IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

MELISSA HEMPHILL Claimant **PINNACLE HEALTH FACILITIES XVII LLC** Employer	**APPEAL 16A-UI-10597-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/04/16** **Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the September 20, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 12, 2016. The claimant participated personally. The employer participated through Dayle Tessner. Amanda Noel also testified for the employer. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Did the claimant voluntarily quit the employment with good cause attributable to the employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a CNA and was separated from employment on September 2, 2016, when she voluntarily quit the employment without notice. Continuing work was available.

The employer serves a population of residents and therefore is required to maintain appropriate staffing levels. In August 2016, the claimant began experiencing personal health issues and calling off of work. She was absent from work on August 8, 2016, was a no-call/no-show on August 9, 2016 and presented the employer a doctor's note to excuse the absence upon returning to work. The claimant called off again on August 25, 2016, citing to "personal problems" and the claimant's manager, Dayle Tessner, asked the claimant the nature of her call off. The claimant refused to share why she was calling off work because she didn't know

Ms. Tessner very well. The employer was therefore unaware of the nature of the claimant's health issues.

On August 28, 2016, the claimant was taken by a friend to Broadlawns to seek medical help due to mental health issues. While at Broadlawns, the claimant became upset and kicked a peace officer and hit a monitor, causing her to be incarcerated at the Polk County Jail. The claimant was unable to place a phone call to report her absence on August 29, 2016, but the claimant's boyfriend, James, notified the employer that the claimant was incarcerated. He again called the employer on August 30, 2016 to provide an update and inquired about a medical leave of absence. The employer told him that the claimant would need to talk to the employer about it when she returned to work. The claimant did not follow up with the employer to request a leave of absence, nor was any leave of absence denied.

The claimant returned to perform work on August 31, 2016 without issue. The claimant presented no doctor's notes or restrictions to employment upon her return. The claimant was not disciplined for any time off during the month of August due to personal reasons, illness or incarceration. The claimant was not scheduled to work on September 1, 2016. The claimant had voluntarily picked up shifts on September 2 and 3, 2016, to offset wages lost while she was incarcerated. The undisputed evidence presented is that the claimant "promised" she would be able to work for the shifts. Prior to her shift beginning on September 2, 2016, the claimant called and spoke to Chantilly "Tilly" Barr, the assistant director of nursing, and reported she would not be into work because she had a fight with her boyfriend and was feeling "unstable." The claimant indicated because of the fight, she had a near "mental breakdown." The claimant did not seek medical care immediately in response.

The claimant had been scheduled to work from 4:00 p.m. until 6:00 a.m. Upon learning the claimant had called off again, Amanda Noel, the staffing coordinator, sent the claimant a text message, stating she was "furious" because she had worked already 55 hours that week, and was frustrated because she had to help cover the claimant's missed shifts to ensure proper staffing. Ms. Noel was unaware of any medical issues contributing to the claimant's absence. The text message contained no threats or profanities. The claimant interpreted the text message to be very rude, and in response text messaged Ms. Barr to tender her resignation, saying she couldn't handle it. No doctor advised the claimant to quit her employment. The claimant did not report the message to Ms. Noel's manager, Dayle Tessner, to human resources, or to an available corporate hotline. When the employer attempted to call the claimant back to discuss, she was unresponsive and her phone was later turned off for a period of time.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,808.00, since filing a claim with an effective date of September 4, 2016. The administrative record also establishes that the employer did participate in the September 20, 2016 fact-finding interview by way of Dayle Tessner.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's separation from the employment was without good cause attributable to the employer.

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 Admin. Code r. 871-24.25(22), (20) and (27) 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:
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> (22) The claimant left because of a personality conflict with the supervisor.
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> (20) The claimant left for compelling personal reasons; however, the period of absence exceeded ten working days.
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> (27) The claimant left rather than perform the assigned work as instructed.

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 871 IAC 24.25. “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). Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 24.26(4). The test is whether a reasonable person would have quit under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O’Brien v. Employment Appeal Bd.,* 494 N.W.2d 660 (1993).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness’s testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the

trial, their motive, candor, bias and prejudice. *Id*. After assessing the credibility of the claimant who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the weight of the evidence in the record fails to establish intolerable and/or detrimental working conditions that would have prompted a reasonable person to quit the employment without notice.

The administrative law judge is not persuaded the single text message from Amanda Noel, on September 2, 2016, stating she was mad and frustrated with the claimant's repeated calling off and having to pick up shifts would be deemed harassment or a hostile work environment, that would constitute good cause attributable to the employer for quitting, for unemployment insurance purposes. Ms. Noel previously had to cover multiple shifts for the claimant due to her incarceration and calling off, and though the text message was not professional, it was not threatening, profane or otherwise offensive.

Rather, the credible evidence presented is that the claimant was facing personal health issues that were affecting her both personally and professionally, and in fact on the day she resigned after calling off, she had fought with her boyfriend, which had in her own words, pushed her to a near breakdown. Further, the credible evidence does not establish that the claimant provided her employer medical documentation to support her assertion that she quit due to a personal health condition. It is understandable that the claimant was upset due to the fight and the text message from Ms. Noel may have compounded her feeling upset. However, based on the evidence presented, the administrative law judge concludes the claimant's leaving the employment may have been based upon good personal reasons, but it was not for a good-cause reason attributable to the employer according to Iowa law. Benefits must be denied.

Iowa Code § 96.3(7)a-b 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 § 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 § 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 states pursuant to § 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 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.

Because the claimant’s separation was disqualifying, benefits were paid to which she was not entitled. The claimant has been overpaid benefits in the amount of $1,808.00. 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 it 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. The employer satisfactorily participated in the fact-finding interview by way of Dayle Tessner. Since the employer did participate in the fact-finding interview the claimant is obligated to repay the benefits she received and the employer’s account shall not be charged.

DECISION:

The September 20, 2016, (reference 01) unemployment insurance decision is reversed. The claimant voluntarily left the 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. The claimant has been overpaid unemployment insurance benefits in the amount of $1808.00, and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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