IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JENNIFER R ENGLES
3341 W 50TH ST
DAVENPORT IA 52806

DAVIS FAMILY ENTERPRISES INC
D/B/A CULVER'S OF DAVENPORT
5320 JERSEY RIDGE RD
DAVENPORT IA 52807

Appeal Number: 04A-UI-05638-RT
OC: 04/25/04 R: 04
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Davis Family Enterprises, Inc., doing business as Culver's of Davenport, filed a timely appeal from an unemployment insurance decision dated May 12, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Jennifer R. Engles. After due notice was issued, a telephone hearing was held on June 11, 2004, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. Scott Davis, Owner and President, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

At 11:44 a.m., the claimant called and spoke to the administrative law judge. She had received a copy of the notice but had not read it, but the claimant could read. She had had her parents read it, but they had not told her that she needed to call in a telephone number. The claimant was aware that the hearing was June 11 but did not know the time. The administrative law judge informed the claimant that he had held the hearing, which began when the record was open at 10:02 a.m. and ended when the record was closed at 10:16 a.m. When the administrative law judge asked why the claimant had not called at 10:00 a.m., the time of the hearing, she stated that she did not know what time the hearing was. The administrative law judge informed the claimant that he could not take evidence from her know, but that he would treat her phone call as a request to reopen the record and reschedule the hearing. 871 IAC 26.14(7)(b) provides that if a party responds to a notice of appeal and telephone hearing after the record has been closed and any party which has participated is no longer on the telephone line, the administrative law judge shall not take the evidence of the late party. Instead, the administrative law judge shall inquire as to why the party was late in responding to the notice of appeal and telephone hearing. For good cause shown, the administrative law judge shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the administrative law judge does not find good cause for the tardy parties late response to the notice of appeal and telephone hearing. Failure to read or follow the instructions on the notice of appeal and telephone hearing shall not constitute good cause for reopening the record. The administrative law judge concludes that the claimant received the notice, but did not bother reading the notice and apparently left it to her parents to do so and they apparently either did not read the notice carefully or informed the claimant erroneously. The claimant did not even know what time the hearing was scheduled for. It appears to the administrative law judge that the claimant was not too concerned about the hearing. Accordingly, the administrative law judge concludes that the claimant has not demonstrated good cause to reopen the record and reschedule the hearing. The notice is quite clear that a party must call in a telephone number if that party wants to participate in the hearing. The claimant at least knew the date of the hearing so there was some part of the notice that the claimant read. The date for the hearing is right next to the time and is right below the notice to call in a telephone number. The claimant's request to reopen the record and reschedule the hearing is denied.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time shift manager from August 18, 2001 until she voluntarily quit on April 20, 2004. On that day, the claimant informed the employer that she was quitting and turned in her uniforms and left. The claimant quit because the previous day she had been told by the employer's witness, Scott Davis, Owner and President, that she was going to be facing a two week pay reduction at $.50 per hour, based upon a $9.00 per hour pay rate as a disciplinary measure for chronic tardies. The claimant expressed no concerns or objections at that time, nor did she indicate or announce an intention to quit. The next day the claimant came in and quit and again expressed no concerns or objections to the pay reduction nor did she indicate or announce an intention to quit prior to actually quitting.

On March 1, 2004, the claimant was one hour late. This is a problem for the employer because as shift manager, the claimant is responsible for opening the store. Further, from March 1, 2004 to April 20, 2004, the claimant was late on nine different occasions varying from 5-20 minutes, which again delayed the opening of the store. The claimant never gave any reasons for her tardies and did not report these tardies to the employer although she was required to do

so. The claimant did not have any unreported absences and she had received no warnings or disciplines for her attendance.

Pursuant to her claim for unemployment insurance benefits filed effective April 25, 2004, the claimant has received unemployment insurance benefits in the amount of $549.00 as follows: $197.00 for benefit week ending May 1, 2004; $174.00 for benefit week ending May 8, 2004, (earning $72.00); $66.00 for benefit week ending May 15, 2004 (earnings $180.00); $66.00 for benefit week ending May 22, 2004 (earnings $180.00); and $46.00 for benefit week ending May 29, 2004, (earnings $200.00). For benefit week ending June 5, 2004, the claimant received no benefits reporting earnings of $250.00.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. She is.

Iowa Code Section 96.5-1 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.

871 IAC 24.26(1) 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:
>
> (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

871 IAC 24.25(21), (28) 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.

(21) The claimant left because of dissatisfaction with the work environment.

(28) The claimant left after being reprimanded.

The employer's witness, Scott Davis, Owner and President, credibly testified that the claimant voluntarily quit when she announced in writing that she was quitting and turned in her uniforms and left on April 20, 2004. The claimant conceded at fact-finding that she quit. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to proof that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code Section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The claimant did not participate in the hearing and provide sufficient evidence of good and justifiable reasons attributable to the employer for her quit. The employer's witness credibly testified that the claimant quit because she was given a temporary two-week reduction in pay of $.50 per hour based upon her $9.00 per hour pay rate because of chronic lateness. This was announced to the claimant on April 19, 2004 and the claimant quit the next day April 20, 2004. The pay reduction was to only be $.50 per hour for two weeks. The claimant expressed no concerns about this matter at any time nor did she ever indicate or announce an intention to quit prior to her quit. If the claimant had done so, Mr. Davis would have negotiated with the claimant. On the strength of the evidence here, the administrative law judge must conclude that there is not a preponderance of the evidence that the short time temporary reduction in pay was a substantial breach in the claimant's contract of hire. Further, there is not a preponderance of the evidence that the reduction in pay was unjustified. Mr. Davis credibly testified that the claimant was one hour late on March 1, 2004 and that thereafter she was late an additional nine occasions. She never informed the employer why and did not report these tardies in advance as she was required to do. Tardies by the claimant were particularly problematic because she was the one who opened the store. It is true that the claimant received no warnings or disciplines for her attendance, but the administrative law judge is constrained to conclude on the evidence here that there is not a preponderance of the evidence that the claimant's temporary reduction in pay was not justified by the claimant's repeated tardies. Further, it appears that the claimant, in effect, quit because she was reprimanded or because she was dissatisfied with the work environment and this is not good cause attributable to the employer. Finally, and most compelling, the claimant never expressed any concerns or objected to the reduction in pay either when she was informed of it on April 19, 2004 or when she quit on April 20, 2004, as required by Cobb v. Employment Appeal Board, 506 N.W.2d 445 (Iowa 1993). In addition, the claimant never indicated or announced an intention to quit at any time prior to her quit if her concerns were not addressed by the employer as required by Swanson v. Employment Appeal Board, 554 N.W.2d 294 (Iowa App.1996).

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

Iowa Code Section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. 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.
>
> 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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $549.00 since separating from the employer herein on or about April 20, 2004 and filing for such benefits effective April 25, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated May 12, 2004, reference 01, is reversed. The claimant, Jennifer R. Engles, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits, because she left work voluntarily without good cause attributable to the employer. The claimant has been overpaid unemployment insurance benefits in the amount of $549.00.

kjf/b