

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CELINA B LUCIDO
Claimant

APPEAL 21A-UI-13328-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLACK SAILS PIRATE BAR
Employer

**OC: 03/14/21
Claimant: Respondent (2R)**

Iowa Code § 96.5(1) – Voluntary Quit from Employment
Iowa Code § 96.5(2)a – Discharge from Employment
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding
Public Law 116-136, sec. 2104 – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

On June 7, 2021, employer Black Sails Pirate Bar filed an appeal from the June 1, 2021 (reference 01) unemployment insurance decision that allowed benefits based on a determination that claimant was discharged from employment and the employer failed to establish willful or deliberate misconduct. The parties were properly notified of the hearing. A telephonic hearing was held at 2:00 p.m. on Friday, August 20, 2021. The claimant, Celina B. Lucido, did not register a telephone number at which to be reached and did not participate in the hearing. The employer, Black Sails Pirate Bar, participated through Patricia Sexton, Owner and Operating Manager. Employer's Exhibit 1 was received and admitted into the record. The administrative law judge took official notice of the administrative record.

ISSUES:

Did the claimant quit the employment without good cause attributable to the employer or was she discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time, most recently as a bartender, from late May 2020 until November 27, 2020, when she quit. Continued work was available, had claimant not quit her employment.

During claimant's employment, she struggled with personal issues that affected her ability to work. While working her scheduled shift on November 14, claimant called Sexton from outside the bar. Claimant was crying and said she "could not handle it." Sexton arranged to have another employee come in and cover claimant's shift. Claimant never worked another shift for the employer.

On November 15, the employer held its monthly staff meeting. Claimant attended this meeting. During the meeting, Sexton discussed the new drug-testing policy. Claimant signed off on the policy. On November 24, Sexton notified employees that all employees needed to report to the bar the following day to complete drug tests. Claimant read this notice and was aware she needed to report to work for the test. Claimant did not report to work as instructed and complete the drug test. She next failed to report for her scheduled shift on November 27. Claimant then fell out of contact with the employer entirely.

The administrative record reflects that claimant has received regular unemployment insurance benefits, Pandemic Emergency Unemployment Compensation, and Federal Pandemic Unemployment Compensation Benefits since her separation from this employer. Claimant received benefits in her prior claim year (effective March 15, 2020) and in this claim year. The employer participated in the fact-finding interview. Sexton received an unscheduled "cold-call" from the agency and gave them substantially the same information she provided during the interview.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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 Code §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.

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

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 has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2) (amended 1998). 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. *LaGrange v. Iowa Dep't of Job Serv.*, (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984).

Here, the evidence in the record indicates that claimant voluntarily ended her employment after being instructed to come in and take a drug test. Claimant then did not report for her next scheduled shift or make any contact with the employer. While she may have assumed she would be discharged since she did not report for the drug test, the employer never told claimant that she no longer had a job. Claimant simply removed herself from the employer's workforce. The evidence in the record indicates that claimant's separation is without good cause attributable to the employer. Benefits are denied.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged. Iowa Code § 96.3(7)a-b, 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) (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 un rebutted 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 she 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. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

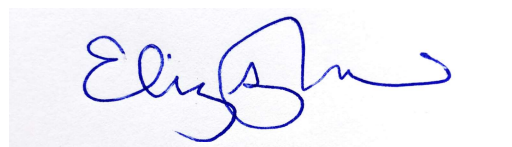
The administrative record indicates all benefits have been paid out under the prior claim year. This matter will be remanded to the Benefits Bureau for further action.

DECISION:

The June 1, 2021 (reference 01) unemployment insurance decision is reversed. Claimant was not discharged but separated from employment without good cause attributable to the employer. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

REMAND:

This matter is remanded to the Benefits Bureau of Iowa Workforce Development for issuance of overpayment decisions in claimant's claim year effective March 15, 2020, and for any further necessary action.



Elizabeth A. Johnson
Administrative Law Judge

August 25, 2021
Decision Dated and Mailed

lj/kmj