

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

GERMAINE K ROBINSON
Claimant

L A LEASING INC
Employer

APPEAL 16A-UI-10959-DL-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/06/15
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 September 30, 2016, (reference 11) unemployment insurance decision that allowed benefits based upon voluntarily quitting the employment. The parties were properly notified about the hearing. A telephone hearing was held on October 24, 2016. Claimant did not respond to the hearing notice instruction and did not participate. Employer participated through risk manager Michael Payne.

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 worked for one day on April 8, 2016, at a full-time ongoing assignment with Twin City Tanning. He told the employer he had not returned to work because he had been incarcerated because of being in an altercation. In the fact-finding interview the administrative record reflects that claimant did not mention the incarceration but said he did not return because of having had to get stitches in his foot that night but did contact the employer as soon as he could. The employer did not mention the incarceration in the fact-finding interview but said he contacted them on April 13, 2016. At the hearing the employer testified he did not return for available continued work or otherwise communicate with the employer until June 2016. The employer said in the fact-finding interview it would have required him to sign a written warning for the no-call/no-show and he was no longer considered an employee.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1652.00, since filing a claim with an effective date of September 4, 2016. There are no payments on the September 6, 2015, claim year according to the administrative record. 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's separation from the employment was without good cause attributable to the employer.

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.

While the employer has the burden to establish the separation was a voluntary quitting of employment rather than a discharge, 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 (Ia. Dist. Ct. App. 1973).

The Iowa Supreme Court in *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa, June 3, 2016) has invalidated Iowa Admin. Code r. 871-24.25(16), which presumed that an individual who does not report to the employment because of incarceration had quit without good cause attributable to the employer. Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). The employer has the burden of proving that a claimant's departure from employment was voluntary. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016). "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". *Id.* (citing *Cook v. Iowa Dept. of Job Service*, 299 N.W.2d 698, 701 (Iowa 1986)).

The term "voluntary" requires volition and generally means a desire to quit the job. *Id.* (citing *Bartelt v. Emp't Appeal Bd.*, 494 N.W.2d 684, 686 (Iowa 1993); *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Cook*, 299 N.W.2d at 701 (Iowa 1986); *Moulton v. Iowa Emp't Sec. Comm'n*, 34 N.W.2d 211, 213 (1948)). There must be substantial evidence to show that claimant's absence from work was voluntary. Incarceration, in and of itself, can never be considered volitional or voluntary. If the leaving was not voluntary, then there is no analysis into whether or not the employee left with good cause attributable to the employer because the case must be analyzed as a discharge. *Id.* (citing *Ames v. Emp't Appeal Bd.*, 439 N.W.2d 669, 673-74 (Iowa 1989)(employees refusing to go to work and cross union picket line due to the risk of violence associated with crossing the picket line was not a voluntary quitting of employment)).

However, predicate acts that lead to incarceration can rise to level of conduct which would disqualify a claimant from receiving benefits. *Id.* Those predicate acts, however, must be volitional and must lead to an absence from the workplace which results in a loss of employment. *Id.* Further, the circumstances that led to the incarceration must establish volitional acts of a nature sufficient to allow a fact finder to draw the conclusion that the employee, by his or her intentional acts, has purposively set in motion a chain of events leading to incarceration, absence from work, and ultimate separation from employment. *Id.* Lastly, if an employee fails to notify the employer of the status of his or her incarceration, or engages in deception regarding the incarceration, that may result in a voluntary quit or disqualifying misconduct. *Id.* It must also be analyzed whether or not the employee was capable of notifying

the employer of the status of the incarceration and what steps the employee took to notify the employer.

Because the claimant engaged in an altercation that could reasonably have been foreseen to lead to an injury and incarceration, and ultimately have an adverse impact upon his employment. Even had he notified the employer, his incarceration on multiple scheduled workdays was not a good-cause reason for the separation attributable to the employer. Employer's attribution of the absences as a voluntary leaving of employment was reasonable as it is not expected to hold employment for employees incarcerated for volitional acts.

The administrative law judge further concludes that the claimant has been overpaid unemployment insurance benefits.

Iowa Code section 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. 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 September 30, 2016, (reference 11) unemployment insurance decision is reversed. Claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$1652.00 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.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/rvs