

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

DARCEY L KLAAHSEN
Claimant

APPEAL NO: 19A-UI-01281-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE UNIVERSITY OF IOWA
Employer

OC: 01/13/19
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 February 8, 2019, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 27, 2019. The claimant participated personally. The employer participated through Mary Eggenburg, benefits specialist. Dawn McCalley, Human Resources Manager, also testified. The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibit 1 was admitted. 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 research associate for the department of ophthalmology, and was separated from employment on January 4, 2019, when she quit the employment without notice. Continuing work was available.

On December 14, 2018, the claimant was presented a performance improvement plan (PIP) which she refused to sign. The PIP was in response to ongoing performance and attendance issues with the claimant. After being presented the PIP and speaking to her manager, the claimant drafted an email to Ms. McCalley, indicating she was considering quitting the employment (Employer Exhibit 1).

The claimant was on a pre-approved vacation December 16 through 22, and not scheduled December 23 through 25, 2018. On December 25, 2018, she sent an email to her manager, stating she would be out December 26, 27, and 28, 2018 because her 17 year old son had food poisoning. She did not update the department calendar to alert her colleagues she would be absent, even though she had access remotely. The claimant was not scheduled December 29 through January 1, 2019 due to the weekend and holiday. On January 1, 2019, the claimant notified her employer she would be absent on January 2, 2019 due to a funeral. She did not update the department calendar, or add that she would be late to work on January 3, 2019 due to a scheduled doctor's appointment. Upon arrival that morning, Ms. McCalley met with the claimant to discuss the PIP that she had refused to sign, and the email about resignation. Ms. McCalley stated the claimant became upset during the conversation, in which she voiced frustrations with her manager. She asked if she quit whether he would write a positive recommendation for her and Ms. McCalley stated yes. The claimant then tendered her resignation (Employer Exhibit 1). Ms. McCalley denied intending to discharge the claimant at the meeting, or presenting the claimant with the option to resign in lieu of termination. Separation thereby ensued.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,428.00, since filing a claim with an effective date of January 13, 2019. The administrative record also establishes that the employer did not participate in the February 5, 2019 fact-finding interview or make a witness with direct knowledge available for rebuttal. Mary Eggenburg faxed a copy of the notice of fact-finding interview to the claims department on January 30, 2019, updating the phone number listed on the notice of interview. She was not called for the interview and when she did not receive the call, she sent in a fax/written statement approximately fifteen minutes after the scheduled time, alerting the Workforce Advisor that she had not been called and included a copy of the claimant's email about planning to resign and resignation letter.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant quit the employment without good cause attributable to the employer. Benefits are denied.

An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa Code § 96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer" Iowa Code § 96.5(1) or (2) is discharged for work –connected misconduct, Iowa Code § 96.5(2) a, or (3) fails to accept suitable work without good cause, Iowa Code § 96.5(3).

The first two disqualifications are premised on the occurrence of a separation of employment. To be disqualified based on the nature of the separation, the claimant must either have been fired for misconduct or have quit but not for good cause attributable to the employer. Generally, the employer bears the burden of proving disqualification of the claimant. Iowa Code § 96.6(2). Where a claimant has quit, however, the claimant has "the burden of proving that a voluntary quit was for good cause attributable to the employer pursuant to Iowa Code section § 96.5(1). Since the employer has the burden of proving disqualification, and the claimant only has the burden of proving the justification for a quit, the employer also has the burden of providing that a particular separation was a quit. The Iowa Supreme Court has thus been explicitly, "the

employer has the burden of proving that a claimant's departure from employment was voluntary." *Irving v. Employment Appeal Board*, 883, NW 2d 179, 210 (Iowa 2016).

Quit not shown: 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.

A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). Generally, a quit is defined to be a "termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." Furthermore, 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 employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5.

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge found the employer testimony to be more persuasive, and concludes that the claimant voluntarily quit the employment and had she not resigned, continuing work was available. The evidence does support the claimant had been recently disciplined but the administrative law judge is not persuaded the claimant would have been fired on January 3, 2019, had she not resigned.

In this case, the claimant was issued a reprimand on December 14, 2018, which she refused to sign. She then sent Ms. McCalley an email the same day stating she may quit employment. The claimant was then absent the remainder of the month due to scheduled and unscheduled absences related to vacation, a funeral, holiday and her son being sick. When she returned to the office, she was confronted by Ms. McCalley about the warning and subsequent email. The claimant then tendered her resignation. The evidence presented supports the claimant had intent to resign, as confirmed by her email, and acted on the intent by tendering her resignation during a meeting on January 3, 2019.

The next issue is whether the claimant quit with good cause attributable to the employer.

The claimant has the burden of proof to establish she quit with good cause attributable to the employer, according to Iowa law. 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). Ordinarily, "good cause" is derived from the facts of each case keeping in mind the public policy stated in Iowa Code section 96.2. *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993)(citing *Wiese v. Iowa Dep't of Job Serv.*, 389 N.W.2d 676, 680 (Iowa 1986)). "The term encompasses real circumstances, adequate excuses that will bear the test of reason, just grounds for the action, and always the element of good faith." *Wiese v. Iowa Dep't of Job Serv.*, 389 N.W.2d 676, 680 (Iowa 1986) "[C]ommon sense and prudence must be exercised in evaluating all of the circumstances that lead to an employee's quit in order to attribute the cause for the termination." *Id.*

Iowa Admin. Code r. 871-24.25 provides in pertinent part:

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:

- (3) The claimant left to seek other employment but did not secure employment.
- (28) The claimant left after being reprimanded.

Based upon the evidence presented, the administrative law judge is persuaded the claimant quit in response to the written performance improvement plan on December 14, 2018. While the claimant's reasons for quitting may have been personally compelling, they are not for a good cause reason attributable to the employer according to Iowa law. Benefits must be denied.

The final issue to address is whether the claimant has been overpaid benefits and has to repay the benefits.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

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 un rebutted 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 \$1,428.00. 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.

Here, the employer representative credibly testified that she faxed in contact information in advance of the scheduled fact-finding interview to participate but was not called. When she did not receive a phone call, she followed up in writing via fax within fifteen minutes of scheduled interview. Benefits were not allowed because the employer failed to respond timely or adequately to IWD's request for information relating to the payment of benefits. Instead, benefits were allowed because the employer did not receive the phone call to participate in the fact-finding interview. The employer thus cannot be charged. Since neither party is to be charged, any potential charges for this claim should be absorbed by the fund.

Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay the benefits she received.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The February 8, 2019, (reference 01) 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 benefits in the amount of \$1,428.00. She is not required to repay the benefits she received. The employer's account is relieved of charges.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn