, Mr. Beringer, to report that she had again failed the test for the third time. The claimant stated at that time, "I guess I'm done here." Based upon the previous agreement at the time of hire and the statements made by Ms. Diaz, the human resource coordinator reasonably concluded that Ms. Diaz was relinquishing her training position with the organization prior to the expiration of the four-month time period that the claimant was given to pass the examination. Applicants for certified nursing assistant certification are allowed to retake the test as many times as they request to do so without being required to take additional educational classes.

Although Ms. Diaz could not have continued to be employed by Holy Spirit Retirement Home after the four-month provisional period, she could have continued to be employed until approximately April 17, 2011, had the claimant not chosen to relinquish her position by a telephone call dated March 28, 2011. The claimant was free to take additional tests during that time and, if successful, she could have continued her employment indefinitely with Holy Spirit Retirement Home.

### **REASONING AND CONCLUSIONS OF LAW:**

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

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(33) 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:

(33) The claimant left because such claimant felt that the job performance was not to the satisfaction of the employer; provided, the employer had not requested the claimant to leave and continued work was available.

An individual who voluntarily leaves employment has the burden of proving that the voluntary leaving was for good cause attributable to the employer. See Iowa Code section 96.6-2. In this case, the claimant was aware that she was being hired as a certified nursing assistant trainee and that she was able to continue in provisional employment for a four-month period. If the claimant did not pass the certified nursing assistant examination and receive certification within the four months, the employer would not be able to employ her. Ms. Diaz had taken the examination on three occasions and after failing the most recent examination on or about

March 28, 2011, the claimant contacted the employer and verbally relinquished her position with Holy Spirit Retirement Home because she believed that she could not take the test again. The evidence in the record establishes the claimant was not precluded from taking the test again each week until she successfully passed it. The administrative law judge concludes from the evidence in the record that the claimant chose to leave her employment in anticipation, as she might later be discharged by the employer when she was unable to receive certification after the four-month provisional period of her employment had ended. Work continued to be available to Ms. Diaz at the time that she chose to leave. As the claimant's reason for leaving was not attributable to the employer, the claimant is subject to a benefit disqualification. Unemployment insurance 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 issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

**DECISION:**

The representative's decision dated May 2, 2011, reference 08, is reversed. The claimant voluntarily 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 her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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