

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MARK E BERNHARDT
Claimant

APPEAL 17A-UI-01785-NM-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

RIVERBEND HOLDINGS LLC
Employer

**OC: 11/27/16
Claimant: Respondent (5)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Admin. Code r. 871-24.1(113) – Definitions – Separations
Iowa Admin. Code r. 871-24.26(1) – Change in Contract of Hire
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 February 13, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on March 8, 2017. The claimant participated and testified. Witness Scott Huffman was called on behalf of the claimant. The employer participated through owner Kevin Brown and witness Karly Gittings and Katie Krystofiak. Official notice was taken of the fact finding documents.

ISSUES:

Was the separation a layoff, discharge for misconduct, or a voluntary quit without good cause attributable to the employer?

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

Can any 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 service tech from September 23, 2013, until this employment ended on November 22, 2016, when he was laid off.

On November 17, 2016, claimant's supervisor notified him that his position at the Fort Madison location was being eliminated, as it was going to be transferred to a location in Peoria, Illinois. Van Order offered claimant a demotion to a water crew position. Claimant was making \$16.00

per hour in the service tech position. Claimant testified he asked Van Order what the pay would be in the water crew position, but Van Order would not tell him. The normal pay for individuals on the water crew is \$12.00 per hour. Brown testified Van Order told him that he told claimant the pay would be \$14.00 per hour. Claimant denied this allegation.

Witnesses Huffman and Krystofiak were nearby during claimant's conversation with Van Order and were able to overhear the conversation. Neither could recall a specific pay rate being discussed. Both claimant and Huffman testified claimant told Van Order he did not want to take a pay cut and asked what he was supposed to do. Both testified Van Order told him if he was not going to take the water crew position he was laid off and could leave. Claimant denies he ever indicated he was quitting.

The claimant filed a new claim for unemployment insurance benefits with an effective date of November 27, 2016. The claimant filed for and received a total of \$6,720.00 in unemployment insurance benefits for the weeks between November 27, 2016 and March 4, 2017. The employer did not participate in a fact finding interview regarding the separation on February 9, 2017, but testified this was because it did not receive notice of the hearing until after a decision had been made. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was laid off due to a lack of work. Benefits are allowed.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
 - a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.1(113)a provides:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

- a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

Claimant testified Van Order told him that he was being laid off work. Both parties agreed that claimant's position was being eliminated, as it was being transferred to another location in Illinois. While claimant was offered another position with the company, his position was no longer available. Claimant testified that while he did decline the other position offered, he did

nothing to indicate he was quitting. The administrative law judge finds that claimant's separation was a layoff due to a lack of work. Benefits are allowed.

In the alternative, even if claimant was found to have voluntarily quit his employment, he did so with good cause attributable to the employer.

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. 871-24.26(1) 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:

(1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

In general, a substantial pay reduction of 25 to 35 percent or a similar reduction of working hours creates good cause attributable to the employer for a resignation. *Dehmel v. Emp't Appeal Bd.*, 433 N.W.2d 700 (Iowa 1988). A notice of an intent to quit had been required by *Cobb v. Emp't Appeal Bd.*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Emp't Appeal Bd.*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Emp't Appeal Bd.*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). Those cases required an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. However, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added to rule 871-24.26(6)(b), the provision addressing work-related health problems. No intent-to-quit requirement was added to rule 871-24.26(4), the intolerable working conditions provision. Our supreme court recently concluded that, because the intent-to-quit requirement was added to Iowa Admin. Code r. 871-24.26(6)(b) but not 871-24.26(4), notice of intent to quit is not required for intolerable working conditions. *Hy-Vee, Inc. v. Emp't Appeal Bd.*, 710 N.W.2d 1 (Iowa 2005).

Claimant was offered another position with the company, but declined this position as it was a demotion and would result in a pay decrease. While the employer testified that claimant was told the rate of pay was \$14.00 per hour, this testimony was based solely on second-hand information. Claimant provided credible, first-hand testimony that he was not told what his new rate of pay would be. This testimony is supported by the fact that neither Huffman nor Krystofiak could recall a pay rate being discussed.

Even if we assume claimant was not laid off, but quit, inasmuch as the claimant would suffer an indefinite demotion in title and work duties combined with an unknown reduction in pay, and employer has not established misconduct as a reason for the effective demotion, the change of

the original terms of hire is considered substantial. Thus, the separation was with good cause attributable to the employer. As claimant's separation qualifies him to receive benefits, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The February 13, 2017 (reference 01) unemployment insurance decision is modified with no change in effect. Claimant did not quit but was laid off due to a lack of work. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment and participation are moot.

Nicole Merrill
Administrative Law Judge

Decision Dated and Mailed

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