

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ORLANDO S JENNINGS

Claimant

APPEAL NO. 09A-UI-01912-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY DOLLAR STORES OF IOWA INC

Employer

**OC: 01-04-09 R: 03
Claimant: Respondent (2R)**

Section 96.5-1 – Voluntary Leaving
Section 96.3-7 - Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 28, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 27, 2009. The claimant did participate. The employer did participate through Frank Sposeto, District Manager. Employer's Exhibit One was received.

ISSUES:

Did the claimant voluntarily quit his employment without good cause attributable to the employer?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as an assistant manager full time beginning September 17, 2007 through January 6, 2009 when he voluntarily quit.

Frank Sposeto tried to contact the claimant on January 5 when the store manager at the store where the claimant worked quit without notice. Mr. Sposeto wanted the claimant to come into work because the Store Manager had just quit without notice and he believed a \$500.00 deposit had gone missing on the claimant's last work shift. The claimant did not return Mr. Sposeto's phone calls or Mr. Sposeto's text message telling him that he would be contacting the police about the missing deposit. At no time did Mr. Sposeto tell the claimant that he was discharged or that his employment was ending. Because the Store Manager quit without notice Mr. Sposeto had the locks changed to the store. Mr. Sposeto tried to contact the claimant to give him his new set of keys, but the claimant would not return his phone calls. On January 6, the claimant went to another store location and turned in his store keys. Continued work was available for the claimant if he had reported to work on his next scheduled shift.

Claimant has received unemployment benefits since filing a claim with an effective date of January 4, 2009.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged but voluntarily left his employment without good cause attributable to the employer.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

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 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 section 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.

The claimant turned in his keys to another store, an act indicating he had no intention of returning to work. The claimant was never told he was discharged. The claimant had ample opportunity to return any number of Mr. Sposeto's phone calls or text messages but chose not to. Had he contacted Mr. Sposeto he would have learned that he was not discharged and that the employer had found the missing money. Since claimant did not follow up with management personnel and his assumption of having been fired was erroneous, claimant's failure to continue reporting to work was an abandonment of his job. Benefits are denied.

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.

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 whether or not the overpayment is recovered. Iowa Code section 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code section 96.3(7)b is remanded to the Agency.

DECISION:

The January 28, 2009, reference 01, decision is reversed. The claimant voluntarily left 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. Claimant is overpaid benefits in the amount of \$1,257.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs