

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**TIMOTHY PENISTEN**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL 21A-UI-05813-SN-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/26/20**  
**Claimant: Appellant (1)**

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Iowa Code § 96.5(1) – Voluntary Quit  
Iowa Admin. Code r. 871-24.26(4) – Intolerable working conditions

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the February 17, 2021, (reference 06) unemployment insurance decision that denied benefits based upon her voluntary quit. The parties were properly notified about the hearing. A telephone hearing was held on April 28, 2021. The claimant participated and testified. The employer participated through Unemployment Insurance Hearing Representative Barbara Buss and Human Resources Assistant Brandi Kading.

**ISSUE:**

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?

**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 food production worker from January 29, 2020, until he was separated from employment on April 13, 2020, when he voluntarily quit. The claimant began his shift at 6:00 a.m. each day and ended it at varying times. His supervisor was Salad Line Supervisor Tom Harris.

The employer has an attendance policy outlined in its employee manual. The attendance policy is progressive. A no-call / no-show counts as two occurrences. After accruing four occurrences, an employee receives a verbal warning. After accruing six occurrences, an employee receives a written warning. After accruing eight occurrences, an employee receives a final warning. An employee is terminated after accruing 10 occurrences. The employee manual also states if an employee is absent without notice for three consecutive days, they are considered to have abandoned their position. The claimant received an employee handbook at the time of his hire. An employee can check their schedule with an application called Kronos.

After entering the employer's facility, a food production worker would first go to the locker room. The locker room was typically crowded with lockers stacked on top of one another. They would then step into the clock in area. Finally, each employee would put on their smocks and hairnets in another preparation area. Employees stood shoulder to shoulder in this area before entering the warehouse itself. While working on the production line, nearly every employee stood roughly shoulder to shoulder. Two employees had separate roles which isolated them. One would use a large metal pole to feed salad into the machine. The other worker would direct the pump that dispensed the lettuce on the line. At 4:30 a.m. each night a sanitation crew would clean the surfaces in the plant.

The claimant last worked for the employer on April 13, 2020. Prior to his last day worked, the claimant asked Mr. Harris for a leave of absence in response to Mr. Harris informing him that there had been positive Covid19 cases in the facility. Mr. Harris instructed the claimant to request a leave of absence from human resources.

On April 14, 2020, the claimant did not show up to work or notify anyone he was going to be absent on that date. The claimant was attempting to get approval for a leave of absence after his discussion with Mr. Harris. The claimant was not able to speak to anyone in the human resources department. The claimant called in sick for his remaining shifts that week on April 16, April 17 and April 19, 2020. He remained away from work from April 20, 2020 to May 3, 2020.

On May 6, 2020, the claimant spoke with Human Resources Assistant Kristi Conter<sup>1</sup> about taking a leave of absence. The claimant explained he was not comfortable working in the facility due to a rumor that there had been some employees testing positive for Covid19. The claimant was concerned because he has hypertension which increases his mortality risk if he was to become infected by Covid19. Ms. Conter confirmed there had been positive cases in the plant, but she said she was not required to provide the specific numbers of employees who had been infected there. During the conversation, Ms. Conter attempted to reassure the claimant that they had installed partitions in the locker room and on the production line. She also informed him that masks were being provided to production line workers. After the conversation, Ms. Conter scheduled the claimant to return on May 24, 2020.

On May 24, 2020, the claimant called in to work stating he had a flat tire.

The claimant was scheduled to work on May 27, May 28, and May 29, 2020. The claimant did not report he would be absent or show up for shifts on those dates. He did not check the schedule.

The claimant had not been disciplined prior to his termination.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was without good cause attributable to the employer.

Iowa Code section 96.5(1) provides:

An individual shall be disqualified for benefits:

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<sup>1</sup> Ms. Conter was not made available for the call because she no longer works for the employer.

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 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:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Iowa Admin. Code r. 871-24.26(4) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(4) The claimant left due to intolerable or detrimental working conditions.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "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. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). 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 decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

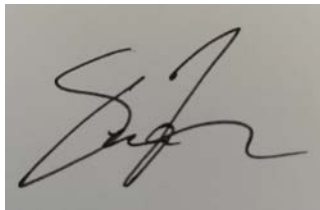
After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge does not find the claimant's allegation that the employer failed to take any mitigation efforts in response to Covid19 credible.

The claimant claims Ms. Conter offered no assurance and that essentially the employer made no efforts to mitigate the spread of Covid19 other than distributing hand sanitizer. The administrative law judge finds this allegation lacking in credibility primarily because the claimant stated during the hearing that he wanted the pandemic "to die down" before he returned. In that context, the claimant likely did not concern himself with the mitigation efforts being put in place. The administrative law judge also finds the claimant's allegation he did not have access to any kind of mask in May 2020 incredible. By that time, masks were fairly abundant. This incredible allegation colors the rest of his testimony.

In the context of the mitigation efforts taken by the employer, the claimant's work environment was not intolerable. Furthermore, the claimant's three consecutive absences violated a written rule of the employer and disqualify him under Iowa Admin. Code r. 871-24.25(4). While claimant's leaving 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 are denied.

**DECISION:**

The February 17, 2021, (reference 06) unemployment insurance decision is affirmed. The claimant voluntarily left his 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.



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Sean M. Nelson  
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May 6, 2021  
Decision Dated and Mailed

smn/scn