

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JAMES WOLFE
Claimant

LIEBE TRUCKING INC
Employer

APPEAL 20A-UI-00547-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/08/19
Claimant: Respondent (2)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
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:

On January 20, 2020, Liebe Trucking, Inc. (employer) filed an appeal from the January 10, 2020, reference 03, unemployment insurance decision that allowed benefits based upon the determination James Wolfe (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on February 5, 2020. The claimant participated personally. The employer participated through Sara Liebe, Vice President, and Mindy Liebe, Assistant Office Manager. The employer's Exhibits 1 and 2 were admitted without objection. The administrative law judge took official notice of the fact-finding record.

ISSUES:

Did the claimant voluntarily leave employment with good cause attributable to the employer or did the 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 and charged to the employer's account?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Truck Driver beginning on February 1, 2019. The claimant drove a local truck route in Davenport, Iowa, driving to and from the same business. The claimant became sick on November 21 and did not report back to work until November 25, with a doctor's note.

When he returned, the employer reassigned him to comparable work in Cedar Rapids, Iowa. They also asked him to take an over-the-road trip to Wisconsin. The claimant took the load but did not think he was capable of following the DOT log procedures. Upon the claimant's return, Gary Liebe ("Liebe"), Owner, disciplined the claimant as the load he took to Wisconsin was not properly transported and the claimant had contaminated the product.

On December 5 and 6, the claimant was assigned local routes in Cedar Rapids, working with Liebe's son-in-law. At the end of the day on December 6, the claimant was told that was all the work the son-in-law had for him and he would need to talk to Liebe for further work assignments.

The claimant did not hear from Liebe by Monday morning, December 9. The employer's mechanic called the claimant that morning and said he was cleaning out the claimant's truck. He told him where to pick up his personal items. The claimant assumed he was fired and did not contact Liebe.

The employer had work for the claimant in Cedar Rapids. The claimant did not contact anyone in management after December 6. The employer has a policy that states after three days of no-call/no-show absences an employee will be deemed to have voluntarily resigned. On December 11, after missing three days of work without notification, the employer accepted the claimant's separation as a voluntary resignation.

The claimant has received unemployment benefits in the amount of \$3,367.00, since filing a claim with an effective date of December 8, 2019, for the seven weeks ending February 1, 2020. The employer's third party representative did not answer when called for the fact-finding interview scheduled for January 9, 2020. On January 8, the third party representative sent a letter stating she was not available for the fact-finding call, but did not provide the name and phone number of a first-hand witness who could participate. The other information she provided states the claimant separated due to three days of no-call/no-show absences and provides the employer's policy. However, the documentation did not specify which three days the claimant missed that led to the end of his employment.

REASONING AND CONCLUSIONS OF LAW:

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

For the reasons that follow, the administrative law judge concludes the claimant was not discharged but voluntarily quit without good cause attributable to the employer. Benefits are denied.

Iowa Code section 96.5 provides, provides in relevant part:

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.

...

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 disqualification shall continue 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. 871-24.25 provides, in relevant part:

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:

...

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

...

(21) The claimant left because of dissatisfaction with the work environment.

...

(27) The claimant left rather than perform the assigned work as instructed.

(28) The claimant left after being reprimanded.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left his employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It 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). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

If an individual misses work without notice to the employer and the employer has a policy prohibiting such conduct stating it will be considered a voluntary resignation, the individual is presumed to voluntarily quit without good cause attributable to the employer. Iowa Admin. Code r. 871-24.25(4). In this case, the employer's policy states after three no-call/no-show absences an employee will be deemed to have voluntarily resigned. The claimant missed work without notification to the employer for three consecutive days. The employer has established that the claimant voluntarily quit his employment.

The 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). 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 the claimant did not follow up with management personnel or the owner, and his assumption of having been fired was erroneous, his failure to continue reporting to work was an abandonment of the job. Benefits are denied.

- II. Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived and charged to the employer's account?*

For the reasons that follow, the administrative law judge concludes the claimant has been overpaid unemployment insurance benefits; however, he is not obligated to repay those benefits because the employer failed to participate in the fact-finding interview and its account shall be charged.

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

Payment – determination – duration – child support intercept.

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) (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.

(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.

(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 he 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. The employer did not participate in the fact-finding interview via live testimony nor did it provide the name and phone number of a first-hand witness who would be available for rebuttal testimony. The documents submitted on behalf of the employer lacked specificity and the information would not be disqualifying on its own. The employer did not participate in the fact-finding interview. As a result, the claimant is not obligated to repay to the agency the benefits he received and the employer's account shall be charged.

DECISION:

The January 10, 2020, reference 03, unemployment insurance decision is reversed. The claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of \$3,367.00 but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.



Stephanie R. Callahan
Administrative Law Judge

February 14, 2020
Decision Dated and Mailed

src/rvs