IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LAURA A WILLIAMS Claimant **HEARTLAND HEALTH MANAGEMENT** Employer	**APPEAL 18A-UI-02916-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/04/18** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
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 February 22, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 29, 2018. Claimant participated. Employer participated through administrator Shelia Matheney and director of nursing Lisa Perrenoud. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record with no objection.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 part-time as a certified nursing assistant (CNA) from January 13, 2015, and was separated from employment on January 16, 2018.

The employer has an attendance policy. The policy provides that if an employee is "absent because of illness for three (3) or more successive days, [the employer] reserves the right to request 'release for duty' documentation from [the employee's] physician . . . to assure [the employee] can resume normal work activities." Employer Exhibit 1. Claimant was aware of the employer's policy.

The last five days claimant was scheduled to work for the employer before her separation were: January 7, 9, 10, 12, and 16, 2018. Claimant did not report to work on January 7, 9, 10, 12, and 16, 2018. On January 7, 2018, claimant properly reported she would be absent due to illness. On January 9, 2018, claimant properly reported she would be absent due to illness. On January 10, 2018, claimant properly reported she would be absent due to illness.

On January 11, 2018, claimant sent Ms. Perrenoud (claimant's direct supervisor) a text message with a doctor's note excusing claimant from work on January 12, 2018. Ms. Perrenoud responded on January 11, 2018 and requested a doctor's note for claimant's absences on January 7, 9, and 10, 2018 "before [she] can return to work." Employer Exhibit 1. Claimant responded "Ok I'll try to get ahold of her [(claimant's doctor).]" Employer Exhibit 1. Claimant was not able to get a doctor's note excusing her from work on January 7, 9, and 10, 2018. Claimant testified her doctor would not provide her a doctor's excuse for those days because her doctor did not see her on those days. *See* Employer Exhibit 1. Claimant's next scheduled work day was January 16, 2018.

On January 16, 2018, claimant sent Ms. Perrenoud a text message informing Ms. Perrenoud that she could not get a doctor's note excusing her from work on January 7, 9, and 10, 2018. Employer Exhibit 1. Claimant also informed Ms. Perrenoud that she was going to turn in her name tag. Employer Exhibit 1. Claimant testified she was turning in her name tag because she could not provide the doctor's note excusing her from work on January 7, 9, and 10, 2018, that the employer had requested on January 11, 2018. Claimant needed her name tag to clock in and out of the building and is required for work. The employer never requested claimant turn in her name tag. Ms. Perrenoud responded to claimant's text message: "All you need is for her [(claimant's doctor)] to say you can return to work[.]" Employer Exhibit 1. Claimant then responded that she requested a doctor's note excusing her from work, but the doctor would not provide a work excuse for January 7, 9, and 10, 2018. *See* Employer Exhibit 1. Claimant never requested a release to return to work from her doctor. Ms. Perrenoud testified that on January 16, 2018, the employer only wanted a release to return to work from claimant's doctor.

After January 16, 2018, claimant never contacted the employer about returning to work. The employer never told claimant she was discharged. Claimant never contacted the employer to confirm she had been discharged. Claimant did not return to the employer to work. Claimant did not speak to the employer regarding her employment status after January 16, 2018. The employer had work available for claimant. The employer understood that claimant was resigning effective immediately on January 16, 2018. On January 30, 2018, claimant turned in her name tag to the employer.

On January 8, 2018, the employer warned claimant due to her absenteeism. Employer Exhibit 1. The employer warned claimant if she continued to have excessive absences, she may be suspended or discharged. Employer Exhibit 1. The employer sent the January 8, 2018 written warning to claimant by text message. Employer Exhibit 1.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2,674.00, since filing a claim with an effective date of February 4, 2018, for the seven weeks ending March 24, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview. Claimant does not have other employment in her base period and has not requalified for benefits. Thus, claimant is no longer otherwise monetarily eligible for benefits after this employer's wages are excluded from the base period.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes claimant was not discharged but voluntarily quit the employment without good cause attributable to the employer, has not requalified, and is not otherwise monetarily eligible for benefits. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's 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*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit that was admitted into evidence. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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 Code section 96.5(1)*g* 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. But the individual shall not be disqualified if the department finds that:
>
> *g.* The individual left work voluntarily without good cause attributable to the employer under circumstances which did or would disqualify the individual for benefits, except as provided in paragraph "a" of this subsection but, subsequent to the leaving, the individual worked in and was paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.27 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 Form 65-5323, 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.
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> This rule is intended to implement Iowa Code section 96.5(1)"*g*."

Iowa Admin. Code r. 871-24.25(37) 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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> **(37)** The claimant will be considered to have left employment voluntarily when such claimant gave the employer notice of an intention to resign and the employer accepted such resignation. This rule shall also apply to the claimant who was employed by an educational institution who has declined or refused to accept a new contract or reasonable assurance of work for a successive academic term or year and the offer of work was within the purview of the individual's training and experience.

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 has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2) (amended 1998). Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. *LaGrange v. Iowa Dep't of Job Serv.,* (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's rule requiring employees provide a release to return to work after three consecutive absences is reasonable.

Claimant's argument that she informed the employer she was turning in her name tag because the employer had discharged her on January 16, 2018 is not persuasive. Although on January 11, 2018, the employer had requested claimant provide it with a doctor's note excusing her from work for January 7, 9, and 10, 2018, on January 16, 2018, the employer clarified with claimant that it only needed her to provide a doctor's note saying she "can return to work[.]" Employer Exhibit 1. Despite the employer's clarification on January 16, 2018 that it only needed a release to return to work, not a doctor's note excusing claimant from work for three days, claimant never attempted to contact her doctor to get a note saying had been released to return to work. A release to return to work is different from a note asking an employer to excuse an employee from work. The release to return to work notifies the employer that claimant is able to safely return to work. An excuse from work merely informs the employer why claimant was absent from work.

Claimant failed to return to work after January 16, 2018. Claimant testified she turned her name tag into the employer on January 30, 2018 because she thought she had been discharged; however, the employer never informed claimant she was discharged. Claimant was the party that initiated the statement on January 16, 2018 that she was going to turn in her name tag. The employer never requested claimant turn in her name tag. Claimant never followed up with the employer after January 16, 2018 about her employment status

Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. *LaGrange v. Iowa Dep't of Job Serv.,* (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984). Since claimant did not follow up with management personnel or the owner, and her assumption of having been fired was erroneous, her failure to continue reporting to work was an abandonment of the job. While claimant's leaving the employment may have been based upon good personal reasons, it was not for a good-cause reason attributable to the employer according to Iowa law. Benefits must be denied.

Inasmuch as claimant quit without good cause attributable to the employer, the separation is disqualifying. Furthermore, since claimant has not requalified for benefits since the separation and is not otherwise monetarily eligible according to base period wages, benefits are denied until she requalifies and is otherwise eligible for benefits.

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 she 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), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The February 22, 2018, (reference 01) unemployment insurance decision is reversed. Claimant voluntarily quit the employment without good cause attributable to the employer, has not requalified for benefits, and is not otherwise monetarily eligible. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of $2,674.00 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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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs