

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

SHELLY R FORMARO
2304 INDIANOLA AVE
DES MOINES IA 50315

GIT-N-GO CONVENIENCE STORES INC
2716 INDIANOLA AVE
DES MOINES IA 50315-2399

Appeal Number: 04A-UI-08506-RT
OC: 07-11-04 R: 02
Claimant: Respondent (3)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Git-N-Go Convenience Stores, Inc., filed a timely appeal from an unemployment insurance decision dated July 30, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Shelly R. Formaro. After due notice was issued, a telephone hearing was held on August 30, 2004, with the claimant participating. Laurie Whitmore testified for the claimant. John Judge, Supervisor, participated in the hearing for the employer. Department Exhibit 1 was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit 1, the administrative law judge finds: The claimant was employed by the employer as a full-time cashier/stocker from November 20, 2003 until she separated from her employment on July 9, 2004. On July 3, 2004, the claimant submitted a written letter of resignation to be effective July 18, 2004 with her last day of work, July 17, 2004 as shown at Department Exhibit 1. The reason the claimant submitted her written letter of resignation was that she was denied an advance, which she had requested. The employer does not promise or guarantee employees advances. The claimant was absent on July 4, 2004 as noted in her resignation so that she could earn some money. The claimant was then absent July 5 and 6, 2004 because her sister was in surgery. The claimant properly notified the employer on each of these occasions. When the claimant called on July 9, 2004 to find out if her check was in the store, the claimant was informed that she was discharged for not coming to work the three days that she was absent. The claimant had previously expressed some concerns to the employer about some working conditions but had never indicated or announced an intention to quit if any of her concerns were not addressed by the employer. The claimant had a history of absences and was given a warning on April 21, 2004. Pursuant to her claim for unemployment insurance benefits filed effective July 11, 2004, the claimant had received unemployment insurance benefits in the amount of \$1,392.00 as follows: \$232.00 per week for six weeks from benefit week ending July 17, 2004 to benefit week ending August 21, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was as of July 18, 2004 or benefit week ending July 24, 2004.
2. Whether the claimant is overpaid unemployment insurance benefits. She is overpaid unemployment insurance benefits in the amount of \$1,160.00 from benefit week ending July 24, 2004 to benefit week ending August 21, 2004.

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.

871 IAC 24.25(1) 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:

871 IAC 24.25(13) 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:

(13) The claimant left because of dissatisfaction with the wages but knew the rate of pay when hired.

871 IAC 24.25(21) 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:

(21) The claimant left because of dissatisfaction with the work environment.

871 IAC 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.

Iowa Code Section 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.

871 IAC 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The first issue to be resolved is the character of the separation. The claimant maintains that she was discharged on July 9, 2004. The employer maintains that the claimant quit effective July 18, 2004 but then left early when she failed to return to work. The administrative law judge concludes that the claimant was discharged on July 9, 2004 in advance of the effective date of her voluntary quit on July 18, 2004. The evidence is clear that the claimant submitted a written resignation on July 3, 2004 indicating that she was quitting effective July 18, 2004; July 17, 2004 being her last day of work. This resignation is shown at Department Exhibit 1. Accordingly, the administrative law judge concludes that the claimant voluntarily left her

employment effective July 18, 2004. The issue then becomes whether the claimant left her employment voluntarily without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code Section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The main reason for the claimant's resignation was the denial of an advance that she had requested. This is shown in Department Exhibit 1 and the claimant ultimately so testified that it was her main reason for the resignation. The claimant also conceded this at fact-finding. The claimant now testifies that there were other reasons including some scuffle with a thief and a hurt back. The administrative law judge does not believe the claimant's testimony is credible here that those are reasons for her quit because of the written resignation and the testimony to the contrary. The evidence also establishes that advances are not promised or guaranteed by the employer. The claimant testified that she was guaranteed an advance and then it did not come through. The administrative law judge does not believe this is credible, and even if so, does not believe that it is a reason for a voluntary quit because the evidence establishes that the employer never promises or guarantees advances. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's denial of an advance makes her working conditions unsafe, unlawful, intolerable or detrimental or that it is a substantial change in her contract of hire. The administrative law judge further concludes that the other reasons now given for the claimant for her quit were not really reasons for her quit. In any event, the claimant, herself, concedes that she never indicated or announced an intention to quit to the employer for any reason with a sufficient opportunity for the employer to address her concerns. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily effective July 18, 2004 and, as a consequence, is disqualified to receive unemployment insurance benefits thereafter beginning with benefit week ending July 24, 2004 and continuing thereafter.

However, the evidence establishes that the claimant was discharged on July 9, 2004, before the effective date of her resignation. Where the claimant gave the employer an advanced 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. The administrative law judge concludes that the employer has not demonstrated good cause for discharging the claimant prior to the effective date of her resignation. The evidence does indicate that the claimant was absent for three days: July 4, 5, and 6, 2004. The claimant concedes so. The absence on July 4, 2004 was so the claimant could earn the necessary money that she needed and gave notice of this absence to the employer in her resignation. The claimant was also absent on July 5 and 6, 2004 because her sister was in the hospital facing surgery and both of these absences were properly reported. The administrative law judge concludes that these absences were not excessive, unexcused absenteeism and were not disqualifying misconduct. It is true that the claimant had a history of absences and had been given a warning on April 21, 2004, but there is no evidence that the claimant was going to be discharged prior to the three absences noted above. Accordingly, the administrative law judge concludes that the claimant was discharged on July 9, 2004, but not for disqualifying misconduct and, as a consequence, she would be entitled to receive unemployment insurance benefits for one week, benefit week ending July 17, 2004, which was before the effective date of her resignation.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,392.00 since separating from the employer herein on or about July 9, 2004 and filing for such benefits effective July 11, 2004. The administrative law judge concludes that the claimant is entitled to \$232.00 of these benefits for benefit week ending July 17, 2004 but is not entitled to unemployment insurance benefits in the amount of \$1,160.00 from benefit week ending July 24, 2004 to benefit week ending August 21, 2004. The administrative law judge, therefore, concludes that the claimant is overpaid unemployment insurance benefits in the amount of \$1,160.00.

DECISION:

The representative's decision of July 30, 2004, reference 01, is modified. The claimant, Shelly R. Formaro, is entitled to receive unemployment insurance benefits for one week, benefit week ending July 17, 2004, because she was discharged but not for disqualifying misconduct, prior to the effective date of her resignation. The claimant is not entitled to receive unemployment insurance benefits beginning with benefit week ending July 24, 2004 and continuing thereafter because she left work voluntarily without good cause attributable to the employer effective July 18, 2004. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,160.00.

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