IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

JOSEPH E MCKINNEY
Claimant

WHITEYS BAR & GRILL LLC
Employer

APPEAL NO: 18A-UI-07280-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/27/18
Claimant: Respondent (2)

Section 96.5-1 – Voluntary Leaving
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 28, 2018, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a telephone hearing was held before Administrative Law Judge Julie Elder on July 25, 2018. The claimant participated in the hearing. Tosha Rubner, Co-Owner, participated in the hearing on behalf of the employer. Employer's Exhibit 1 was admitted into evidence.

ISSUE:

The issue is whether the claimant voluntarily left his employment with good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time line cook for Whitey's Bar & Grill from June 26, 2014 to May 30, 2018. He voluntarily left his employment by sending the employer a text message after another line cook was made assistant kitchen manager.

The employer gave the claimant double shifts rather than split shifts because he did not have a driver's license and had to walk to work. By working double shifts the claimant did not have to walk back and forth to work twice a day. The claimant moved across the street from the employer and the employer decided it was no longer fair to other employees to only schedule the claimant for double shifts without any split shifts. On May 23, 2018, the first day the claimant was to work a split shift, he was hostile and rude to co-worker Drew and Drew asked and received permission from the employer to send the claimant home. The claimant left "in a huff" and the employer texted him to come in early for his 5:00 p.m. shift so they could discuss the situation. The claimant stated they did not need to talk because the employer took his shift away for no reason and there was nothing to talk about. The employer told the claimant the meeting was not optional. The claimant came in early and the employer explained why it scheduled him for a split shift and also discussed the claimant telling co-workers and bar patrons he was going to work in another establishment in Mount Vernon. The employer told him

he was free to work at the other bar but she did not want to hear about the claimant continuing to make disparaging remarks about the employer behind her back. The claimant stated he did not have the other job but the employer countered that he told another employee he planned to leave the employer "high and dry." The employer also told the claimant he was a valuable employee. After the meeting several bar customers told the employer the claimant continued to talk about getting a job with the other bar and make comments about the employer. The employer promoted Drew to assistant kitchen manager and the claimant was upset and made further statements about the employer to bar patrons.

On May 30, 2018, the claimant texted the employer at 3:19 a.m. and stated, "Sense (sic) you find somebody else to run the kitchen I think it's time for we (sic) to say goodbye. Tell Drew he's my boy and I love him to death but I'm not working tonight" (Employer's Exhibit 1). The employer saw the text at 6:00 a.m. when she woke up and responded, "I'm sorry that it has come to this Joe but you have lied and talked shit behind my back for the last time. I warned you barely a week ago that I wasn't gonna put up with this crap anymore. You come into my bar and run your mouth about "opening" up a restaurant in Mount Vernon. As far as I'm concerned you quit your job in a drunken text message. I have the proof. Good luck. For your sake I hope that you figure out that you have got to stop lying and grow up" (Employer's Exhibit 1). The claimant replied, "Ok, Tosha as I explained why in the text message. I did not quit. I called and messaged you 7 hours before I had to work" (Employer's Exhibit 1). The claimant continued to exchange text messages with the employer's co-owner's husband. The employer determined the claimant voluntarily quit his job.

The claimant has claimed and received unemployment insurance benefits in the amount of $1,767.00 for the six weeks ending July 21, 2018.

The employer participated personally in the fact-finding interview through the statements of Co-Owner Tosha Rubner.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left his employment 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:
>
> 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.

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. 871 IAC 24.25. Leaving because of unlawful, intolerable, or detrimental working conditions would be good cause. 871 IAC 24.26(3),(4). Leaving because of dissatisfaction with the work environment is not good cause. 871 IAC 24.25(1). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code section 96.6-2.

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). In *Langley v. EAB*, 490 N.W.2d 300 (Iowa App. 1992) the court found a claimant gave notice of resignation one month in advance. The employer accepted it. The claimant later attempted to withdraw the notice but the employer refused. The Court of Appeals agreed that the separation was a quit. Each case must turn on its own facts. *Wolfe v. IUCC*, 232 Iowa 1254, 7 N.W.2d 799 (1943).

In this case the claimant voluntarily quit his job and then tried to rescind his resignation in text messages sent at 3:19 a.m. May 30, 2018, and later in the thread. The employer, however, accepted his resignation. The claimant referenced the fact the employer promoted another employee, Drew, to assistant kitchen manager, said he thought it was time to say good-bye, and told the employer to tell Drew "he's my boy and I love him to death." The employer understood those comments to be a voluntary quit by the claimant as he cited a reason for leaving, effectively told the employer he was leaving and instructed the employer to give a message to Drew that would be unnecessary if the claimant planned to return to work. Additionally, the claimant had been telling co-workers and bar patrons he was leaving to accept another job at an establishment in Mount Vernon and the employer was aware of those comments and had spoken to the claimant about those statements one week prior. The claimant then said he was "not working tonight" which the employer interpreted as he was not working that night because he was voluntarily quitting his job. Given those facts, the employer's determination that the claimant voluntarily quit his job was reasonable. Taken in totality the text message was a voluntary leaving.

Under these circumstances, the administrative law judge concludes the claimant voluntarily left his employment without good cause attributable to the employer. Therefore, benefits must be denied.

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.

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.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The employer participated in the fact-finding interview personally through the statements of Co-Owner Tosha Rubner. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of $1,767.00 for the six weeks ending July 21, 2018.

DECISION:

The June 28, 2018, reference 01, decision is reversed. The claimant voluntarily left his 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 received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of $1,767.00 for the six weeks ending July 21, 2018.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/rvs