IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ROBERT E TEESDALE Claimant **TEAM STAFFING SOLUTIONS INC** Employer	**APPEAL 17A-UI-03557-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/08/16** **Claimant: Respondent (2)**

Iowa Code § 96.5(1)j – Voluntary Quitting – Temporary Employment
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 March 28, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 26, 2017. Claimant participated. Employer participated through human resources generalist Sarah Fiedler. Employer Exhibit One and Two were admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit payment history, with no objection.

ISSUES:

Did claimant quit by not reporting for additional work assignments within three business days of the end of the last assignment?

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

Can 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 temp-to-hire full-time as a maintenance worker last assigned at Foam Fabricators from November 28, 2016, and was separated from the assignment, but not the employment, on January 31, 2017. Claimant last worked on January 27, 2017. The employer (Casey Nichols (account manager)) notified claimant that the assignment had ended on January 31, 2017. The employer left claimant a voicemail. Casey spoke with claimant on February 3, 2017. Claimant notified the employer that he had a non-work related injury, which he had surgery for and he was not available for work at that time. Claimant indicated he would be available in approximately two weeks (around February 17, 2017). Casey told claimant to return to a work assignment he would have to be off restrictions and provide the employer with a doctor's release. Claimant did not contact the employer on February 17, 2017. Claimant's next contact with the employer was on March 6, 2017, when he signed in that he was available for work, but he had not provided a release to return to work. On March 9, 2017, claimant

contacted the employer and inquired about Seimans, but he was not off of work restrictions at that time. The employer reminded claimant he needed to be off of restrictions to continue with the employer. On March 14, 2017, claimant checked in with the employer, but he was still not released to return to work without restriction. On March 24, 2017, Casey called claimant to see what his status was, but she had to leave a message. There was no contact with claimant after March 24, 2017. Claimant testified he was released to return to work around March 28 or 29, 2017, but he did not provide the employer with a release to return to work. Claimant has not provided a release to return to work with no restrictions to the employer.

The employer does have a policy that complies with the specific terms of Iowa Code § 96.5(1)(j). Employer Exhibit One. The document was separate from any contract of employment and a copy of the signed document was provided to the temporary employee. Employer Exhibit One.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2448.00, since filing a claim with an effective date of May 8, 2016, for the six weeks ending April 22, 2017. The administrative record also establishes that the employer did not participate in the fact-finding interview. The fact-finding interview was scheduled for March 27, 2017 at 8:15 a.m. Ms. Fiedler testified she was in a different fact-finding interview at 8:00 a.m. and was still in that fact-finding interview when claimant's fact-finding interview phone call came in around 8:19 a.m. The fact-finder left a name and number and gave the employer until 9:00 a.m. to call back. Ms. Fiedler called at 8:34 a.m. and left a message for the fact-finder. In the message Ms. Fiedler reiterated the information already provided and left her direct phone number for the fact-finder to call. Ms. Fiedler did not receive a return phone call.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant is separated from the employment without good cause attributable to employer. Benefits are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code § 96.5(1)d 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. But the individual shall not be disqualified if the department finds that:
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> d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.25(35) 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:
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> (35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:
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> (a) Obtain the advice of a licensed and practicing physician;
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> (b) Obtain certification of release for work from a licensed and practicing physician;
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> (c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
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> (d) Fully recover so that the claimant could perform all of the duties of the job.

The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that:

> "Insofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

On February 3, 2017, claimant notified the employer he was unable to work due to a non-work related injury, but he informed the employer that he would be available in two weeks (around February 17, 2017). The employer told claimant he had to have no work restrictions and provide a doctor's note releasing him to return to work with no restrictions before he would be given another assignment. Claimant did not contact the employer around February 17, 2017. Although claimant may have checked in with the employer on March 6, 9, and 14, 2017 that he was available for work, he still had not been released to return to work and he failed to provide the employer a doctor's note releasing him to return to work, which was a known requirement. Furthermore, on March 24, 2017, the employer attempted to contact claimant regarding his status, but it had to leave a message and claimant did not respond to the message. It is noted

that claimant testified he was released to return to work around March 28 or 29, 2017, but he did not provide the employer with his release to return to work.

Claimant's failure to return to the employer after he was released to return to work from his non-work related injury and his failure to communicate with the employer after March 14, 2017 indicates his intention to quit his employment with the employer. The employer is not obligated to accommodate a non-work related medical condition. An employee's failure to return to the employer and offer services upon recovery from an injury "statutorily constitutes a voluntary quit and disqualifies an individual from unemployment insurance benefits." *Brockway v. Emp't Appeal Bd.*, 469 N.W.2d 256 (Iowa Ct. App. 1991). Because claimant failed to communicate with the employer after March 14, 2017, he is considered to have abandoned his job at this time. Benefits are denied effective the week beginning March 12, 2017.

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

> 7. Recovery of overpayment of benefits.
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> 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.
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> 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.
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> (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.
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> (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 benefits were not received due to any fraud or willful misrepresentation by the claimant and the employer did not participate in the initial proceeding to award benefits. As such, the claimant is not obligated to repay to the agency benefits he received in connection with this employer's account. However, the employer did not participate in the initial proceeding to award benefits because it was in a different fact-finding interview when the initial call came in, but the employer returned the call and left a message during the time frame provided by the fact-finder, but did not receive a return call from the fact-finder. Iowa Code § 96.3(7)(b)(1)(a) provides: "[t]he 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." (emphasis added). In this case the employer did not fail to timely or adequately respond to a request for information because the employer contacted the fact-finder during the time frame provided, but did not receive a return call from the fact-finder. The benefits paid to the claimant in this case were not because the employer failed to respond timely or adequately to the department's request for information. As such, the employer cannot be charged for the overpayment.

DECISION:

The March 28, 2017, (reference 02) unemployment insurance decision is reversed. Claimant is separated from the employment without good cause attributable to employer. Benefits are withheld until such time as claimant works in and has been paid wages equal to ten times his weekly benefit amount.

Claimant has been overpaid unemployment insurance benefits in the amount of $2448.00 and is not obligated to repay the agency those benefits. Further, because the employer did not receive a return phone call to participate in the fact-finding interview its account shall not be charged.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/scn