

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LOUIS D ESCALANTE

Claimant

APPEAL NO. 11A-UI-01662-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RYDELL CHEVROLET INC

Employer

OC: 10/03/10

Claimant: Respondent (2)

Section 96.5(1) – Voluntary Quit
Section 96.4(3) – Able & Available
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 8, 2011, reference 03, decision that allowed benefits effective January 16, 2011 based on an Agency conclusion that the claimant was able and available for work. After due notice was issued, a hearing was started on March 10, 2011 and concluded on March 30, 2011. Claimant Louis Escalante participated on March 10, but was not available on March 30, 2011 at the number he provided for the hearing. Audra Heineman, Human Resources Manager, represented the employer. Exhibit One was received into evidence. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and wages reported by the claimant. The administrative law judge took official notice of the November 1, 2010, reference 01 decision and supporting documents. The administrative law judge took official notice of the Agency's administrative record of the claimant's responses to the automated telephonic claim reporting system.

Early in the March 10, 2011 proceeding, it became apparent to the administrative law judge that the claimant's separation from the employment had not been adjudicated and that issues relating to the separation should be added to the hearing. The claimant declined to waive his right to formal notice of the separation issues. For that reason, the hearing was adjourned and was set to recommence on March 30, 2011. Notice of the March 30, 2011 was mailed to both parties on March 11, 2011.

ISSUES:

Whether the claimant has been able to work and available for work since he established the additional claim for benefits that was effective January 16, 2011.

Whether the claimant has been overpaid benefits, based on the able and available issue.

Whether the claimant separated from the employment with Rydell Chevrolet for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Louis Escalante was employed by Rydell Chevrolet as a full-time shipping and receiving clerk and last performed work for the employer on December 9, 2010. Mr. Escalante's normal working hours were 7:30 a.m. to 4:30 p.m., Monday through Friday. On December 10, 2010, Mr. Escalante notified the employer he would not be in until noon because he needed to run errands. Mr. Escalante then failed to appear at all for his shift. Mr. Escalante was next scheduled to work on Monday, December 13, 2010. Mr. Escalante was absent from work and failed to notify the employer. Mr. Escalante was again absent from work without notifying the employer on Tuesday, December 14, and Wednesday, December 15. After Mr. Escalante was absent three consecutive days without notifying the employer, the employer concluded Mr. Escalante had voluntarily quit and that the employment was ended. The employer's written attendance policy required that Mr. Escalante contact the employer prior to the scheduled start of his shift if he needed to be absent. The policy also indicated that three consecutive no-call/no-show absences would be deemed a voluntary quit. The policy was contained in an employee handbook that the employer had provided to Mr. Escalante.

Mr. Escalante established an additional claim for benefits that was effective January 16, 2011 and has received benefits. Mr. Escalante has used the automated telephonic weekly reporting system to continue his claim for benefits. Mr. Escalante called in his claim each week between January 16, 2011 and the benefit week that ended March 26, 2011, the most recent week that appears in the Agency's records. Each week Mr. Escalante represented via the automated reporting system that he had contacted five prospective employers. Mr. Escalante received \$2,355.00 in benefits for the period of January 16, 2011 through March 26, 2011.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

A worker who is absent from work three days without notifying the employer in violation of the employer's policy is deemed to have voluntarily quit the employment without good cause attributable to the employer.

The weight of the evidence establishes that Mr. Escalante voluntarily quit the employment without good cause attributable to the employer by being absent for three days without notifying the employer. The employer has a written policy that placed Mr. Escalante on notice that such absence would be deemed a voluntary quit. Based on the voluntary quit, Mr. Escalante is disqualified for benefits until 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 employer's account shall not be charged for benefits paid to Mr. Escalante.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Mr. Escalante failed to appear for the March 30, 2011 proceeding and thereby failed to present any evidence whatsoever to support the assertion that he has been able to work and available for since he established the additional claim for benefits that was effective January 16, 2011. Mr. Escalante's assertion via the automated weekly claims reporting system that he made five job contacts per week is insufficient by itself to establish by a preponderance of the evidence that Mr. Escalante was indeed available for work during the weeks in question. Based on Mr. Escalante's failure to appear and meet his burden of proving he was available for work during the weeks in question, the administrative law judge concludes that Mr. Escalante did not meet the work availability requirement during the period of January 16, 2011 through March 26, 2011 and was not eligible for benefits for those weeks.

Iowa Code section 96.3-7, as amended in 2008, provides:

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) 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. 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. The employer shall not be charged with the benefits.

(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.

Because Mr. Escalante was ineligible for the benefits he received for the period of January 16, 2011 through March 26, 2011 based on the availability issue, the \$2,355.00 in benefits he received for that period constitute an overpayment. Mr. Escalante must repay that amount.

DECISION:

The Agency representatives February 8, 2011, reference 03, decision is reversed. The claimant has failed to demonstrate that he was able to work and available for work during the period of January 16, 2011 through March 26, 2011 and was not eligible for benefits for that period. The claimant has been overpaid \$2,355.00 for the period of January 16, 2011 through March 26, 2011 and must repay that amount.

The claimant voluntarily quit the employment without good cause attributable to the employer. The claimant is disqualified for benefits until 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 employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css