IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JOSHUA VOSHELL Claimant **FAREWAY STORES INC** Employer	**APPEAL 20A-UI-03168-AD-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/15/20** **Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
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:

On April 15, 2020, Fareway Stores Inc. (employer/appellant) filed an appeal from the April 13, 2020 (reference 01) unemployment insurance decision that determined Joshua Voshell (claimant/respondent) was eligible to receive unemployment insurance benefits.

A telephone hearing was held on May 8, 2020. The parties were properly notified of the hearing. Employer participated by VP of Human Resources Theresa McLaughlin. Market Manager Les Lickiss participated as a witness for employer. Claimant participated personally.

Employer's Exhibits 1-2 were admitted. Official notice was taken of the administrative record.

ISSUE(S):

I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

II. Was the claimant overpaid benefits?

III. Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant worked for employer as a full-time meat clerk. Claimant's first day of employment was September 18, 2017. The last day claimant worked on the job was December 11, 2019. Claimant's immediate supervisor was Lickiss. Claimant separated from employment on December 11, 2019. Claimant quit on that date.

Claimant did not provide a reason to employer prior to quitting. He simply told Lickiss and Assistant Manager Kevin Bills that he was quitting, punched out, and left the store. Bills told claimant at that time that he should contact District Manager Brian Greiner about his quitting. Claimant did not do so.

The most recent incident leading to claimant's quitting was his feeling that employer had not properly responded to his report that a coworker threatened to bring guns to work. Claimant reported this issue to Lickiss on December 9, 2019. Specifically, claimant told Lickiss he heard from another coworker that a second coworker had threatened to bring guns to work. When claimant told Lickiss this, Lickiss joked the employee would probably shoot claimant first. This was because claimant had recently reported the coworker to management for adjusting valves in the building without permission to do so.

Upon learning of the alleged threat, Lickiss immediately went to the coworker and asked him if he had made a statement about bringing guns to work. The coworker denied doing so. He also talked to the coworker who relayed the alleged threat to claimant. That coworker confirmed the second coworker had made a statement along those lines. Lickiss then spoke with the caregiver of the coworker who allegedly made the threat. The caregiver reported he had spoken with the coworker and the coworker denied making such a statement.

Lickiss brought this information to his supervisor, Greiner. Claimant quit before Lickiss was able to tell him the results of the investigation and the actions taken. It was approximately two weeks after claimant quit before the investigation was completed. The delay was due in part to the coworker being off work for a couple weeks for a medical procedure.

Claimant brought up the coworker's alleged threat again on December 11. Claimant wanted to know if any response had been taken. Lickiss said it was not claimant's job to worry about that. This upset claimant, as he felt Lickiss was not taking the issue seriously and responding properly. However, claimant did not report this issue and his concerns about the handling of it to anyone superior to Lickiss prior to quitting.

The coworker who allegedly made the threat was a part-time employee who had some form of mental impairment. Claimant acknowledged it was unlikely the individual would be able to purchase a firearm but suggested he may be able to access firearms in some other way. This individual had never threatened claimant in any way.

Claimant was previously reprimanded on November 23, 2019 for working in an unsafe manner. Claimant believed this reprimand was unfair, as he felt others did not work as hard or as well as him and had avoided discipline.

Employer did not participate in the fact-finding interview. The administrative record shows the fact-finder called employer at 515-432-2623 at the time of the interview but was unable to reach a representative. The fact-finder indicated a voicemail message was left at that number at that time. The fact-finder did not indicate that a representative for employer returned the call in a timely manner to participate in the interview. McLaughlin confirmed the above number was the correct number to call for the interview. However, McLaughlin stated the representative who was to participate did not receive a call at that time and was unable to reach an IWD representative after that time.

The unemployment insurance system shows claimant has received weekly benefits in the amount of $367.00 for a total of two weeks, from the benefit week ending April 25, 2020 and continuing through the benefit week ending May 2, 2020. The total amount of benefits paid to date is $734.00.

Claimant has also received Federal Pandemic Unemployment Compensation (FPUC) benefits in the amount of $1,200.00.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the April 13, 2020 (reference 01) unemployment insurance decision that determined claimant was eligible to receive unemployment insurance benefits is REVERSED.

I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

Iowa Code section 96.5(1)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 provides in relevant part:

> 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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> **(21)** The claimant left because of dissatisfaction with the work environment.
>
> **(28)** The claimant left after being reprimanded.

Iowa Admin. Code r. 871-24.26 provides in relevant part:

> 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:
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> **(2)** The claimant left due to unsafe working conditions.
>
> **(4)** The claimant left due to intolerable or detrimental working conditions.

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*., 883 N.W.2d 179 (Iowa 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 1980)).

"Good cause" for leaving employment must be that which is reasonable to the average person, not to the overly sensitive individual or the claimant in particular. *Uniweld Products v. Industrial Relations Commission*, 277 S.2d 827 (Florida App. 1973). While a notice of intent to quit is not required to obtain unemployment benefits where the claimant quits due to intolerable or detrimental working conditions, the case for good cause is stronger where the employee complains, asks for correction or accommodation, and employer fails to respond. *Hy-Vee Inc. v. EAB*, 710 N.W.2d 1 (Iowa 2005).

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). 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).

It is the duty of the administrative law judge as 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 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. *Id*. 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 believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

The administrative law judge found the witnesses to all provide credible and reliable testimony. The witnesses' testimony was largely consistent, with the exception of one key factual dispute regarding the date when claimant first reported the coworker's alleged threat. The administrative law judge found Lickiss's testimony here to be more reliable for the reasons set forth below, and resolved the factual dispute accordingly.

Claimant testified that he reported the coworker's alleged threat to bring guns to work prior to December 9, 2019. Claimant explained he believed this was the case because he reported it prior to reporting the coworker to management for adjusting valves in the building without permission to do so. However, this is inconsistent with testimony that Lickiss joked at the time of claimant reporting the alleged threat that the coworker would shoot him first due to the prior report about adjusting valves. For these reasons, the administrative law judge concluded the report was made on December 9, 2019, rather than earlier.

Employer has carried its burden of proving claimant's departure from employment was voluntary. However, claimant has not carried his burden of proving the voluntary leaving was for good cause attributable to employer.

Claimant quit primarily due to his feeling that Lickiss was not properly handling the complaint he brought regarding the coworker's alleged threats. However, claimant only allowed two days for employer to address this issue prior to quitting. While the administrative law judge understands claimant's frustration with Lickiss's responses to the complaint and does not seek to minimize the seriousness of such a threat, two days is not a reasonable amount of time to give employer to respond to this issue prior to simply quitting. This is particularly unreasonable given that claimant did not bring the issue and his concern with Lickiss's handling of it to anyone above Lickiss prior to quitting, even after being advised to call Greiner at the time he quit.

The administrative law judge further finds that while Lickiss's initial response to claimant's report was not appropriate and Lickiss could have done a better job of communicating the steps he was taking to respond to claimant, Lickiss did respond reasonably by gathering information from the relevant parties and reporting it to Greiner. While claimant may not have felt employer was not acting diligently to respond to the alleged threat, due at least in part to Lickiss not clearly communicating the response to claimant, the response was reasonable in the circumstances.

The administrative law judge finds the seriousness of the alleged threat must also be taken into account when analyzing whether claimant's response was appropriate. As an initial matter, it is unclear whether the threat was in fact made. Furthermore, the alleged threat was not specifically a threat of violence and did not appear to be imminent in anyway. Finally, it seems unlikely in the circumstances that the individual was likely to carry out any such threat, particularly due to the individual being out for some time for a medical procedure. Again, the administrative law judge does not seek to downplay the seriousness of such a threat. But given the facts and circumstances here, the judge finds employer's response was reasonable.

The administrative law judge finds that a reasonable person would not have felt the working conditions so unsafe, intolerable, or detrimental as to justify quitting just two days after raising the issue, particularly without first elevating the issue to management above Lickiss. Claimant's quitting is more aptly described as being due to dissatisfaction with the work environment and his supervisor than due to unsafe, intolerable, or detrimental working conditions. Such reasons do not constitute good cause for quitting attributable to employer.

Finally, claimant quit at least in part due to being reprimanded on November 23, 2019 for working in an unsafe manner. Claimant believed this reprimand was unfair, as he felt others did not work as hard or as well as him and had avoided discipline. Quitting following a reprimand is assumed to be without good cause attributable to employer, and the administrative law judge finds it was without good cause here. While the administrative law judge understands claimant's frustration with the reprimand, it does not appear to have been unwarranted or issued in a discriminatory or vindictive manner. While claimant's coworkers' performance should have perhaps been more closely scrutinized, this does not constitute good cause for quitting.

Because claimant's quitting was not with good cause attributable to employer, benefits must be denied.

II. Was the claimant overpaid benefits? Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

Iowa Code section 96.3(7) provides, in pertinent part:

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.
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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.
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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.

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.

The unemployment insurance system shows claimant has received weekly benefits in the amount of $367.00 for a total of two weeks, from the benefit week ending April 25, 2020 and continuing through the benefit week ending May 2, 2020. The total amount of benefits paid to date is $734.00.

Because the administrative law judge now finds claimant ineligible for benefits, he has been overpaid benefits in that amount.

Employer did not participate in the fact-finding interview. The administrative record shows the fact-finder called employer at 515-432-2623 at the time of the interview but was unable to reach a representative. The fact-finder indicated a voicemail message was left at that number at that time. The fact-finder did not indicate that a representative for employer returned the call in a timely manner to participate in the interview. McLaughlin confirmed the above number was the correct number to call for the interview. However, McLaughlin stated the representative who was to participate did not receive a call at that time and was unable to reach an IWD representative after that time.

Based on the information available, the administrative law judge concludes that any failure to participate in the interview was due to employer's failure to be available at the number listed or to timely return the call. The fact-finder indicated a voicemail was left. This would have included the fact-finder's direct number and directions to return the call within 30 minutes if the representative wished to participate in the interview. As noted above, the fact-finder did not indicate any such return call was received.

Because employer did not participate in the fact-finding interview within the meaning of Iowa Admin. Code r. 871-24.10 and the overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment, benefits shall not be recovered from claimant.

III. Is the claimant eligible for federal pandemic unemployment compensation?

PL116-136, Sec. 2104 provides, in pertinent part:

> (b) Provisions of Agreement
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> (1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to
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> (A) the amount determined under the State law (before the application of this paragraph), plus
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> (B) an additional amount of $600 (in this section referred to as "Federal Pandemic Unemployment Compensation").
>
> ….
>
> (f) Fraud and Overpayments
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> (2) Repayment.--In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State

> shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency…

Here, the claimant is disqualified from receiving regular unemployment insurance (UI) benefits. Accordingly, claimant is also disqualified from receiving Federal Pandemic Unemployment Compensation (FPUC). In addition to the regular UI benefits claimant received, claimant received $1,200.00 in FPUC benefits. Claimant is required to repay those benefits.

DECISION:

The April 13, 2020 (reference 01) unemployment insurance decision that determined claimant was eligible to receive unemployment insurance benefits is REVERSED. Claimant is disqualified from receiving benefits until he earns wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Claimant has been overpaid regular unemployment insurance benefits in the amount of $734.00. Benefits shall not be recovered and the employer shall be charged due to its failure to participate in the fact-finding interview.

Claimant has been overpaid Federal Pandemic Unemployment Compensation (FPUC) benefits in the amount of $1,200.00. Claimant is required to repay those benefits.

Andrew B. Duffelmeyer
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 478-3528

May 14, 2020
Decision Dated and Mailed

abd/scn

Note to Claimant:

This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at https://www.iowaworkforcedevelopment.gov/pua-information.