

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**TABATHA A GRUBBS**

Claimant

**APPEAL 18A-UI-10380-DB-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DAVENPORT SQUARE FAMILY RESTR INC**

Employer

**OC: 09/23/18**

**Claimant: Respondent (4)**

Iowa Code § 96.5(1)d – Voluntary Quitting/Illness or Injury

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/appellant filed an appeal from the October 11, 2018 (reference 01) decision that found claimant was eligible for benefits based upon a discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on October 31, 2018. The claimant participated personally. The employer, Davenport Square Family Restr. Inc., participated through witness Peter Hasakis. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

**ISSUES:**

Did claimant voluntarily quit the employment with good cause attributable to 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:

Claimant was employed full time as a dishwasher. Claimant was employed from August 17, 2017 until August 29, 2018. Claimant's immediate supervisors were Peter Hasakis, Matt (Peter's son) and Felipe. This employer operates a restaurant.

On August 15, 2018, claimant had suffered an injury to her finger. The injury was not work-related. No worker's compensation claim was filed. She had to leave her shift early to see a doctor. Claimant had another co-worker, Adrienne, cover the remainder of her shift.

On August 16, 2018, claimant was unable to work and did not go to work. She went to the emergency room the night of August 16, 2018 and was told that she had an infection. Surgery was scheduled for her at noon on August 17, 2018. She notified Matt that she was having

surgery and would be unable to work on Friday, August 17, 2018. She also informed Matt that she would let the employer know when she would be able to return to work.

Claimant was discharged from the hospital on August 18, 2018. She had working restrictions to refrain from getting her finger wet. She was unable to work until she had the stitches removed on September 6, 2018. However, claimant returned to work on August 29, 2018 and worked a partial shift. August 29, 2018 was the last day she physically completed work for the employer. See Employer Statement of Protest. She did not return to work after August 29, 2018.

Claimant learned from Adrienne (her co-worker) that another dishwasher had been hired. Claimant did not contact any of her supervisors to schedule her return to work. Claimant did not offer her services to return to work after she recovered from her injury on September 6, 2018.

Claimant has received unemployment insurance benefits of \$1,060.00 for five weeks between September 23, 2018 and October 27, 2018. The employer did not participate in the fact-finding interview but did send in a statement of protest noting that the claimant voluntarily quit work. No reason for the quit or a notation that the claimant did not give a reason for quitting was noted in the protest.

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

For the reasons that follow, the administrative law judge concludes as follows:

Iowa Code § 96.5(1)d 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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.25(35) 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:

(35) The claimant left because of illness or injury which was not caused or aggravated

by the employment or pregnancy and failed to:

- (a) Obtain the advice of a licensed and practicing physician;
- (b) Obtain certification of release for work from a licensed and practicing physician;
- (c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
- (d) Fully recover so that the claimant could perform all of the duties of the job.

Claimant has the burden of proof to establish that the injury, illness or aggravation is work-related. *Shontz v. Iowa Employment Sec. Commission*, 248 N.W.2d 88, 91 (Iowa 1976). In this case, claimant has not met her burden. As such, claimant voluntarily quit by failing to return to work to offer her services when she was fully recovered from her non-work related injury. Claimant never spoke to any of her immediate supervisors about her job after she left work on August 29, 2018. Claimant voluntarily quit without a good-cause reason attributable to the employer according to Iowa law. Benefits are denied. Because benefits are denied, the issues of overpayment and chargeability must be addressed.

Iowa Code § 96.3(7)a-b, 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) (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.

(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.

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 those 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).

In this case, the claimant has received benefits but was not eligible for those benefits. However, the employer did not participate in the fact-finding interview by telephone and only responded in the statement of protest that claimant voluntarily quit on August 29, 2018. No additional information about her quitting in August of 2018 was provided on the statement of protest. No reason for the quit or a notation that the claimant did not give a reason for quitting was noted in the protest pursuant to Iowa Admin. Code r. 871-24.10. As such, the employer did not participate in the fact-finding interview by submitting detailed factual information of the quantity and quality that, if unrebutted, would be sufficient to result in a decision favorable to the employer. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay to the agency the benefits she received in connection with this employer's account, and this employer's account shall be charged for benefits paid.

**DECISION:**

The October 11, 2018 (reference 01) unemployment insurance decision is modified in favor of the appellant. Claimant voluntarily quit work on August 29, 2018 without good cause attributable to the employer. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount after her separation date, and provided she is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits but 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 for benefits paid.

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Dawn Boucher  
Administrative Law Judge

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Decision Dated and Mailed

db/rvs