

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEONEL ESCOBAR
Claimant

APPEAL NO. 10A-UI-00139-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 11/29/09
Claimant: Respondent (2R)

Section 96.5-1 – Voluntary Quit
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated December 23, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 21, 2010. Claimant participated. Employer participated by Tony Luse, employee relations manager. The record consists of the testimony of Tony Luse and the testimony of Leonel Escobar. Anna Cox served as Spanish interpreter.

ISSUE:

Whether the claimant voluntarily left for good cause attributable to the employer; and
Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a pork producer. The claimant was a full-time production worker at the employer's plant in Marshalltown, Iowa.

The claimant was a no call/no show on November 23, 2009; November 24, 2009; and November 25, 2009. The employer has a written policy, of which the claimant was aware, that if there are three consecutive no calls/no shows, that an employee is considered to have voluntarily quit his employment. The employer also has a written policy that all requests for vacation are to be submitted in writing to the employee's supervisor and then given to human resources.

The claimant did report to work on November 30, 2009. He was informed at that time by Tony Luse that he no longer had a job. The claimant informed Mr. Luse that his supervisor had not approved his taking time off but had also not said no.

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(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 this case established that the claimant had three consecutive days where he failed to call in and failed to come to work as scheduled. Those three days were November 23, 2009; November 24, 2009; and November 25, 2009. The claimant had previously asked his supervisor for those days off because he wanted to attend an Amway convention. The claimant did not submit a written request for vacation days as he was required to do. He simply had asked his supervisor for the time off.

The claimant's employment was ended effective November 30, 2009, due to the three no calls/no shows. When the claimant showed up for work he was told that he no longer had a job. Mr. Luse testified that the claimant told him that while his supervisor had not given him permission to leave, he had not said no either. The claimant testified that his supervisor had given him permission. The claimant's testimony is not reliable on this issue for several reasons. First, the claimant could not recall the name of his supervisor when asked that question by the administrative law judge, despite the fact that he had worked for the employer for approximately two years. Second, the employer's policy requires that a vacation request be submitted in writing first to the supervisor and then to human resources. There is no evidence that this was done. The claimant apparently assumed that since his request was pending or that his supervisor had not said "no" he was able to leave. The claimant then missed three scheduled days of work. He did not call in to report his absence. Accordingly, this is a voluntary quit and benefits are denied.

The next issue is overpayment of benefits.

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.

This matter is remanded to the claims section for a determination of the overpayment issue.

DECISION:

The decision of the representative dated December 23, 2009, 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. This matter is remanded to the claims section for determination of the overpayment issue.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs