IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

DANIEL R FITZGERALD Claimant **RUAN LOGISTICS CORP** Employer	**APPEAL 16A-UI-09316-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/17/16** **Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
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 August 18, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 22, 2016. The claimant participated personally. The employer participated through Tom Scraggs, manager. Employer exhibit 1 was admitted.
The administrative law judge took official notice of the administrative records including the fact-finding documents. 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:

Was the claimant discharged for disqualifying job-related misconduct or did he quit for reasons that would be 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 shuttle driver and was separated from employment on July 13, 2016, when he separated from employment.

The evidence is disputed as to whether the claimant quit or was discharged, but the claimant last performed work on July 13, 2016, and during that shift he attended a quarterly safety meeting. While at the meeting, the employer announced that it would be implementing a new policy which required shuttle drivers to check in mid-way through their shift with dispatch, to alert of any delays. The employer indicated this would require drivers to place a 30-second call and simply report their status. The policy was in response to recent delays and the employer's

attempt to be proactive to identify when and where delays were occurring. During the meeting, the claimant spoke out and declared he did not need a nanny. The claimant also took out his fuel card and badge during the meeting and set them on the table. The claimant spoke with Mr. Scraggs and reiterated that he didn't need a nanny and was a grown man. He also stated at that time he was thinking of quitting. The employer again confronted the claimant after the meeting as the claimant's shift was scheduled to begin soon. Mr. Scraggs said to the claimant, "I need to know if you are working so I can make arrangements or if you are going home to cool off." He also stated to the claimant that if he was quitting, Mr. Scraggs would need the keys to the vehicle since he already had the fuel card and badge. The claimant responded by retrieving the keys and handing them to Mr. Scraggs. The employer accepted the claimant's refusal to work his shift with the new policy in place, in conjunction with his voluntary relinquishment of his keys, badge and fuel card as the claimant's intent to resign. The claimant made no further efforts to return to work. The employer never told the claimant he was fired, or not to return, either verbally or in writing. Further, Mr. Scraggs himself lacked the authority to discharge the claimant, even if he had wanted to do so.

Prior to separation, the employer reported a similar incident a few months prior in which the claimant had become upset with Mr. Scraggs, and had thrown down his keys and fuel card on a table, threatening to quit. The employer worked to calm the claimant down and he did not follow through with the resignation.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,392.00, since filing a claim with an effective date of July 17, 2016. The administrative record also establishes that the employer did not participate in the August 17, 2016 fact-finding interview or make a witness with direct knowledge available for rebuttal. The fact-finder attempted to call Barry Carter, who is employed with the corporate office, but was unable to reach him. No written statement was submitted in lieu of attending the fact-finding interview.

REASONINGS AND CONCLUSIONS OF LAW:

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

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. 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). 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). In this case, the claimant initiated the separation, by way of becoming mad at a meeting, and voluntarily setting out his fuel card and badge in front of the employer. Then the claimant told Mr. Scraggs that he was contemplating quitting and didn't need a nanny, in response to the employer notifying staff that they would need to make a 30-second call to dispatch mid-shift so dispatch would know if they were running behind. Then when confronted a second time, the claimant was offered the option to go cool down for the day, or work. Mr. Scraggs did not tell the claimant he was fired but rather if he was quitting, to bring his keys, to which the claimant produced them immediately. The administrative law judge is not persuaded the employer acted in any way that was consistent with a discharge, inasmuch as the words they used, and the fact that Mr. Scraggs himself lacked the authority to even fire the

claimant. Rather the claimant voluntarily ended the employment by way of saying he didn't need a nanny and not responding in the affirmative when Mr. Scraggs asked if he was planning to work that day. This was confirmed by the claimant's voluntary relinquishment of his badge, fuel card and keys. For these reasons, the claimant's separation will be analyzed as a quit and not a discharge.

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

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
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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(21), (22) and (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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> (21) The claimant left because of dissatisfaction with the work environment.
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> (22) The claimant left because of a personality conflict with the supervisor.
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> (27) The claimant left rather than perform the assigned work as instructed.

"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). Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 24.26(4). The test is whether a reasonable person would have quit under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.,* 494 N.W.2d 660 (1993).

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*. After assessing the credibility of the claimant

who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the weight of the evidence in the record fails to establish intolerable and/or detrimental working conditions that would have prompted a reasonable person to quit the employment without notice.
In this case, the claimant quit after being told he would have to check in mid-shift with his employer by way of a 30-second call to dispatch. The claimant was not singled out in this change of policy, and the policy itself required minimal change to the claimant's existing job duties. Cognizant that the claimant may not feel like he should have to "check in" with the employer, the employer as a business has the responsibility to keep its services on time or alternately problem solve when there are delays. The request was not unreasonable by the employer. Therefore, based on the evidence presented, the claimant's leaving the employment may have been based upon good personal reasons, but it was not for a good-cause reason attributable to the employer according to Iowa law. Benefits must be denied.

Iowa Code § 96.3(7)a-b 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 § 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 § 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 states pursuant to § 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
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> (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.
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> (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.
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> (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.
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> (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 $1,392.00. 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 satisfactorily participate in the fact-finding interview. 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 August 18, 2016, (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 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 unemployment insurance benefits in the amount of $1,392.00, and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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