IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

RALPH BESERRA
Claimant

R C CASINO LLC
Employer

APPEAL NO. 18A-UI-11592-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/21/18
Claimant: Respondent (2R)

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

STATEMENT OF THE CASE:

R. C. Casino (employer) appealed a representative's November 20, 2018, decision (reference 01) that concluded Ralph Beserra (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 14, 2018. The claimant participated personally. His wife Donna Beserra, observed the hearing. The employer participated by Sara Pasha, Human Resources Partner. Exhibit D-1 was received into evidence. The employer offered and Exhibit 1 was received into evidence.

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 March 15, 2017, as a full-time maintenance mechanic one.

On October 6, 2018, the claimant was called to a guest's sixth floor room to resolve an issue involving water in the tub. The claimant removed the panel and changed a valve position to one hundred-percent. There was a tag on the valve that read, "Do not change valve position". It was signed with the director's initials. The guest ran water in the tub. It overflowed and dripped water down to the first floor. On October 8, 2018, the director interviewed the claimant about the incident.

The facility's director and the human resources director interviewed the claimant on October 17, 2018. The claimant said he saw the tag but was unable to read it because he had dyslexia. The employer asked the claimant to provide documentation that he had dyslexia and how that diagnosis would affect his job duties. The employer had no intention of reprimanding the claimant. He said he could provide the documentation quickly. Based on the claimant's statement, the employer told the claimant to return to work when he provided the paperwork.

On October 18, 2018, the claimant brought in documentation from a psychologist who evaluated him on October 2, 2012. It said he had a reading disorder. The papers did not mention how it would affect his job duties.

The employer was concerned about safety at the casino and hotel. The claimant handled electrical and water maintenance but was willing to accommodate the claimant so he could continue to work as a maintenance mechanic one. On October 19, 2018, the employer wrote the claimant's psychologist asking for information about the claimant's specific type of reading disorder and how it would affect his job duties. The psychologist responded on October 22, 2018, that he had no medical information, no opinion on the claimant's current level of functioning or how it might affect his job duties.

On or about October 24, 2018, the claimant told the employer he did not have an appointment with a doctor to get the required information until November 20, 2018. On October 30, 2018, the employer called the claimant and asked him to return to work at the same schedule and pay. Due to safety concerns, the employer would accommodate the claimant with different job duties until he provided the required documentation. The claimant said he would think about it. The employer never heard from the claimant again.

The claimant owns an apartment building where he is providing all the mechanical maintenance.

The claimant filed for unemployment insurance benefits with an effective date of October 21, 2018. He received $2,394.00 in benefits after the separation from employment. The employer participated personally at the fact finding interview on November 15, 2018, by Sara Pasha.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant voluntarily quit work 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:
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> 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.

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). The claimant's intention to voluntarily leave work was evidenced by the claimant's actions. He did not provide the documentation and so the employer accommodated him. The claimant chose not to appear for work. There was no evidence presented at the hearing of good cause attributable to the employer. The claimant voluntarily quit without good cause attributable to the employer. Benefits are denied.

The issue of whether the claimant is able and available to work while self-employed is remanded for determination.

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.
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> (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.
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> (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.
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> (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.
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> (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 he 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.

DECISION:

The representative's November 20, 2018, decision (reference 01) is reversed. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount provided the claimant is otherwise eligible.

The issue of whether the claimant is able and available to work is remanded for determination. The claimant has received unemployment insurance benefits that he 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.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs