

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

NICOLE C COVINGTON
Claimant

APPEAL NO. 19R-UI-09114-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SYSTEMS UNLIMITED INC
Employer

**OC: 09/01/19
Claimant: Respondent (2)**

Iowa Code § 96.5-1 – Voluntary Quit
Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.3-7 – Recovery of Overpayment of Benefits
871 IA Admin. Code 24(10) – Employer Participation in Fact Finding

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated September 24, 2019, reference 01, which held claimant eligible for unemployment insurance benefits. Hearing was originally held on October 23, 2019 in front of ALJ Duane Golden. Golden issued a ruling which was appealed by claimant. On November 18, 2019, the Employment Appeals Board remanded the decision. After due notice, a hearing was scheduled for and held on December 12, 2019. Claimant participated personally. Employer participated by Jenny O'Brien, Tammy Reynolds, and Terri Reynolds.

ISSUES:

Whether claimant quit for good cause attributable to employer?

Whether claimant was discharged for misconduct?

Whether claimant was overpaid benefits?

If claimant was overpaid benefits, should claimant repay benefits or should employer be charged due to employer's participation or lack thereof in fact finding?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: All findings of fact determined by Judge Duane Golden in his October 24, 2019 hearing are hereby incorporated. Additional findings are listed below.

Claimant was a no-call/no-show for work on August 13, 2019. She signed for and received a disciplinary action on August 16, 2019. At the time of the receipt of this notice, claimant made statements that she was searching for other employment so there was no need for a write up.

On August 20, 2019 claimant was in a hurry leaving work at or around 6am as she was picking up her son to get him to his 5am football practice. Claimant's supervisor told claimant that her hours ran until 6am.

On August 21, 2019 employer was coming into work shortly before 6am and met claimant getting into her car. Employer told claimant that she was to work until 6am. Claimant, when confronted by employer, told the employer that she was done with this type of confrontation, and she quit.

Claimant stated that employer's version of this events was off. She stated that she worked until 6am, clocked out via her phone, and then went to her car. When employer was complaining to her, claimant did not wish to have a 6am argument and instead just said, "I'm done" and drove off to get her son.

Employer texted claimant later in the day stating that claimant's quit had been accepted by employer. Claimant texted employer back that she had not quit and had instead just stated that she was done dealing with employer's ill-founded complaints.

Claimant did receive benefits in the amount of \$1,180.00 in this matter.

Employer did not substantially participate in fact finding as employer's documents were not, in and of themselves, substantial information that the fact finder could find in employer's favor absent employer's testimonial participation.

REASONING AND CONCLUSIONS OF LAW:

Initially, the administrative law judge must make a determination as to whether the claimant quit or was terminated in this matter. As both claimant's and employer's stories involving their interaction on August 21, 2019 cannot be correct, a decision on credibility must be made. 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 Ct. 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*, 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. *State v. Holtz*, Id.

Here, it is reasonable for the administrative law judge to consider the recent actions on the part of both claimant and employer. Employer had recently issued a warning to claimant. Claimant responded to the warning by saying she was searching for other employment. This goes to show claimant's disdain for her job and/or supervisor. Claimant stated that she was leaving after 6am when employer addressed her for leaving too early. The equities of the situation lie in favor of the employer in this matter as claimant had previously shown her desire to leave as soon as possible, and her frustration with employer's late arrival causing her to be later in leaving. It is much more likely that claimant simply had enough of what she perceived to be employer's harassment, and told employer that she quit than it is likely that employer decided after the fact to turn claimant's leaving after her shift into a quit.

Iowa Code section 96.5(1) 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 Code section 96.3(7)a-b, as amended in 2008, 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 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.

The overpayment issue was addressed. Claimant was overpaid \$1,180.00 in unemployment benefits in this matter.

The issue of employer participation was addressed. Employer did not substantially participate in fact finding such that employer's account will be charged for overpayment of benefits received by claimant.

DECISION:

The decision of the representative dated September 24, 2019, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Claimant has been overpaid benefits in this matter. Employer's account will be charged for the benefits received by claimant.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/scn