

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SARA HEDLUND
Claimant

APPEAL NO: 19A-UI-03458-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 03/24/19
Claimant: Respondent (2)

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 April 18, 2019, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a telephone hearing was held before Administrative Law Judge Julie Elder on May 15, 2019. The claimant did not respond to the hearing notice and did not participate in the hearing. Esthefany Martinez, Human Resources Manager; Bill Kelley, GVP Produce Commissary; and Trenton Kilpatrick, Employer Representative; participated in the hearing on behalf of the employer. Employer's Exhibits One through Sixteen were admitted into evidence.

ISSUE:

The issue is whether the claimant voluntarily left her employment with 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 as a full-time production worker for Hy-Vee from July 17, 2018 to February 8, 2019. She voluntarily left her employment by failing to call the employer or show up for work for five consecutively scheduled workdays.

The claimant was scheduled to work February 3 through February 7, 2019. She was a no-call/no-show February 3, 2019. She texted her supervisor February 4, 2019, and said her daughter was in the hospital and asked him to "put in vacation time for (her) the next few days." The supervisor asked if she was coming back and the claimant said she was planning on it and the supervisor replied, "K." The claimant did not call the employer's attendance line or contact the employer again. On February 8, 2019, the employer sent the claimant a certified letter stating she was considered a no-call/no-show February 3 through February 7, 2019, and it assumed she quit her job (Employer's Exhibit One). The claimant did not contact the employer after she received the letter February 13, 2019.

On June 7, 2018, the claimant received a counseling form for attendance; on July 1, 2018, she received a counseling form for attendance; on July 26, 2018, she received a written warning for attendance after she was absent July 8 and tardy July 17, 2018; on July 30, 2018, she received a final written warning after she was tardy July 29, 2018; and on October 10, 2018, she received a termination warning after she was absent September 18 and October 7 and tardy September 13, 2018 (Employer's Exhibits Ten through Fourteen). On January 22, 2019, the employer prepared a termination warning for the claimant because she was absent November 20, 23, 26, 27, was a no-call/no-show December 16, 2018, was absent December 2, 3, 7, 10, 27, 2018, and January 6, 14 and 15, 2019, and was tardy January 17, 2019, but the claimant was not at work again to receive it (Employer's Exhibit Six). On January 30, 2019, the employer prepared an updated termination warning because she was tardy January 23 and January 24, was absent January 27, and was a no-call/no-show January 29, 2019 (Employer's Exhibits Five and Six). The claimant never returned to work and the employer was unable to present her with the updated termination warning.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,009.00 for the five weeks ending April 27, 2019.

The employer participated personally in the fact-finding interview through the statements of Esthefany Martinez and Bill Kelley.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left her employment without good cause attributable to the employer.

Iowa Code § 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.

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. 871 IAC 24.25. Leaving because of unlawful, intolerable, or detrimental working conditions would be good cause. 871 IAC 24.26(3),(4). Leaving because of dissatisfaction with the work environment is not good cause. 871 IAC 24.25(1). 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.

The claimant had a poor attendance record and at least two no-call/no-shows prior to February 3, 2019. She was then a no-call/no-show for five consecutive workdays between February 3 and February 7, 2019, in violation of the employer's policy. While the claimant did text her supervisor February 4, 2019, to ask about vacation for a few days, she did not ask for any specific days off, did not follow the employer's policy for vacation or leave, and never contacted the employer again. Although her supervisor could have communicated with her more clearly in their text message exchange, it was the claimant's responsibility to communicate with the employer about her absence and maintain contact with it. Inasmuch as the claimant failed to report for work or notify the employer for three consecutive work days in violation of the

employer's policy, she is considered to have voluntarily left her employment without good cause attributable to the employer. Therefore, benefits are denied.

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.

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.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The employer participated in the fact-finding interview personally through the statements of Esthefany Martinez and Bill Kelley. Consequently, the claimant’s overpayment of benefits cannot be waived and she is overpaid benefits in the amount of \$2,009.00 for the five weeks ending April 27, 2019.

DECISION:

The April 18, 2019, reference 01, decision is reversed. The claimant voluntarily left her 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 received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$2,009.00 for the five weeks ending April 27, 2019.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn