IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

HILDA D HOPPER Claimant **OMEGA FOODS INC** Employer	**APPEAL 16R-UI-07402-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/17/16** **Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
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 May 3, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 26, 2016. Claimant participated. Employer participated through general manager George Devitt and unemployment insurance consultant Amber Niles. Employer exhibit one was admitted into evidence with no objection.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

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 crew member from May 3, 2013, and was separated from employment on March 23, 2016.

The employer has a policy that requires employees to call the employer at least two hours before their shift if they are going to be late or absent. The employer also has a policy that one no-call/no-show is considered a voluntary quit. Claimant was aware of the policies. Employer Exhibit One.

On March 19, 2016, claimant went to the employer in the evening. Claimant was not scheduled to work that evening, but her husband was working. Claimant's husband also worked for the employer. Claimant was not in her uniform when she went to the employer. Claimant went in the backdoor, but prior to entering the building, she flicked her cigarette on the ground.

Claimant requested her keys from her husband. The employer was really busy and the manager on duty requested her to clock in and work even though she was not in her uniform. Claimant clocked in and worked for approximately an hour. After working for approximately an hour, the manager on duty came up to claimant and stated a complaint came through about her entering the building with a cigarette. Claimant denied entering the building with a cigarette.

Claimant was scheduled to work on March 21, 2016 at 11:00 a.m. Claimant did not work on March 21, 2016. Claimant did not contact the employer to let it know she would be absent. The employer did not try to contact claimant. Claimant's husband also works for the employer. When claimant's husband arrived to work on March 21, 2016, he told the employer that she was placed into drug rehabilitation for the next six weeks. Claimant testified she did not go to drug rehabilitation for six weeks and did not instruct her husband to tell the employer this. Claimant testified that on March 21, 2016, she had a conversation with Tabitha Hamilton (a training manager at the employer) at claimant's apartment. Ms. Hamilton told claimant she was fired and that Mike was not going to rehire her. Ms. Hamilton told claimant she was fired for bringing a cigarette into the building. Ms. Hamilton does not have the authority to discharge employees; only Mr. Devitt has the authority to discharge employees.

Claimant was scheduled to work on March 22, 2016. Claimant did not work on March 22, 2016. Claimant did not contact the employer to let it know she would be absent. The employer did not try to contact claimant.

Claimant was also scheduled to work on March 23, 2016 at 11:00 a.m. Claimant did not work on March 23, 2016. Claimant did not contact the employer to let it know she would be absent. On March 23, 2016, claimant testified she tried to contact the employer to see if she was rehireable, but no one answered the phone. Claimant did not go to the employer to see if she was rehireable. March 23, 2016, was the last day claimant was on the schedule. Claimant was not put on the schedule for the next week. On March 25, 2016, claimant's husband told the employer that he and claimant were moving to Kansas.

There was work available for claimant had she shown up for work on March 21, 2016. Mr. Devitt had not told claimant she was going to be fired.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2,646.00, since filing a claim with an effective date of April 17, 2016, for the 14 weeks ending July 23, 2016. 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. Benefits are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a

witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit submitted. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

For the reasons that follow, the administrative law judge finds claimant was not discharged from employment, but voluntarily separated her employment.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
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> 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(4), (28) and (27) 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:
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> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.
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> (28) The claimant left after being reprimanded.
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> (27) The claimant left rather than perform the assigned work as instructed.

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). Since the employer does not have a policy as set out in Iowa Admin. Code r. 871-24.25(4), the separation was not due to failure to call or report for three days.

On March 21, 2016, claimant testified that Ms. Hamilton told her she was discharged because of the incident on March 19, 2016 (bringing a cigarette into the employer's building). Mr. Devitt credibly testified that Ms. Hamilton did not have the authority to discharge employees, because

he is the person with that authority. After Ms. Hamilton told claimant she was discharged, claimant did not follow up with the employer, even though she was scheduled to work on March 21, 2016. Furthermore, claimant only made one attempt to contact the employer after her conversation with Ms. Hamilton, which was by phone on March 23, 2016. When the employer did not answer on March 23, 2016, claimant failed to follow up any further with the employer and she did not go to the employer to speak with someone about her employment.

Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. Claimant had been scheduled to work on March 21, 22, and 23, 2016. Claimant failed to contact the employer and report her absences on these days. An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. Since claimant did not follow up with Mr. Devitt or the owner, and her assumption of having been fired was erroneous, her failure to continue reporting to work was an abandonment of the job without good cause attributable to the employer. Benefits are denied.

Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
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> 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.
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> 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.
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> (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.
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> (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.
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> (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.
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> (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.
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> (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.
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> (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 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 she received and the employer's account shall not be charged.

DECISION:

The May 3, 2016, (reference 01) unemployment insurance decision is reversed. Claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of $2,646.00 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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