IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ROBERT O KING Claimant **PER MAR SECURITY & RESEARCH CORP** Employer	**APPEAL 16A-UI-08039-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/12/16** **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 July 12, 2016, (reference 02) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 12, 2016. Claimant participated. Employer participated through operations manager Brandyn Veith. Operations manager David Lee registered for the hearing on behalf of the employer, but did not answer when contacted at the number provided. Official notice was taking the administrative record of the fact-finding documents regarding the employer's participation with no objection.

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 was employed full-time as a security guard from January 2, 2009, and was separated from employment on June 24, 2016.

The employer provides security services for other companies (customers). The employer assigns its employees to what customer they are going to provide security for. When an employee's assignment ends, then the employer finds another place to assign the employee that is near their residence.

Omega Morgan Company is a customer of the employer. Omega Morgan Company was a long term temporary job. Claimant was assigned by the employer at the Omega Morgan Company site from May 6, 2015 to June 9, 2016. In June 2016, the Omega Morgan Company ended the services of the employer. Mr. Lee contacted claimant on June 10, 2016 and notified him that the Omega Morgan Company did not need the employer's services anymore. Mr. Lee told claimant he would get a hold of him about a future assignment when one became available. When a customer terminates the employer services, the employer does not discharge the employees that are at the customer's site.

On June 20, 2016, Mr. Lee contacted claimant about a position at the Menards site. The employer offered claimant the Menards position and he accepted the position. The employer did not discuss the pay rate with claimant when he accepted the position. Claimant did not ask the employer about the pay rate when he accepted the position. Claimant assumed the pay rate for the Menards position would be the same as it was with Omega Morgan Company ($11.00 per hour). The pay rate for the Menards position was $10.00 per hour. All of the employer's pay rates are based on contractual agreements, so each site has a different pay rate depending on the contract with the customer.

Claimant trained on June 22 and 23, 2016 for the Menards position. Claimant did not like the conditions at the Menards job site because there was not any air conditioning where he was stationed. There were no immediate bathroom facilities where claimant was stationed at on the Menards job site, but he could contact someone if it was an emergency to have someone cover for him.

On June 24, 2016, claimant was discussing with Mr. Lee about coming back the next week to train and work at the Menards site. Mr. Lee told claimant on June 24, 2016 that the pay rate for this position was $10.00 per hour. Claimant told Mr. Lee that it was a waste of everyone's time for him to do more training because he was not going to accept the job. Claimant informed the employer that he had been looking for work in Charles City. Claimant did not want the Menards job because of the pay ($10.00 per hour), conditions, and travel (claimant lives 40 minutes away from Menards). The amount of time for claimant to travel to the Menards job site and the Omega Company job site was approximately the same; Menards was closer in distance to his residence.

After June 24, 2016, Mr. Lee and claimant did have conversations about claimant not getting paid for the two days of training. Claimant was only paid $7.25 per hour for the training. The employer only pays $7.25 per hour for training because the employer does not bill its customers for training.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1,260.00, since filing a claim with an effective date of June 12, 2016, for the six weeks ending August 6, 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.

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(3), (13), (27) and (30) 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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> (3) The claimant left to seek other employment but did not secure employment.
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> (13) The claimant left because of dissatisfaction with the wages but knew the rate of pay when hired.
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> (27) The claimant left rather than perform the assigned work as instructed.
>
> (30) The claimant left due to the commuting distance to the job; however, the claimant was aware of the distance when hired.

Iowa Admin. Code r. 871-24.26(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.

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).

In general, a substantial pay reduction of 25 to 35 percent or a similar reduction of working hours creates good cause attributable to the employer for a resignation. *Dehmel v. Emp't Appeal Bd.*, 433 N.W.2d 700 (Iowa 1988). A notice of an intent to quit had been required by *Cobb v. Emp't Appeal Bd.*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Emp't Appeal Bd.*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Emp't Appeal Bd.*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). Those cases required an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. However, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added to rule 871-24.26(6)(b), the provision addressing work-related health problems. No intent-to-quit requirement was added to rule 871-24.26(4), the intolerable working conditions provision. Our supreme court recently concluded that, because the intent-to-quit requirement was added to Iowa Admin. Code r. 871-24.26(6)(b) but not 871-24.26(4), notice of intent to quit is not required for intolerable working conditions. *Hy-Vee, Inc. v. Emp't Appeal Bd.,* 710 N.W.2d 1 (Iowa 2005).

Although claimant was not required by law to give the employer notice of his intent to quit, the change to the terms of hire must be substantial in order to allow benefits. In this case, claimant was not aware of the pay rate change when he accepted the Menards position. Claimant assumed that his pay rate was going to be the same ($11.00 per hour). Claimant trained for the Menards position for two days (June 22 and 23, 2016). Claimant first discovered his pay rate was being reduced to $10.00 per hour on June 24, 2016. When claimant found out his pay rate was only going to be $10.00 per hour at the Menards position, he told Mr. Lee it would be a waste of time for him to continue training because he was not going to accept the position. The employer determines where its employees, including claimant, are placed. Claimant's refusal to work where he was assigned is considered a voluntary quit.

Claimant's argument about the travel to the Menards job site is not persuasive. The Menards job site was approximately the same travel time as claimant's last job site, which he was at for over one year. Claimant's argument that there were not any bathrooms in the immediate area of where he was working at the Menards job site is also not persuasive. If claimant needed to use the bathroom he was able to contact someone to cover for him while he used the bathroom. Furthermore, claimant has failed to show a substantial pay reduction. Although claimant's pay rate was reduced by $1.00, the pay reduction only amounted to approximately a ten percent reduction. Ten percent is not considered a substantial pay reduction.

Claimant has not met the burden of proof to show he quit with good cause attributable to the employer. While claimant's leaving the employment may have been based upon good personal reasons, it was not for a good-cause reason attributable to the employer according to Iowa law. Benefits must be 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.

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 July 12, 2016, (reference 02) unemployment insurance decision is reversed. Claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Claimant has been overpaid unemployment insurance benefits in the amount of $1,260.00 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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