

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ELLIOTT A PEDROZA
Claimant

APPEAL NO: 18A-UI-11913-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIMCO
Employer

OC: 11/11/18
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 November 30, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were notified about the hearing. A telephone hearing was held on December 28, 2018. The employer participated through Doug Moravek, human resources generalist.

The claimant did not respond to the notice of hearing and did not participate. The notice of hearing was returned to the Appeals Bureau as undeliverable. An Appeals Bureau clerk left a voicemail for the claimant on December 20, 2018 at the number listed on DBRO, to obtain a new address but the claimant did not respond (See administrative file). The claimant has not updated his address with IWD during this claim year. (See KLOG). The claimant discontinued making weekly continued claims after the week ending December 8, 2018.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibit 1 was admitted into evidence. 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 welder and was separated from employment on October 5, 2018, after three consecutive no-call/no-shows on October 3, 4, and 5, 2018.

When the claimant was hired, he was provided of the employer's policies which state three consecutive no-call/no-shows will be deemed voluntary separation due to job abandonment (Employer Exhibit 1). The claimant was aware through training and prior disciplinary warnings that he was expected to call the plant in advance of a shift if he was unable to work his shift (Moravek testimony). The employer reported that had the claimant not discontinued reporting for work, continuing work was available as hours for welders were ramping up at the time of claimant's separation.

The employer is unaware of any incident such as hospitalization or incarceration which may have triggered the claimant not reporting to work or notifying the employer of his absences on October 3, 4 and 5, 2018. The claimant did not make any further attempts to return to work after October 2, 2018.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,688.00, since filing a claim with an effective date of November 11, 2018. The administrative record also establishes that the employer did not participate in the November 29, 2018 fact-finding interview or make a witness with direct knowledge available for rebuttal. The notice of fact-finding interview was mailed to the correct address but was not rerouted to the correct person internally, in part due to an employee being out of the office at a funeral. The phone number called for the fact-finding interview (as located by the IWD representative) was for the corporate office. Mr. Moravek did not have details as to why the call was not answered or the voicemail returned.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily quit 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: 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(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: The claimant was absent for three days without giving notice to employer, in violation of company rule.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). 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. Iowa Admin. Code r. 24.25.

An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. In this case, the claimant knew through training and prior discipline for attendance that he must call the employer if he was unable to report to work. The claimant last worked October 2, 2018 and did not return to work again or notify the employer that he could not work. There is no evidence to support the claimant was unable to report his absences (due to incarceration or hospitalization) or that he made any efforts to return to work after October 2, 2018. Because it was peak season for welders, the administrative law judge is persuaded continuing work would have been available to the claimant, had he reported to work after October 2, 2018.

The evidence in the record establishes that he voluntarily quit the employment effective October 5, 2018 for personal reasons and without good cause attributable to the employer. He demonstrated an intention to voluntarily quit the employment by ceasing to report for scheduled shifts and by ceasing contact with the employer. Because the claimant has failed to establish he voluntarily quit the employment with good cause attributable to the employer, benefits are denied.

The next issues are whether the claimant must repay the benefits he received and whether the employer's account is subject to charges.

Iowa Code § 96.3(7)a-b 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) (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.

(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 he was not entitled. The claimant has been overpaid benefits in the amount of \$1,688.00. 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 did not participate in the fact-finding interview and the evidence presented does not support that the employer's non-participation was attributed to Agency or Postal Service error, but rather internal issues at the employer related to rerouting the mail. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay the benefits he received and the employer's account shall be charged.

DECISION:

The November 30, 2018, (reference 01) decision is reversed. The claimant quit the employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid benefits in the amount of \$1,688.00 but does not have to repay the benefits. The employer's account is not relieved of charges because it failed to participate in the fact-finding interview.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn