IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

CHRISTY BARKER Claimant **AT&T MOBILITY SERVICES LLC** Employer	**APPEAL 18A-UI-00834-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/24/17** **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 January 12, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 12, 2018. Claimant participated. Employer participated through hearing representative Amanda Lange and call center director Valencia Taylor. Official notice was taken of the administrative record, with no objection.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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: Claimant was employed full-time as an area manager from May 16, 1998, and was separated from employment on December 27, 2017, when she quit.

On December 27, 2017, claimant sent an e-mail to Ms. Taylor's supervisor informing the employer she was resigning effective immediately. Ms. Taylor was claimant's direct supervisor. The employer accepted claimant's resignation. The employer had work available for claimant had she not resigned. Claimant informed Ms. Taylor's supervisor that she was resigning due to a hostile work environment. Claimant cited multiple examples in her e-mail.

One example claimant cited was a coaching action plan she received on May 17, 2017. The coaching action plan was an outline for claimant to improve her performance. Claimant was given a copy of the coaching action plan on May 23, 2017 via e-mail. It started as a thirty day

plan, but was extended to a ninety day plan, which claimant successfully completed in August 2017.

Claimant also stated in her resignation e-mail that the hostile work environment escalated in October 2017 and November 2017, when Ms. Taylor referred to claimant as the old regime. Ms. Taylor started at claimant's location on May 1, 2017. Ms. Taylor denied referring to claimant as the old regime, but she knew what claimant was referring to. When Ms. Taylor came into the organization, claimant was the only second level manager in the position and Ms. Taylor had to hire another second level manager (area manager). After the new area manager was hired, claimant would allow first level managers come to her and complain about the new area manager. Ms. Taylor instructed claimant around October 2017 and November 2017 that she needed to direct the first level managers to the new area manager if they have complaints/concerns with that area manager so they could work it out.

Claimant also cited an incident in her resignation letter where the president of the union called her a racist and she did not feel the employer backed her up. Ms. Taylor testified that the president of the union had called claimant a racist, but Ms. Taylor does not have the authority to discipline the union president. Ms. Taylor did speak to the union president and stated the union president's behavior was inappropriate. Ms. Taylor also spoke to claimant and told claimant that the union president's comment was inappropriate, she supported claimant, and she spoke to the union president.

On November 3, 2017, the employer put claimant on a performance improvement plan because her performance had declined. This was a thirty day performance improvement plan, but the plan was extended to January 6, 2018. In November 2017, claimant did receive phone calls from human resources asking questions about Ms. Taylor's management behavior/style. Human resources did not ask anything directly about claimant. Claimant did not offer anything about her concerns. Claimant was aware she could have filed an anonymous complaint with the employer about Ms. Taylor's behavior. On December 22, 2017, Ms. Taylor informed claimant she was unsatisfactory in the performance improvement plan, because she was not following the tactics within the plan. Ms. Taylor also told claimant that the plan was going to be extended another thirty days. Ms. Taylor did not tell claimant she was going to be discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2,838.00, since filing a claim with an effective date of December 24, 2017, for the seven weeks ending February 10, 2018. The administrative record also establishes that the employer did participate in the fact-finding interview by providing written documentation that, without rebuttal, would have resulted in disqualification.

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. Benefits are denied.

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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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), (28), and (37) provide:

> **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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> **(28)** The claimant left after being reprimanded.
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> **(37)** The claimant will be considered to have left employment voluntarily when such claimant gave the employer notice of an intention to resign and the employer accepted such resignation. This rule shall also apply to the claimant who was employed by an educational institution who has declined or refused to accept a new contract or reasonable assurance of work for a successive academic term or year and the offer of work was within the purview of the individual's training and experience.

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).

Claimant's argument that Ms. Taylor created a hostile work environment is not persuasive. Since May 2017, Ms. Taylor has placed claimant on a coaching action plan and a performance improvement plan. Disciplining an employee for unsatisfactory performance does not automatically create a hostile work environment. It is noted claimant successfully completed the coaching action plan and although on December 22, 2017, claimant was still unsatisfactory on her most recent performance improvement plan, Ms. Taylor did not tell claimant she was going to be discharged. Instead, Ms. Taylor informed claimant that her performance improvement plan was going to be extended. Claimant did not contact Ms. Taylor's supervisor or human resources to report her concerns, despite being able to file an anonymous complaint. It is further noted that in November 2017, claimant testified she was contacted by human resources about Ms. Taylor's management behavior/style, but she did not report any of her concerns at this time.

Claimant's decision to quit because she did not agree with her supervisor about various issues and after having her performance improvement plan extended was not for a good cause reason attributable to the employer. *See* Iowa Admin. Code r. 871-24.25(21), (22), and (28). Claimant has not demonstrated that a reasonable person would find the work environment detrimental or intolerable. *O'Brien v. EAB*, 494 N.W.2d 660 (Iowa 1993); *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). Claimant has not met her burden of proving that her voluntary leaving was for good cause attributable to the employer. While claimant's leaving the employment 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 must be denied.

Iowa Code section 96.3(7)*a, b*, as amended in 2008, 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 section 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 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.

(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.

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 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.

(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.
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> 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 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 they 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. Since the employer did participate in the fact-finding interview by providing written documentation that, without rebuttal, would have resulted in disqualification, the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The January 12, 2018, (reference 01) unemployment insurance decision is reversed. Claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of $2,838.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview by providing written documentation that, without rebuttal, would have resulted in disqualification, and its account shall not be charged.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs