IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

AMBER M RAUSCH Claimant **MERCY MEDICAL CENTER** Employer	**APPEAL 18A-UI-09504-H2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/19/18** **Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Leaving
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the September 6, 2018, (reference 01) that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 3, 208. Claimant participated. Employer participated through (representative) Amanda Felton, Manager of Human Resources; Rita Harris, Director of the Hall-Perrin Cancer Center; Christine Gust, Senior Human Resources Generalist and Jeanne Noble, Clinical Research Specialist. Employer Exhibit 1 was admitted into the record.

ISSUES:

Did the claimant voluntarily quit her employment without 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: Claimant was employed full time as the front-office supervisor in the oncology department beginning on June 21, 2016 through August 21, 2018 when she voluntarily quit the job. The claimant quit after she had been reprimanded on August 9 for failing to perform all of her job duties, most specifically that she had not learned the scheduler's job duties and was not working side by side with them as instructed. Continued work was available for the claimant.

The claimant was allowed every single request for military time off she made. She was required to follow the employer's rules for notification when she would need military leave and after being told to do so, did follow those instructions. In 2016, the claimant was granted 16 hours for

military leave. In 2017, she was granted 264 hours for military leave. In the eight months of 2018 she worked she was granted 216 hours of military leave.

Claimant was a supervisor over a number of employees. When she was hired as the supervisor she was specifically told that she was expected to learn all the job duties performed by her subordinates so that she would be able to step in and cover for any one of them when they were absent or a need arose. Over two years after being hired, the claimant still did not know how to perform all of the functions of the pre-authorization job or the scheduler.

In her performance evaluation of June 2018, her direct supervisor specifically noted that claimant's "lack of visibility working in scheduling is noticed by physicians. The role of supervisor includes working side by side with front line staff on a regular basis." (Employer's Exhibit 1, page 11) The same evaluation also specifically noted that, "Amber is not routinely seen working side by side with schedulers." (Employer's Exhibit 1, page 12) Lastly the same performance evaluation clearly put claimant on notice that she needed to change her behavior when it was written, "Amber needs to improve her visibility working side by side in scheduling. As a supervisor, Amber is responsible for knowing all of the jobs she oversees and working side by side with staff in all areas to gain and maintain proficiency in all areas. Amber is expected to fill in when there is a vacancy in any area." (Employer's Exhibit 1, page 14) After receiving the performance evaluation the claimant did not change her behavior to meet the employer's expectations.

The performance evaluation was authored and conducted by her then direct day-to-day supervisor, Jeanne Noble. Claimant does not allege that Ms. Noble did anything to create a hostile or intolerable work environment. The claimant was given fair notice of the expectations. Claimant would agree with any verbal conversation held with her by a supervisor about her need to work side by side with the schedulers, but then would not follow through and actually perform the work. During her performance evaluation Ms. Noble did tell the claimant she thought she might have done her a disservice by not being more direct with her about the necessity to learn and perform the schedulers duties. The claimant knew before her performance evaluation the expectations and was specifically on notice after her performance evaluation that she needed to change what she was doing and learn and perform the scheduler's job.

On July 3 Ms. Noble, who had been the claimant's supervisor from August 2016 until July 3, 2018 changed positions and claimant's direct supervisor became Ms. Harris. Ms. Harris noted that the claimant still had not learned the scheduler's job and gave the claimant specific instruction on July 17 that she was to work side by side with the schedulers. Claimant did not do as Ms. Harris had instructed.

Around August 1 or 2, Ms. Harris approached Ms. Felton in human resources and discussed with her that she wanted to give claimant a written warning for her failure to learn the scheduling job and to work side by side with her employees. Ms. Felton agreed with Ms. Harris and the write up process was begun. After Ms. Harris had made the decision to write up the claimant, claimant made an appointment to speak to Ms. Felton to voice complaints she had about Ms. Harris. The decision to write up the claimant was made before the claimant ever complained to Ms. Felton. Claimant was not written up by Ms. Harris as retaliation for her complaints to human resources, but simply because she was not following long-standing instructions to learn the scheduler job and to work side by side with the schedulers.

On August 9, the claimant was given the write-up that specifically put her on notice as to what she was to do with regard to working with the schedulers. The requirements were no different

than what was in her job description or in her last performance evaluation. The claimant was specifically told by Ms. Felton that the write-up was in process prior to her complaints about Ms. Harris. The claimant could have continued working, but chose not to do so. The claimant was only being required to perform her actual job duties.

Claimant has received unemployment benefits since filing a claim with an effective date of August 19, 2018. The employer did personally participate in the fact-finding interview and provided essentially the same information to the fact-finder as was provided at the appeal hearing.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant voluntarily left the employment without good cause attributable to the employer.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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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) 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.

Iowa Admin. Code r. 871-24.25(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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> (27) The claimant left rather than perform the assigned work as instructed.

Iowa Admin. Code r. 871-24.25(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:
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> (28) The claimant left after being reprimanded.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

The claimant simply has not proven that the employer created an intolerable work environment. The claimant was only being asked and required to perform job duties that had been assigned to her since she began as supervisor two years prior. In the prior two years the claimant had not learned the scheduler's job and she had not worked side by side with the schedulers as required.

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 Ct. 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. *State v. Holtz*, 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. *State v. Holtz*, Id.

The employer was well within their rights to issue her a disciplinary warning. On its face the timing of the disciplinary warning does at first appearance seem suspicious. However, the testimony of Ms. Felton and Ms. Harris that it was in progress before the claimant ever made a complaint about Ms. Harris is credible and believable. The employer's witnesses offered the more believable and credible testimony in light of the fact that Ms. Noble had specifically noted the same issues on the claimant's performance evaluation before Ms. Harris issued the warning a month later.

No work place is perfect. The conduct of Ms. Harris does not rise to the level of creating a hostile or intolerable work environment that would give rise to good cause attributable to the employer for the claimant leaving her employment. The meeting on June 3 was merely an isolated incident. One bad meeting or even a series of uncomfortable meetings does not under these circumstances create an intolerable work environment. The claimant quit after being reprimanded for not performing her required job duties. Her voluntary leaving of her employment was without good cause attributable to the employer. Benefits are denied.

Iowa Code section 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.
>
> (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 the claimant was not entitled. 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 they did participate in the fact-finding interview. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer participated in the fact-finding interview the claimant is obligated to repay the benefits she received to the agency and the employer's account shall not be charged.

DECISION:

The September 6, 2018, (reference 01) decision is reversed. The claimant voluntarily left her 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 $2,531.00 and she is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

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