

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NICK A WALKER**

Claimant

**APPEAL NO. 10A-UI-09395-HT**

**ADMINISTRATIVE LAW JUDGE  
AMENDED DECISION**

**GOOD SAMARITAN SOCIETY RED OAK**

Employer

**OC: 04/04/10**

**Claimant: Respondent (2-R)**

Section 96.5(1) – Quit

**STATEMENT OF THE CASE:**

The employer, Good Samaritan Society Red Oak (Good Samaritan), filed an appeal from a decision dated June 22, 2010, reference 01. The decision allowed benefits to the claimant, Nick Walker. After due notice was issued, a hearing was held by telephone conference call on August 19, 2010.

The claimant provided a telephone number for the hearing. That number was dialed at 11:02 a.m. and 11:04 a.m. and allowed to ring ten times on each occasions. The claimant did not answer and there was no voice mail to leave a message. By the time the record was closed at 11:17 a.m. the claimant had not contacted the Appeals Section and did not participate.

The employer participated by Dietary Director Kristi Fiedler, RN/Charge Nurse Tammy Gussey and Human Resources Associate Cheryl Williams..

**ISSUE:**

The issue is whether the claimant quit work with good cause attributable to the employer.

**FINDINGS OF FACT:**

Nick Walker was employed by Good Samaritan from September 8, 2009 until February 5, 2010 as a full-time dietary associate. He was placed on a performance improvement plan (PIP) for 30 days effective January 5, 2010. Dietary Director Kristi Fiedler met with him on February 5, 2010, to discuss his progress. He had not made satisfactory progress and was still refusing to read and follow the dietary cards for the residents. He asserted he did not have to do that because dietary did not pay any attention to them anyway. The employer disagreed.

Ms. Fiedler intended to extend his PIP another 30 days to give him another opportunity to improve, but did not get that far in the discussion. The claimant did not seem cooperative and Ms. Fiedler asked him if he wanted to resign. She did not tell him he would be discharged as she did not intend to fire him at that time. He elected to resign although continuing work was available to him.

Nick Walker has received unemployment benefits since filing a claim with an effective date of April 4, 2010.

The record was closed at 11:17 a.m. At 1:17 p.m. the claimant called. The number the administrative law judge dialed was the one given by the claimant. He maintained it was a correct number but he intended to use it only as "back up" if his cell phone didn't work. But he was asleep at the time the hearing was scheduled to start and did not answer the phone when it rang or call in within five minutes after the scheduled start time of the hearing as instructed.

## **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.

871 IAC 24.25(28) 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:

(28) The claimant left after being reprimanded.

The claimant was not given the choice between resigning and being discharged. Continuing work was available to him at least through the extended PIP period but he elected to quit because of the disciplinary action against him. Under the provisions of the above Administrative Code section, this is a voluntary quit without good cause attributable to the employer and the claimant is disqualified.

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.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

The next issue is whether the record should be reopened. The judge concludes it should not.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The administrative law judge called the number provided by the claimant and it was a correct number. He was asleep and did not hear the phone and apparently did not awaken until two hours after the hearing started. As the judge dialed a correct number and the claimant did not answer because he was asleep, this does not constitute good cause to reopen the record. Therefore, the claimant's request to reopen the hearing is denied.

**AMENDED DECISION:**

The representative's decision of June 22, 2010, reference 01, is reversed. Nick Walker is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/css/css