

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

HEATHER R FRANCIS
Claimant

APPEAL NO. 10A-UI-13222-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

RIVER FOODS INC
Employer

OC: 07/25/10
Claimant: Respondent (2R)

Section 96.5-1 – Voluntary Quit

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated September 13, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 19, 2010. Claimant participated. Employer participated by Diane Minion, manager. Seth Shryock and Tanya Defrise were witnesses for the employer. The record consists of the testimony of Diane Minion; the testimony of Seth Shryock; the testimony of Tanya Defrise; the testimony of Heather Francis; and Employer's Exhibits 1-10.

ISSUE:

Whether the claimant voluntarily left for good cause attributable to the employer.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is Hardees's Restaurant located in Estherville, Iowa. The claimant was hired on November 13, 2009. She was a part-time cashier. Her last date of actual work was July 21, 2010.

A new work schedule was posted on July 18, 2010. The claimant was scheduled to work on July 22, 2010 from 2:00 p.m. to 8:00 p.m. The claimant did not want to work that schedule and said so to several other employees. The claimant asked Seth Shryock, a co-employee to work for her, and he declined, saying that this was his only day off that week. On July 22, 2010, the claimant called her manager, Diane Minion, and informed her that she would not be coming to work because she had a migraine. Ms. Minion told the claimant that she had to find someone to cover her shift or bring a doctor's note excusing her from work.

The claimant did not come to work nor did she provide a doctor's slip. She was a no-call/no-show on July 23, 2010, and July 25, 2010. She never contacted the employer again

after she spoke to Ms. Minion on July 22, 2010. Work was available for the claimant at the time she stopped coming to work.

REASONING AND CONCLUSIONS OF LAW:

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.

A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

The greater weight of the evidence in this case is that it was the claimant who initiated the separation of employment. The claimant did not want to work as scheduled on July 22, 2010, and this was known on July 18, 2010, when the schedule came out. The claimant asked another employee to work for her on July 21, 2010. He declined. The claimant then called in sick, claiming she had a migraine. Ms. Minion told the claimant that she had to either find a replacement or bring in a doctor's slip. The claimant did neither. She was then a no-call/no-show for her next two work days and never contacted the employer at any time after July 21, 2010.

After carefully considering all of the testimony and weighing the credibility of the testimony, the administrative law judge concludes that the claimant did not want to work on July 22, 2010, and tried to avoid working by claiming a migraine headache. The employer offered the claimant two alternatives: find someone else to work for you or bring in a doctor's slip. The claimant had already tried to get a replacement ever since the schedule came out on July 18, 2010. When that did not work, she said she had a migraine. A doctor's slip would have been easy for the claimant to obtain, but she did not do that. A reasonable inference from the evidence is that the claimant was not sick as she claimed.

The employer's testimony that she did not terminate the claimant is corroborated by the testimony of Tanya Defrise. Ms. Defrise was present for the phone call with the claimant and testified that the claimant was never terminated by Ms. Minion. Ms. Defrise said that it was the claimant who asked to be fired and Ms. Minion refused, saying "we will have to see what happens."

It was the claimant who elected to sever the employment relationship. She did so by failing to come to work after July 21, 2010 and failing to notify her employer. She abandoned her job. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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.

The overpayment issue is remanded to the claims section for determination.

DECISION:

The decision of the representative dated September 13, 2010, 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.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs