

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

LUDIVINA CERVANTES

Claimant

APPEAL NO. 17A-UI-12839-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC

Employer

OC: 11/19/17

Claimant: Appellant (1)

Iowa Code Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Ludivina Cervantes filed a timely appeal from the December 8, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on a Benefits Bureau deputy's conclusion that Ms. Cervantes voluntarily quit on November 7, 2017 without good cause attributable to the employer. After due notice was issued, a hearing was held on January 3, 2018. Ms. Cervantes participated. Jeaneth Ibarra represented the employer. Exhibits A was received into evidence.

ISSUE:

Whether Ms. Cervantes separated from the employment for a reason that disqualifies her for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ludivina Cervantes was employed by Tyson Fresh Meats, Inc. as a full-time production worker at the company's plant in Storm Lake. Ms. Cervantes' employment began in 2015. Ms. Cervantes last performed work for the employer on Thursday, November 2, 2017. Ms. Cervantes' work hours were 5:45 a.m. to 2:30 p.m., Monday through Saturday. Her immediate supervisor was Production Supervisor Jose Venegas. Ms. Cervantes' hourly wage was \$16.75. Ms. Cervantes' net weekly pay was \$625.00.

During the period of employment, Ms. Cervantes resided in a mobile home that she owned in a mobile home park in Storm Lake. Ms. Cervantes is a single-parent and resided in the home with her three minor teenaged children. During the last months of the employment, Ms. Cervantes' mobile home was in serious need of repair. As of July 2017, Ms. Cervantes was without a functioning water heater and was without natural gas service to her home. Ms. Cervantes encountered difficulty in securing a licensed plumber to address the water heater issue and eventually had a friend, rather than a licensed plumber, perform work on the water heater. The natural gas provider inspected the attempted repair of the water heater and then refused to restore natural gas service to the mobile home unless and until the water heater was properly repaired by a licensed plumber. Ms. Cervantes continued to be without a functioning water heater and without heat at the onset of the cold weather season in October 2017. To make matters worse, there were five broken windows in Ms. Cervantes' mobile home.

By the start of November 2017, Ms. Cervantes' living situation had become desperate. Ms. Cervantes was absent from work on Friday, November 3, Saturday, November 4, and Monday through Wednesday, November 6-8, 2017, as she sought help with her living situation. Ms. Cervantes was aware that her absences from work were causing her to accumulate attendance points that could place her employment in jeopardy. Ms. Cervantes was aware that the employer's attendance policy required her to call the workplace and speak with a supervisor at least 30 minutes prior to the scheduled start of her shift on each day she was absent from work. Ms. Cervantes was also aware that being absent three consecutive work days without notice to the employer would be deemed job abandonment under the attendance policy. The employer had reviewed the attendance policy with Ms. Cervantes at the start of her employment and posted the policy in the workplace. During the work week of November 6-11, Jeaneth Ibarra, Human Resources Manager for the Tyson Fresh Meats Storm Lake plant, became concerned about Ms. Cervantes and her absence from the employment. Ms. Ibarra attempted to contact Ms. Cervantes at the telephone number the employer had on record for her, but the number was not in service. Ms. Cervantes' prepaid cell phone service had lapsed and Ms. Cervantes lacked sufficient funds to renew it. When Ms. Ibarra was unable to reach Ms. Cervantes, she asked the company chaplains to make contact with Ms. Cervantes.

After Ms. Cervantes reported for work and completed her shift on Thursday, November 9, she was next scheduled to work on Friday, November 10, 2017. That morning, Ms. Cervantes traveled with her children to Minnesota to stay with family and to secure help with her living situation in Storm Lake. Ms. Cervantes did not notify the employer of the personal circumstances that prompted her to cease reporting for work. Ms. Cervantes concluded, based on a prior issue with her assigned shift, that informing the employer of her problems would be of no help. Ms. Cervantes reached this conclusion despite the fact that Ms. Cervantes had eventually been able to get the earlier matter resolved in her favor. Ms. Cervantes was absent without notice to the employer on Friday, November 10, Saturday, November 11, and Monday, November 13. Ms. Cervantes was thereafter absent for additional shifts without complying with the absence notification requirement.

At about 1:00 p.m. Monday, November 13, Tyson Fresh Meats Chaplain Allen Cummings sent a message to Ms. Cervantes via Facebook Messenger. On that day Ms. Cervantes used her brother's tablet computer to access her Facebook account and saw the chaplain's message. The chaplain asked what was going on with Ms. Cervantes and asked whether she was interested in continuing her employment. Ms. Cervantes sent a response through Facebook Messenger. Ms. Cervantes explained her personal circumstances. Ms. Cervantes stated that she wanted to work, but that she "just took off" from Storm Lake in response to the issues with her home. Ms. Cervantes told the chaplain that she had not been reporting her absences because she assumed she had accumulated attendance points and was fired. Chaplain Cummings told Ms. Cervantes that she had not been fired and encouraged Ms. Cervantes to contact Ms. Ibarra. Chaplain Cummings provided Ms. Cervantes with a phone number for Ms. Ibarra. Ms. Ibarra was in fact out of the office on a scheduled period of vacation during the workweek of November 13-18. On the afternoon of November 13, Ms. Cervantes attempted to call Ms. Ibarra, but her call did not go through. On Tuesday, November 14, Ms. Cervantes called Ms. Ibarra's phone number and left a voice mail message indicating that she was interested in returning to the employment, if Ms. Ibarra was willing to speak with her. Ms. Cervantes telephoned Ms. Ibarra again on November 15 or 16 and left a similar message. On November 15, a human resources clerk documented a separation from the employment, based on the employer's job abandonment policy.

Ms. Cervantes subsequently returned to Storm Lake and learned from a coworker that Production Supervisor Moises Gracia was asking about her. On Tuesday, November 21, Ms. Cervantes went to the Tyson Fresh Meats plant and spoke with Mr. Gracia. Ms. Cervantes had at that point been absent for 10 consecutive shifts without providing the required notice to

the employer. Mr. Gracia asked Ms. Cervantes what had been happening and why Ms. Cervantes had not communicated with the employer. Ms. Cervantes explained that she had left Storm Lake in response to her desperate housing situation and had not reported her absences because she assumed she had exceeded the allowable number of attendance points. Ms. Cervantes told Mr. Gracia that Chaplain Cummings had contacted her and that he had indicated the company was looking for her. Ms. Cervantes told Mr. Gracia about her calls to Ms. Ibarra that were not returned by Ms. Ibarra. Mr. Gracia told Ms. Cervantes that he could not do anything for her and that she was no longer employed due to the no-call/no-show absences.

Ms. Ibarra returned to work on November 20. On November 21, Ms. Ibarra was at a point in catching up with her work where she had time to address Ms. Cervantes' calls. When Ms. Ibarra learned that that Mr. Gracia had already spoken with Ms. Cervantes, Ms. Ibarra concluded there was no need to contact Ms. Cervantes.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(113)(b). 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 Iowa Administrative Code rule 871-24.25.

Iowa Code section 96.5(1)f 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. But the individual shall not be disqualified if the department finds that:

f. The individual left the employing unit for not to exceed ten working days, or such additional time as may be allowed by the individual's employer, for compelling personal reasons, if so found by the department, and prior to such leaving had informed the individual's employer of such compelling personal reasons, and immediately after such compelling personal reasons ceased to exist the individual returned to the individual's employer and offered the individual's services and the individual's regular or comparable work was not available, provided the individual is otherwise eligible; except that during the time the individual is away from the individual's work because of the continuance of such compelling personal reasons, the individual shall not be eligible for benefits.

Iowa Admin. Code r. 871-24.25(4) 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:

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

The evidence in the record indicates that Ms. Cervantes initiated the separation from the employment by ceasing to appear for work effective November 10, 2017 and by failing to properly notify the employer of her need to be absent from the employment. Ms. Cervantes did indeed voluntarily quit the employment and was not discharged by the employer. Ms. Cervantes was a no-call/no-show for her shifts on November 10, 11, 13, 14 and 15 before the human resources clerk documented a voluntary quit due to job abandonment. Ms. Cervantes continued to be absent without providing the reasonable, required daily notice until she appeared at the plant on November 21. Ms. Cervantes had a compelling personal reason to be absent from the employment, based on her housing circumstances, but failed to notify the employer of her need to be off work prior to commencing the extended absence. The administrative law judge notes that Ms. Cervantes' housing crisis was months in the making. A reasonable person would have taken additional steps to resolve or mitigate the issues before they reached the point of crisis.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Cervantes voluntarily quit the employment without good cause attributable to the employer. The quit was effective November 10, 2017. Ms. Cervantes is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Cervantes must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The December 8, 2017, reference 01, decision is affirmed. The claimant voluntarily quit the employment without good cause attributable to the employer. The effective quit date was November 10, 2017. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs