

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**BRANDON M RUDKIN**  
Claimant

**AFM LLC**  
Employer

**APPEAL 17A-UI-02715-JP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/12/17**  
**Claimant: Respondent (4)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
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 March 7, 2017, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 4, 2017. Claimant participated. Employer participated through managing partner Khurram Mian, office manager/accounts payable Rayna McCoy, and human resource employee Janelle Vickers. Employer exhibit one was admitted into evidence with no objection.

**ISSUES:**

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

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 a director of operations from October 31, 2013, and was separated from employment on November 1, 2016.

Around October 3 or 4, 2016, claimant submitted his vacation schedule to Ms. Vickers. Ms. Vickers does not have the authority to approve claimant's vacation requests, but he does have to notify her when he is using vacation because she keeps track of his vacation usage. Claimant creates his own schedule and scheduled himself to be on vacation from October 27, 2016 through November 2, 2016. Claimant also posted his schedule, including vacation time in Dropbox for Mr. Mian to see. Mr. Mian was claimant's direct supervisor.

On October 5, 2016, the employer gave claimant a written warning for not updating Mr. Mian about his schedule changes. Employer Exhibit One. Claimant was also warned about not attending a parade he had agreed to attend. Employer Exhibit One.

Prior to October 25, 2016, Mr. Mian testified that he asked claimant if he could get out of his current vehicle lease, but he did not tell claimant he was going to stop his vehicle allowance. Claimant testified that Mr. Mian told him that the employer was going to stop paying his car allowance.

Claimant was supposed to meet with Mr. Mian on October 27, 2016. Mr. Mian testified the meeting was regarding claimant's job performance and prior warnings. On October 27, 2016, claimant communicated with Mr. Mian that he could not meet with Mr. Mian that day because he had to stay home with a sick child. Claimant had worked in the morning on October 27, 2016. Claimant and Mr. Mian communicated about rescheduling the meeting. Claimant testified he initially explained to Mr. Mian that he could not change his vacation schedule to meet with him on October 31, 2016. However, on October 27, 2016, claimant sent a text message to Mr. Mian that stated "How about we handle all of this in person 10/31 as you mentioned?" Employer Exhibit One. Claimant testified he told Mr. Mian that he would meet with Mr. Mian because he wanted Mr. Mian to stop communicating with him. Claimant never canceled the October 31, 2016 meeting with Mr. Mian.

On October 30, 2016, Mr. Mian informed claimant via a text message that he could meet with claimant after 11:45 a.m. on October 31, 2016. Employer Exhibit One. Claimant did not respond to this text message. Employer Exhibit One.

On October 31, 2016, claimant did not appear at the employer to meet with Mr. Mian. Claimant did not contact Mr. Mian to cancel the meeting. Mr. Mian got concerned about claimant's absence from the meeting and attempted to contact claimant by phone and text message. Employer Exhibit One. It was not like claimant to just skip a meeting without communicating with the employer. Mr. Mian was not successful in reaching claimant. Employer Exhibit One. Ms. McCoy then attempted to contact claimant's emergency contact person. Ms. McCoy left a message with claimant's emergency contact person. Claimant's emergency contact person contacted claimant and informed him that the employer had called the emergency contact person and was worried about claimant. The emergency contact person did not return the employer's call. Claimant did not contact the employer after he spoke to his emergency contact person. Even though claimant was scheduled to be on vacation, on October 31, 2016, claimant was in cellphone service for a period of time when he transported product from a Cedar Rapids location to a Coralville location. When claimant was in cellphone service he did receive the employer's messages. Claimant did not reply to any of the employer's messages on October 31, 2016.

On November 1, 2016 at 11:46 a.m., Mr. Mian sent a text message to claimant that stated, "I am not getting any communication from you and the meeting you suggested to Have on 10/31 was a no call no show. If I don't hear from you Shortly I am going to assume you quit your job I am going to call a meeting at 2pm this afternoon to let all GM's know unless I hear from you before that". Employer Exhibit One. Claimant received Mr. Mian's text message on November 1, 2016. On November 1, 2016, at 1:23 p.m., claimant e-mailed the employer his two week resignation notice, effective November 13, 2016. Employer Exhibit One. The employer accepted claimant's resignation notice; however, the employer did not allow claimant to work the next two weeks. On November 1, 2016, the employer removed claimant's electronic access, which claimant needed to perform his job.

The employer did not tell claimant that he was going to be discharged. The employer had work available for claimant had he not resigned. Claimant filed his claim for benefits with an effective date of February 12, 2017.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1855.00, since filing a claim with an effective date of February 12, 2017, for the four weeks ending March 11, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant voluntarily left the employment without good cause attributable to the employer, but was discharged for no disqualifying reason prior to the intended resignation date.

Iowa Code §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.

Iowa Admin. Code r. 871-24.25(37) 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:

(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.

Iowa Admin. Code r. 871-24.25(22) 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:

(22) The claimant left because of a personality conflict with the supervisor.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.25(38) 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:

(38) Where the claimant gave the employer an advance notice of resignation which caused the employer to discharge the claimant prior to the proposed date of resignation, no disqualification shall be imposed from the last day of work until the proposed date of resignation; however, benefits will be denied effective the proposed date of resignation.

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).

On October 27, 2016, claimant clearly told Mr. Mian that he would meet with Mr. Mian on October 31, 2016. Mr. Mian was wanting to meet with claimant to discuss his absenteeism and job performance. On October 31, 2016, claimant failed to contact the employer to notify it that he was not going to be at the meeting despite the employer making numerous attempts to contact claimant. Claimant then contacted the employer on November 1, 2016 after he received a message that the employer was going to consider claimant to have quit if he did not contact the employer. Mr. Mian did not tell claimant he was going to be discharged. Claimant responded to the employer's message with his two week resignation notice due to the employer trying to contact him from October 28, 2016 to October 31, 2016. Employer Exhibit One. Although claimant had schedule his vacation from October 27, 2016 through November 2, 2016 and presumably did not want to be bothered by the employer, when he agreed to meet with the employer on October 31, 2016, it was reasonable to expect the employer to inquire if there was an issue when he did not appear for the meeting and had not contacted the employer. On November 1, 2016 claimant provided his resignation notice with an effective date of November 13, 2016; however, the employer removed his electronic access on November 1, 2016 and separated him from employment immediately.

Claimant's decision to quit because he did not agree with the employer trying to contact him after he missed a scheduled meeting was not a good cause reason attributable to the employer. Because the discharge was in response to a resignation notice no misconduct is established. Since the employer terminated the employment relationship in advance of the resignation notice effective date, claimant is entitled to benefits from the date of termination (November 1, 2016) until the effective date of the proposed resignation (November 13, 2016). It is noted that claimant did not open his claim for benefits until February 2017 and he did not file a weekly continued claim for benefits between November 1, 2016 and November 13, 2016.

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 he 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 the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

**DECISION:**

The March 7, 2017, (reference 02) decision is modified in favor of the appellant. Claimant voluntarily left the employment without good cause attributable to the employer, but was discharged prior to the resignation effective date. Benefits are allowed for the two weeks from the week beginning October 30, 2016 through the week ending November 12, 2016. Thereafter, benefits are withheld until such time as claimant works in and has been paid wages equal to ten times his weekly benefit amount.

Claimant has been overpaid unemployment insurance benefits in the amount of \$1855.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

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