

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DERRICK L ROBINSON
Claimant

HY-VEE INC
Employer

APPEAL 20A-UI-01728-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/02/20
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.11 – Incarceration Disqualification 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:

On February 25, 2020, the employer filed an appeal from the February 18, 2020, (reference 01) unemployment insurance decision that allowed benefits based on a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on March 12, 2020. Claimant participated personally. Laura Dickey observed. Employer participated through office assistant Kristi Conter and was represented by Judy Berry. Employer's Exhibits 1 and 2 were received.

ISSUES:

Is the claimant disqualified from receiving unemployment insurance benefits because of a separation due to incarceration?

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge 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 any 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 began working for employer on March 13, 2019. Claimant last worked as a full-time food production worker. Claimant was separated from employment on January 31, 2020, due to incarceration.

Employer has an attendance policy stating that an employee will be terminated after accruing 12 attendance points. Claimant was aware of the policy.

On December 31, 2019, came to work and informed employer he needed to take time off to obtain treatment for a non-work related mental health condition. At the same time, employer asked claimant to sign a written warning stating he had accrued nine attendance points. Claimant did so. Employer told claimant that he would be allowed to take up to 60 days of unpaid leave, but that he needed to get back to employer after seeing a medical professional to state exactly how much time he needed. Claimant stated that he would do so unless he was hospitalized after being given an initial evaluation. Employer gave claimant until January 2, 2020, to return with a request for a specific amount of leave.

Claimant was evaluated on December 31, 2019. Outpatient treatment was recommended. Therefore, claimant could have returned to work without taking leave. Claimant did not do so and did not get back to employer by January 2, 2020.

On January 3, 2020, claimant was arrested on a probation violation. Claimant was on probation because he previously pleaded guilty to a domestic assault. Claimant served a suspended sentence and was released from jail on January 31, 2020. Claimant did not notify employer he was arrested and that he would not be at work. Claimant did not have any contact with employer until January 31, 2020, when he returned to the workplace and was informed he had been terminated.

Claimant had no-call/no-show absences on January 5, 6, and 7, 2020. Under employer's policy each absence accrues four points. By January 7, 2020, claimant would have accrued 21 points.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,755.00, since filing a claim with an effective date of February 2, 2020, for five weeks until the week ending March 7, 2020. The administrative record also establishes that the employer did not participate in the fact finding interview because its representative provided a wrong telephone number for employer to Iowa Workforce Development.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(11) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

11. Incarceration--disqualified.

a. If the department finds that the individual became separated from employment due to the individual's incarceration in a jail, municipal holding facility, or correctional institution or facility, unless the department finds all of the following:

(1) The individual notified the employer that the individual would be absent from work due to the individual's incarceration prior to any such absence.

(2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the individual was found not guilty of all criminal charges relating to the incarceration.

(3) The individual reported back to the employer within two work days of the individual's release from incarceration and offered services.

(4) The employer rejected the individual's offer of services.

b. A disqualification under this subsection shall continue 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. 871-24.26(17) provides:

Separation due to incarceration.

a. The claimant shall be eligible for benefits if the department finds that all of the following conditions have been met:

- (1) The employer was notified by the claimant prior to the absence;
- (2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the claimant was found not guilty of all criminal charges relating to the incarceration;
- (3) The claimant reported back to the employer within two work days of the release from incarceration and offered services to the employer; and
- (4) The employer rejected the offer of services.

b. If the claimant fails to satisfy the requirements of subparagraph 24.26(17) "a"(1), the claimant shall be considered to have voluntarily quit the employment if the claimant was absent for three work days or more under subrule 24.25(4). If the absence was two days or less, the separation shall be considered a discharge under rule 871—24.32(96). If all of the conditions of subparagraphs 24.26(17)"a"(2), (3) and (4) are not satisfied, the separation should be considered a discharge under rule 871—24.32(96).

This subrule is intended to implement Iowa Code section 96.5 and Supreme Court of Iowa decision, *Irving v. Employment Appeal Board*, 883 N.W.2d 179.

In this case, claimant was separated from employment due to the fact that he missed work because he was incarcerated. Claimant asserts he believed employer approved him to take a two-month unpaid leave and that his absences were therefore excused. That is not the case. Employer needed more information about what leave claimant needed, but did not receive that information. Furthermore, employer approved a potential leave of absence for medical reasons—not incarceration. In fact, claimant did not need the leave for inpatient treatment at all, but failed to communicate that with employer and missed work because he was incarcerated. "But for" his incarceration, claimant would not have been separated from employment.

Claimant did not communicate with employer that he would miss work due to the incarceration and the charges against him were not dismissed.

Claimant did not meet the requirements of the law cited above and therefore is disqualified from receiving unemployment insurance benefits based on this separation from employment due to incarceration.

The next issue is whether claimant was overpaid benefits and should have to repay those benefits. Iowa Code § 96.3(7)a-b 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 § 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 § 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 § 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 § 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 § 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 § 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 § 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 § 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.

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 not participate in the fact-finding interview the claimant is not obligated to repay to the agency the benefits he received and the employer’s account shall be charged.

DECISION:

The February 18, 2020, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to incarceration. 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 \$1,755.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.



Christine A. Louis
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March 18, 2020
Decision Dated and Mailed

cal/scn