IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

KATRINA M NETHERLAND Claimant **FAMILY DOLLAR STORES OF IOWA INC** Employer	**APPEAL NO. 16A-UI-02355-B2** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/24/16** **Claimant: Respondent (2)**

Iowa Code § 96.3-7 – Recovery of Overpayment of Benefits
871 IA Admin. Code 24(10) – Employer Participation in Fact Finding
Iowa Code § 96.5-1 – Voluntary Quit

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated February 18, 2016, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on July 13, 2016. Claimant participated personally. Employer participated by attorney George Wood, with witness Lisa Breiner. Employer's exhibits 1-8 and claimant's exhibits A-G were admitted into evidence. Sign language services were provided by Deaf Services Unlimited.

ISSUES:

Whether claimant quit for good cause attributable to employer?

Whether claimant was overpaid benefits?

If claimant was overpaid benefits, should claimant repay benefits or should employer be charged due to employer's participation or lack thereof in fact finding?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on January 26, 2016. Claimant quit her employment on January 27, 2016. Claimant quit because she could no longer take the inappropriate treatment that she was receiving by employer.

Claimant is deaf. Claimant was an assistant manager working full time for employer since May 20, 2015. Claimant's original store manager and assistant manager treated her poorly through her first couple of months of work for employer. Claimant was called names, insulted, physically assaulted, and treated in an outrageous manner. (Cl. Ex. A). In July, 2015, district management of employer was informed by claimant of her treatment and promptly terminated the offending parties.

Subsequent to this treatment, claimant saw and continues to see a counsellor. She is said to suffer from PTSD, although the administrative law judge cannot determine whether the initial cause of the PTSD was claimant's discovering the dead girlfriend of claimant's father a number of years ago, a bicycle accident suffered by claimant, or the horrendous treatment claimant received while working this most recent job. Employer scheduled claimant around her initial treatment times, but did not allow claimant to change her counselling appointments week to week. Additionally, claimant was not paid by employer when she left for her counselling visits as she wanted.

Claimant continued working for employer for six months after the incidents occurred. Claimant stated that even after these incidents ended, the new store manager and employer as an entity treated claimant poorly by not attending to her needs as a deaf woman. Claimant offered numerous examples of how her needs were not attended. She stated that the new store manager would write up claimant for claimant's actions that occurred as a result of her being deaf. These actions included claimant's not properly locking the store safe when she'd use it – thereby leaving the safe open. Claimant would also not properly lock the back door. Claimant also claimed that the new store manager would talk to claimant without looking directly at claimant, thus making it impossible for claimant to understand what the manager requested claimant to do.

Employer stated that as soon as they found out about claimant's treatment, the other coworkers were fired. Claimant was given time off to attend counselling after the store found out. Claimant's desire to attend counselling sessions created a situation where employer created a schedule based on claimant's counselling sessions. Employer additionally stated that regarding the safe, claimant explained to the new store manager how the safe operated, so claimant's worries that there was not a flashing indicator of when the time out might occur for the safe was not necessary as claimant had successfully used the safe for many months. Regarding the back door, claimant had also used the back door lock effectively for a number of months as there were lights indicating when the alarm was to go off.

Employer also stated that both the store manager and other employees tried to communicate with claimant both through texts and verbally, and this was thought to be effective. The store manager stated additionally that she created a separate list for assignments and tasks to be completed on each day, so that all assistant managers would know tasks to be done. Employer had also scheduled a visit from the district or national office such that a meeting could be conducted on effectively and respectfully dealing with deaf coworkers. Such visit had not taken place before claimant quit.

Employer additionally claimed that claimant had been looking for other employment prior to her quit, and that she was upset because there had been a cigarette sting that happened at the store a couple weeks before claimant's quit. Although claimant did not get in trouble as a result of her sales person's sale of cigarettes to an underage person, claimant felt persecuted by employer. Employer was upset about fines imposed through sales of cigarettes to underage persons.

Claimant has received unemployment benefits in this matter.

Employer substantially participated in fact finding in this matter.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
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> 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.

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.
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> (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 administrative law judge holds that the evidence has failed to establish that claimant voluntarily quit for good cause attributable to employer when claimant terminated the employment relationship because of ongoing grief claimant dealt with at work. Where a claim gives numerous reasons for leaving employment Iowa Workforce is required to consider all stated reasons which might combine to give the claimant good cause to quit in determining any

of those reasons constitute good cause attributable to the employer. Taylor v. Iowa Department of Job Service, 362 N.W.2d 534 (Iowa 1985).

Claimant listed a number of actions on the part of employer that led to her quit. Initially, employer's atrocious actions to claimant certainly could have led to a reasonable quitting of employment – had it occurred at any time near the incidents. The quit in this matter didn't occur until over a half year after the store manager and assistant manager had been fired for their inappropriate actions. The administrative law judge can find no case law allowing for a quit for reasons surrounding an incident or series of incidents which occurred six months prior to the quit, when the incidents weren't subsequently repeated. Claimant admitted that her treatment subsequent to the termination of the manager and assistant manager did not include the physical or verbal abuse that existed prior to those parties' terminations.

Additionally claimant stated that she quit because she was not given paid time off to attend counselling sessions. Claimant dealt with not only her abuse at the hands of previous coworkers during those sessions, but also trauma brought on by difficult life events. Employer did allow claimant time off for the counselling sessions based on those dates claimant originally stated she needed off for the sessions.

Claimant also averred that she quit because employer wouldn't speak while looking at her. This was frustrating to a deaf person who couldn't read lips of a person not looking at her. Claimant said that other coworkers would take time to talk to claimant's face, but the new store manager would talk to claimant while doing other things. Employer addressed this situation through multiple tactics. Not only did employer text information to claimant, she also created a daily report setting out items to be completed that day. Both the daily report and the texts were additional ways to communicate over and above the allowance of lip reading. Claimant could also remind her manager if she didn't catch something that was said.

Other complaints from claimant surrounded lights for the safe and the back door alarms. Claimant taught her new manager how to use the safe, so the absence of lights certainly did not make the operation difficult for her, and the back door was equipped with a lighted alarm which indicated when it was on.

"Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. Uniweld Products v. Industrial Relations Commission, 277 So.2d 827 (Fla. App. 1973). Claimant is not the average person, and her special needs certainly should be attended to by employer. But employer endeavored to address claimant's needs, not only through actions instituted by the store and the new store manager, but also through the fact that special training was to be instituted for other employees to aid all at the store in respecting and addressing claimant's needs. The actions put in place by employer directly addressed claimant's concerns, such that claimant did not have a "good cause" reason to quit her job. Benefits are denied.

The overpayment issue was addressed. Amounts paid to claimant in this matter are deemed to be overpayments.

The issue of employer participation was addressed. As employer substantially participated in the fact finding in this matter, employer's account will not be charged for overpayments received by claimant.

DECISION:

The decision of the representative dated February 18, 2016, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. Benefits received by claimant in this matter are overpayments and must be repaid. Employer's account shall not be responsible for the overpayments.

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Blair A. Bennett
Administrative Law Judge

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Decision Dated and Mailed

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