IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

VIVIAN J ARENCIBIA
Claimant

AVENTURE STAFFING & PROF SVCS
Employer

APPEAL NO: 12A-UI-11635-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/02/12
Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Aventure Staffing & Professional Services (employer) appealed a representative's September 25, 2012 decision (reference 01) that concluded Vivian J. Arencibia (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 25, 2012. The claimant participated in the hearing. Kayla Neuhalfen appeared on the employer's behalf and presented testimony from two other witnesses, Hollie Delagarza and JoDee Shults. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the claimant voluntarily quit for a good cause attributable to the employer?

OUTCOME:

Reversed. Benefits denied.

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began taking assignments with the employer on January 27, 2012. She worked multiple repeating assignments as a certified nursing aide (CNA) at several of the employer's long-term care nursing facility business clients. At that time, the claimant lived in Sioux Center, Iowa. She worked at business client facilities in Sioux Center, Orange City, and Le Mars, Iowa. Her normal rate of pay was $12.00 per hour, although at some of the facilities, such as one in Le Mars at which she worked less frequently, she would earn $13.00 or $14.00 per hour.

The claimant provided the employer with her availability each week, and based on her availability, the employer offered her assignments for the upcoming week; by example, for the employer's week ending July 1 the claimant worked 52.1 hours, the week ending July 8 she

worked 60 hours, the week ending July 15 she worked 68.6 hours, and the week ending July 22 she worked 65 hours.

When the claimant worked assignments at a particular facility in Orange City, she was also entitled to a mileage reimbursement. The employer's employees who commuted to the Orange City facility were entitled to receive a per diem reimbursement of $32.00. Because of an error on the employer's part, the claimant had been receiving this amount even though she had a shorter commute from Sioux Center to Orange City than those employees who were commuting from Sioux City to Orange City. During the employer week ending July 1 through the week ending July 22, the claimant worked at that Orange City facility two days, no days, two days, and four days, respectively.

When the claimant received her paycheck on July 20 for her work through July 15, her paycheck was a little less than she had anticipated it would be, specifically the amount of the mileage reimbursement. This was because the employer had discovered that it had erroneously been paying the claimant the $32.00 per diem reimbursement rate for a person commuting from Sioux City, rather than the $15.00 per diem rate she should have been receiving. When she discovered the discrepancy, she became upset and called the employer on July 23. She felt she had been mislead as to how much she would be earning for working at the Orange City facility, and did not feel it would be worth her time if she had to drive to Orange City for less reimbursement if she were to be scheduled for a "short" shift. She first spoke to Shults, an employee services representative, and expressed her displeasure, indicating that she was giving her notice to quit. She then spoke to Delagarza, the branch manager, who explained the reason for the adjustment in the mileage rate. Delagarza thought she had persuaded the claimant not to quit, but there was a misunderstanding between them on that point. The claimant did indicate that she would work through the ending of the week, but she intended that to mean that she would only work through Friday, and that she was then quitting.

For the week ending July 28 the claimant had been scheduled to work every day Monday through Saturday, of which four of the six days were to be at the Orange City facility. Additionally, she had already been scheduled to work Sunday, July 29, which would also have been at the Orange City facility. None of the shifts were "short" shifts of three or four hours; all shifts were at least five hours. The claimant worked through the shift on July 27, but then did not report for her shifts on July 28 and July 29 as she had already decided to quit as of July 27 because of what she felt was an improper change in her pay.

The claimant established a claim for unemployment insurance benefits effective September 2, 2012. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

If the claimant voluntarily quit her employment, she is not eligible for unemployment insurance benefits unless it was for good cause attributable to the employer. Iowa Code § 96.5-1. Rule 871 IAC 24.25 provides that, 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. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. *Bartelt v. Employment Appeal Board*, 494 N.W.2d 684 (Iowa 1993); *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The claimant did express or exhibit the intent to cease working for the employer and did act to carry it out. The claimant would be disqualified for unemployment insurance benefits unless she voluntarily quit for good cause.

The claimant has the burden of proving that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. The law presumes a claimant has voluntarily quit with good cause when she quits because of a substantial change in the contract of hire. 871 IAC 24.26(1). In *Dehmel v. Employment Appeal Board*, 433 N.W.2d 700 (Iowa 1988), the Iowa Supreme Court ruled that a 25 percent to 35 percent reduction in wage was, as a matter of law, a substantial change in the contract of hire. The Court in *Dehmel* cited cases from other jurisdictions that had held wage reductions ranging from 15 percent to 26 percent were substantial. *Id*. at 703.

Comparing what the claimant had been paid to what she would be paid in the future, by example, for the work for the week ending July 1 the claimant was paid approximately $689.20 (($52.1 x $12.00 = $625.20) + ($32.00 x 2 = $64.00)); if she had been paid the correct reimbursement rate, it would have been approximately $655.20 (($52.1 x $12.00 = $625.20) + ($15.00 x 2 = $30)). For the work for the week ending July 8, there would have been no difference. For the work for the week ending July 15, if the claimant had been paid at the prior incorrect rate she would have been paid approximately $887.20 (($68.6 x $12.00 = $823.20) + ($32.00 x 2 = $64.00)); if she was paid at the correct reimbursement rate she would have been paid approximately $853.20 (($68.6 x $12.00 = $823.20) + ($15.00 x 2 = $30.00)). For the work for the week ending July 22, if the claimant had been paid at the prior incorrect rate she would have been paid approximately $908.00 (($65.0 x $12.00 = $780.00) + ($32.00 x 4 = $128.00); if she was paid at the correct reimbursement rate she would have been paid approximately $840.00 (($65.0 x $12.00 = $780.00) + ($15.00 x 4 = $60.00)).

Not counting the week in which there would be no difference in pay, the resulting reduction in pay ranges from to 4.0 percent to 7.5 percent. Based on the reasoning in *Dehmel*, a 7.5 percent change in the claimant's pay is not substantial for purposes of unemployment insurance benefits. The claimant has not satisfied her burden. Benefits are denied.

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 whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's September 25, 2012 decision (reference 01) is reversed. The claimant voluntarily left her employment without good cause attributable to the employer. As of July 28, 2012, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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