

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JEANNE E PAYNE
609 E 10TH ST S
NEWTON IA 50208

THE GAUCHO CAFÉ LLC
D/B/A THE GAUCHO CAFÉ
207 – 1ST AVE E
NEWTON IA 50208

Appeal Number: 04A-UI-09432-RT
OC: 08-08-04 R: 02
Claimant: Respondent (3-R)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.6-2 – Initial Determination (Timeliness of Protest)
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, The Gaucho Café LLC, doing business as The Gaucho Café, filed a timely appeal from an unemployment insurance decision dated August 26, 2004, reference 02, allowing unemployment insurance benefits to the claimant because the employer's protest was not timely. After due notice was issued, a telephone hearing was held on September 23, 2004, with the claimant participating. John Bali, General Manager, Margaret Rogers-Neuendorf, and Stanley Orfanos participated in the hearing for the employer. Department Exhibit 1 was

admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit 1, the administrative law judge finds: The claimant filed a claim for unemployment insurance benefits effective August 8, 2004. A notice of the claimant's claim was sent to the employer on August 13, 2004 and received by the employer. That notice indicated that a protest was due by August 23, 2004. However, as shown at Department Exhibit 1, the employer's protest was dated and faxed to Iowa Workforce Development on August 24, 2004, one day late. The reason the notice was late was that the owner and bookkeeper, Debbie Martin, was gone on vacation. Ms. Martin was the employer's bookkeeper and owner and handled all of the mail. Although the mail came to the café, it was not opened by the General Manager, John Bali, one of the employer's witnesses. Ms. Martin had access to the bookkeeping records and the employee records and she was the only one who handled such unemployment insurance notices. The employer is now instituting a change of this practice. As soon as Ms. Martin returned, she immediately filled out the protest and faxed it.

Because the administrative law judge hereinafter concludes that the employer's protest was not timely but the employer has demonstrated good cause for the delay in the filing of its protest, the administrative law judge further finds: The claimant was employed by the employer as a part-time head waitress from June 1, 2004 until she voluntarily quit on July 27, 2004. On that day, the claimant walked out before the lunch hour when she was supposed to leave work at 3:00 p.m. Later that day the claimant called and spoke to John Bali, General Manager and the employer's witness, and told him that she had been wrong and that if she was needed to call her. Mr. Bali did not do so. The claimant quit because on that day, July 27, 2004, she had gotten a phone call from Tim Klemme, the General Manager of a business operated by Dr. Martin, the father of the owner of the employer, Debbie Martin. Mr. Klemme called the café to speak to Mr. Bali but he was gone and so spoke to the claimant. The claimant asked Mr. Klemme in if he had received her letter, which he had requested. He responded yes in the affirmative but said nothing more. The claimant then said something about chivalry was not dead and other comments to Mr. Klemme that Mr. Klemme believed were insubordinate. He told the claimant that this was insubordinate. The claimant then got upset and left the café. She has not returned and offered to go back to work.

Mr. Klemme was brought in by Mr. Bali and Ms. Martin to moderate and resolve a conflict between the claimant and the employer's cook, Stanley Orfanos. The claimant had been asked to do a letter, which she had done and provided to Mr. Klemme. The conflict between the claimant and Mr. Orfanos stemmed from an incident on July 20, 2004. The claimant was upset with a coworker waitress who yelled at her. Mr. Orfanos came to the defense of the coworker waitress and admonished the claimant. This then developed into an argument and confrontation between the claimant and Mr. Orfanos. Both were extremely angry and upset. Both yelled and both used profanity. Prior to that time, the claimant had had no problem with Mr. Orfanos. However, she had used profanity and had confrontations with a Budweiser man and another waitress whom she called a "bitch." The argument between the claimant and Mr. Orfanos began in the kitchen. Mr. Orfanos began to leave by going outside and getting in his car. The claimant followed Mr. Orfanos outside and placed her knee into the car door of Mr. Orfanos. Both continued to argue and use profanity. Another reason for the argument was the claimant objected to Mr. Orfanos ringing the bell announcing to the waitresses that the food was ready. At one point the claimant rang the bell herself for Mr. Orfanos. The claimant

expressed concerns about this incident to Mr. Bali but did not at any time indicate that she would quit over the incident. Mr. Bali told the claimant to put it in writing and Mr. Klemme would resolve the matter. Before the matter was resolved, the phone call above occurred and the claimant quit. The claimant had expressed no concerns about Mr. Orfanos or her working conditions prior to the incident on July 20, 2004 nor had she ever indicated or announced an intention to quit for any reason to the employer. The claimant continued to work after July 20, 2004 without further incidents until July 27, 2004. Pursuant to her claim for unemployment insurance benefits, the claimant had received unemployment insurance benefits in the amount of \$504.00 as follows: \$168.00 per week for three weeks from benefit week ending August 14, 2004 to August 28, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely protest of the claimant's claim or, if not, whether the employer established good cause for such failure. The administrative law judge concludes that the employer's protest was not timely but the employer has demonstrated good cause for the delay in the filing of its protest and such protest should, therefore, be accepted and the administrative law judge has jurisdiction to reach the remaining issues.
2. Whether the claimant's separation from employment was a disqualifying event. It was potentially because she voluntarily quit without good cause attributable to the employer but because this was part-time employment and because the claimant is otherwise monetarily eligible to receive unemployment insurance benefits based on wages paid by other base period employers, the claimant is not disqualified to receive unemployment insurance benefits but any benefits to which the claimant is entitled shall not be based on wages paid by the part-time employer herein and the account of the part-time employer herein shall not be assessed any such charges.
3. Whether claimant is overpaid unemployment insurance benefits. The administrative law judge cannot now determine whether the claimant has been overpaid unemployment insurance benefits. This matter must be remanded to Claims for an investigation and determination as to the amount of unemployment insurance benefits the claimant is entitled after removing from consideration the wages earned from the employer herein and then can determine whether the claimant has been overpaid unemployment insurance benefits.

Iowa Code section 96.6-2 provides in pertinent part:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant.

The administrative law judge concludes that the employer has the burden to prove that its protest was timely or that it had good cause for delay in the filing of its protest. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that although its protest was not timely, it had good cause for delay in the filing of its protest. As noted in the findings of fact, the employer's protest was one day late. The reason for the delay was that the sole person responsible for opening the mail and completing unemployment insurance matters, Debbie Martin, was on

vacation. When she returned, she immediately completed the protest and faxed the same. The protest was only one day late. No one else for the employer was authorized or empowered to open mail or respond to unemployment insurance matters. The employer is now in the process of changing this process. Nevertheless, at the time that the notice of claim was mailed to the employer and at the time the protest was due, the employer had no one else but Ms. Martin to do the protest and she was on vacation. In this situation, the administrative law judge concludes that the employer has demonstrated good cause for its delay in filing the protest. Accordingly, the administrative law judge concludes that the employer has failed to effect a timely protest within the time period prescribed by the Iowa Employment Security Law but the employer did establish or demonstrate good cause for such delay. Therefore, the administrative law judge concludes that the employer's protest should be accepted and that he has jurisdiction to make a determination with respect to the other issues presented.

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 24.27 provides:

Voluntary quit of part-time employment and requalification. An individual who voluntarily quits without good cause part-time employment and has not requalified for benefits following the voluntary quit of part-time employment, yet is otherwise monetarily eligible for benefits based on wages paid by the regular or other base period employers, shall not be disqualified for voluntarily quitting the part-time employment. The individual and the part-time employer which was voluntarily quit shall be notified on the Form 65-5323 or 60-0186, Unemployment Insurance Decision, that benefit payments shall not be made which are based on the wages paid by the part-time employer and benefit charges shall not be assessed against the part-time employer's account; however, once the individual has met the requalification requirements following the voluntary quit without good cause of the part-time employer, the wages paid in the part-time employment shall be available for benefit payment purposes. For benefit charging purposes and as determined by the applicable requalification requirements, the wages paid by the part-time employer shall be transferred to the balancing account.

871 IAC 24.26(2) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (2) The claimant left due to unsafe working conditions.

871 IAC 24.26(3) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(3) The claimant left due to unlawful working conditions.

871 IAC 24.26(4) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(4) The claimant left due to intolerable or detrimental working conditions.

871 IAC 24.25(1) 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:

871 IAC 24.25(6) 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:

(6) The claimant left as a result of an inability to work with other employees.

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 parties concede that the claimant left her employment voluntarily. The issue then becomes whether the claimant left her employment without good cause attributable to the employer. The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The administrative law judge concludes that the real reason for the claimant's quit was a telephone conversation with Tim Klemme who was chosen by the employer to intervene and mediate a dispute between the claimant and a coworker, Stanley Orfanos, one of the employer's witnesses. Mr. Klemme called the employer's café and asked to speak to John Bali, the General Manager and one of the employer's witnesses. Mr. Bali was not there and Mr. Klemme spoke instead to the claimant. Rather than simply tell Mr. Klemme that Mr. Bali was not there, she asked if he had received the letter that he had requested about the incident discussed below. He answered yes in the affirmative but did not go into it. The claimant then made a rude statement about chivalry not being dead and other statements to Mr. Klemme that he believed were insubordinate and he told the claimant so. The claimant then got upset and left before the lunch hour when she was supposed to leave at 3:00 p.m. The administrative law judge concludes that this conversation with Mr. Klemme did not make the claimant's working conditions unsafe, unlawful, intolerable or detrimental. Rather, the administrative law judge concludes that it was in the nature of a reprimand and leaving work voluntarily for a reprimand is not good cause attributable to the employer. The administrative law judge further notes that at no time had the claimant ever informed the employer that she intended to quit unless any problems were addressed by the employer and had not given the employer a reasonable opportunity to address any of the claimant's concerns before she announced her quit.

The involvement of Mr. Klemme arose out of an incident between the claimant and Mr. Orfanos on July 20, 2004. The claimant testified basically that it was all the fault of Mr. Orfanos and that he was the only one that used profanity and yelled. Mr. Orfanos testified that it was the fault of the claimant and both were yelling and both used profanity but the claimant started. The other witnesses do not help a great deal. The administrative law judge concludes based on the evidence here that the argument and confrontation between Mr. Orfanos and the claimant was due to both equally. The claimant was mad at a coworker waitress and had yelled at her in a disrespectful manner and Mr. Orfanos came to the defense of the waitress and the argument started. They also argued about Mr. Orfanos ringing the bell announcing that food was ready to be served. However, this is the ordinary way that waitresses are informed that food is ready to be served. In fact, at one point, the claimant rang the bell herself, which is not her duty. The claimant's testimony to the contrary is not credible. The evidence establishes that during the argument Mr. Orfanos tried to go to his car but the claimant followed him to his car continuing to yell at him and then placed her knee in the car door of Mr. Orfanos. It appears to the administrative law judge that the claimant, herself, was trying to continue the confrontation and even made it somewhat physical. There is also some evidence, and the claimant even concedes to some, that the claimant had words with another waitress calling her "bitch" and also a confrontation with the Budweiser man who made deliveries to the employer. It appears to the administrative law judge that at the very least the claimant was equally culpable for the confrontation with Mr. Orfanos. Further, after the confrontation, the claimant worked for at least

several days with Mr. Orfanos without incident and that previously the claimant testified she had had no similar incidents with Mr. Orfanos. The administrative law judge concludes that this one incident with Mr. Orfanos in view of the claimant's participation does not establish that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental. The claimant's quit, if she quit because of this and not just for a phone call with Mr. Klemme, was because she could not work with a coworker but again this is not good cause attributable to the employer. The claimant did express concerns about Mr. Orfanos and the employer's response was to bring in Mr. Klemme to moderate and solve the problem and had asked for the claimant to put something in writing and she did so. The employer was working on this matter but really had not had a chance to resolve it before the claimant quit. Once again the administrative law judge specifically notes the claimant at no time informed the employer that she intended to quit over these matters and, therefore, did not give the employer a reasonable opportunity to resolve the matter before the claimant quit. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer and would be disqualified to receive unemployment insurance benefits.

The administrative law judge concludes that the claimant's employment at all material times hereto was part-time. The administrative law judge further concludes that the claimant is otherwise monetarily eligible for unemployment insurance benefits based on wages paid by other base period employers. Therefore, the administrative law judge concludes that the claimant is not disqualified to receive unemployment insurance benefits. However, any unemployment insurance benefits to which the claimant is entitled shall not be based on wages paid by the part-time employer herein and any benefits received by the claimant shall not be assessed against the account of the part-time employer herein. Unemployment insurance benefits are allowed to the claimant to the extent that she is entitled to benefits after removing from consideration the wages earned from the part-time employer herein. This matter should be remanded to Claims for an investigation and determination as to what amount of benefits the claimant is entitled after removing from the determination of the claimant's unemployment insurance benefits, the wages paid by the part-time employer herein, The Gaucho Café LLC, doing business as The Gaucho Café.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$504.00 since separating from the employer herein on or about July 27, 2004 and filing for such benefits effective August 8, 2004. The administrative law judge is not able to determine now whether the claimant is overpaid such benefits. This matter must be remanded to Claims for an investigation and determination as noted above as

to the amount of benefits to which the claimant is entitled and then for an investigation and determination as to whether the claimant is overpaid any unemployment insurance benefits which she has already received.

DECISION:

The representative's decision of August 26, 2004, reference 02, is modified. The claimant, Jeanne E. Payne, left her employment voluntarily without good cause attributable to the employer and would ordinarily be disqualified to receive unemployment insurance benefits but because the employment she left was part-time and the claimant is otherwise monetarily eligible to receive unemployment insurance benefits, she is not disqualified to receive unemployment insurance benefits. Any unemployment insurance benefits to which the claimant is entitled shall not be based on wages paid by the part-time employer herein and such benefits shall not be assessed against the account of the part-time employer herein. In order to determine the amount of benefits to which the claimant is entitled and to determine whether she is overpaid unemployment insurance benefits, this matter must be remanded to Claims. The employer has demonstrated good cause for the delay in the filing of its protest and the protest is, therefore, accepted.

REMAND:

This matter is remanded to Claims for an investigation and determination as to the amount of unemployment insurance benefits to which the claimant is entitled after excluding wages paid by the part-time employer herein, The Gaucho Café LLC, doing business as The Gaucho Café and after such determination, a further investigation and determination as to whether the claimant is overpaid unemployment insurance benefits. The claimant voluntarily quit without good cause attributable to her part-time employment from the employer but is otherwise monetarily eligible to receive unemployment insurance benefits.

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