

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

LISA K BARNHART

Claimant

APPEAL 23A-UI-02959-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABCM CORPORATION

Employer

OC: 02/26/23

Claimant: Respondent (2)

Iowa Code § 96.5(1) – Voluntary Quit from Employment
Iowa Code § 96.5(2)a – Discharge from Employment
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.25(37) – Notice of Intent to Resign Accepted by Employer
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding

STATEMENT OF THE CASE:

On March 20, 2023, employer ABCM Corporation filed an appeal from the March 17, 2023 (reference 01) unemployment insurance decision that allowed benefits based on a determination that claimant Lisa K. Barnhart was discharged from employment for no willful or deliberate misconduct. The parties were properly notified of the hearing. A telephonic hearing was held at 10:00 a.m. on Wednesday, April 5, 2023. Claimant Lisa K. Barnhart participated personally, and attorney Stuart Higgins represented the claimant. Employer ABCM Corporation participated through witnesses LouAnn Wikan, Interim Administrator at Guttenberg Care Center; Carrie Hogan, Director of Nursing; and Kaylee Ries, Administrative Nurse; and attorney Ray Aranza represented the employer. Claimant's Exhibits A, B, C, and D and Employer's Exhibit 1 was received and admitted into the record. The administrative law judge took official notice of the administrative record to assist in calculating the overpayment amount and determining participation in the fact-finding interview.

ISSUES:

Did the claimant quit the employment without good cause attributable to the employer or was she discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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 this employer on September 4, 2015. Most recently, she worked full-time hours as the assistant director of nursing. Claimant's employment ended on February 20, 2023, when the employer accepted the resignation she tendered on February 10.

As the assistant director of nursing, claimant performed a multitude of job duties. Primarily, claimant functioned as a member of the nursing staff in the facility. The employer had experienced staffing shortages for approximately eighteen months prior to the end of claimant's employment, and these staffing shortages required claimant to fill in as a charge nurse frequently. In addition, claimant was performing the roles of social work designee; infection control coordinator; quality assurance coordinator; and served as the back-up nurse for assisted living and live-in home care. Claimant earned an additional seventy-five cents per hour for taking on these extra roles.

Claimant took approved sick leave beginning January 10 with an anticipated return-to-work date of January 16, 2023. Subsequently, claimant applied for FMLA-protected leave and provided documentation excusing her from work through February 5, 2023. While claimant was on leave, the employer began implementing reorganization plans. The corporation's president had talked to Wikan prior to January 10 about coming to the Guttenberg Care Center, taking over as interim administrator, and restructuring the staffing at the facility. Wikan believed the Guttenberg Care Center employed too many administration-level nursing staff for the patient census they maintained. Under Wikan's restructuring, the employer would fill the director of nursing and administrative nurse positions; eliminate the assistant director of nursing position; and then focus on staffing the charge nurse positions.

On February 7, the employer received a note from claimant's medical provider indicating she was cleared to return to work the following day. That day, Wikan and Hogan called claimant shortly after 5:00 p.m. and let her know that when she returned to work, she would be returning to a different position. They told claimant the position of "assistant director of nursing" had been eliminated. Claimant would now be employed as a charge nurse, working full-time hours for the same rate of pay that she earned prior to taking a leave of absence. Claimant asked for a few days to think about the employer's offer, and the three agreed to meet at 10:00 a.m. on Friday, February 10.

Claimant did not attend the February 10 meeting. Instead, on February 10, claimant delivered a "letter of concern" to the employer via email. (Employer's Exhibit 1) In this letter, claimant states her medical provider recommended she take a leave of absence due to the stress and anxiety Heying's behavior caused her. She also indicates she experienced anxiety due to the multiple roles she performed for the employer. Claimant complains that she should have been offered the administrative nurse position. She closes by resigning from her additional roles and asking either to have the employer reinstate her as the Assistant Director of Nursing or to have the employer offer her a severance package.

The employer responded to claimant through its attorney in a letter dated February 20, 2023. (Claimant's Exhibit D) In this letter, the employer accepts claimant's resignation from all her roles and provides her one month of severance pay.¹ The letter gives claimant twenty-one days to accept the offered severance in exchange for her resignation; this gave claimant a deadline of Monday, March 13, 2023. Claimant did not return the document to the employer by that time. She has not communicated further with the employer.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,102.00, since filing a claim with an effective date of February 26, 2023, and a reopened date of March 19, 2023, for the two weeks ending April 1, 2023. The administrative

¹ The employer states that the severance is paid "per the attached Severance Agreement." That agreement was not included with the exhibit.

record also establishes that the employer did not participate in the fact-finding interview. Documentation prepared by the fact-finder states: "Line rang 10 times before someone answered, once the line was picked up and introductions were had, the line was disconnected." The fact-finder called the employer at the telephone number provided twice beginning at 3:20 p.m., and twice beginning at 3:36 p.m., and all four calls yielded the same result. The fact-finder was never able to leave a voice message regarding the employer's scheduled interview and appeal rights. Wikan denies receiving a telephone call from the fact-finder. She also spoke with the corporate office and staff at that office indicated they did not receive a call either.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation from employment was a voluntary quit without good cause attributable to the employer. Benefits must be withheld.

Iowa Code § 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.

Iowa Code §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.

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. The burden of proof rests with the employer to show that the claimant voluntarily left the employment. *Irving v. Empl. App. Bd.*, 15-0104, 2016 WL 3125854, (Iowa June 3, 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Empl't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Empl't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It 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). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Empl't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Empl't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). On the other hand, when an individual mistakenly believes they are discharged

from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is generally considered a quit without good cause attributable to the employer. *LaGrange v. Iowa Dep't of Job Serv.*, (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984).

In this case, the last communication between the parties was the February 20 letter from the employer (through counsel) to claimant, accepting claimant's resignation and offering claimant one month's pay as severance. This letter placed the proverbial ball squarely in claimant's court; she either needed to sign the Severance Agreement that the employer provided her and send it back, or she needed to send something to the employer in response to their communication. Claimant did neither. Her position that because the letter came from employer's counsel and not an employee of the employer directly, the letter was not "from the employer is absurd. The first line of the letter makes plain Raymond Aranza's connection to the employer: "I represent ABCM Corporation." Further, if claimant had any confusion about Aranza's connection to the employer, she could have reached out to him or to someone with the Guttenberg Care Facility. She did not do this. Instead, she did nothing. By doing nothing, claimant allowed the employer to accept her resignation and let the Severance Agreement expire.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). The standard of what a reasonable person would have believed under the circumstances is applied in determining whether a claimant left work voluntarily with good cause attributable to the employer. *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (Iowa 1993).

Iowa Admin. Code r. 871-24.25(37) 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:

(37) The claimant will be considered to have left employment voluntarily when such claimant gave the employer notice of an intention to resign and the employer accepted such resignation.

Claimant was upset over corporate sending in a consultant, she was unhappy with the employer discharging her daughter from employment, and she was angry with the employer for eliminating her Assistant Director of Nursing position and offering her a less-prestigious job title. Further, she was experiencing significant anxiety after numerous months of balancing a number of additional responsibilities on top of her full-time job. While claimant certainly had compelling personal reasons to leave her employment, she has not identified a good-cause reason that was fairly attributable to the employer. Benefits must be withheld.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged. Iowa Code § 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 un rebutted 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.

Because the claimant's separation was disqualifying, benefits were paid to which she 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

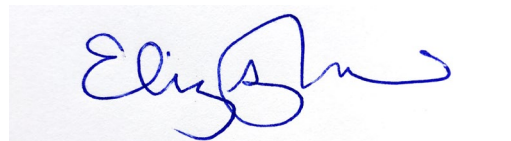
for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. The benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, the employer did not participate in the fact-finding interview. The claimant is not obligated to repay to the agency the benefits she received.

The law also states that an employer is to be charged if “the employer failed to respond timely or adequately to the department’s request for information relating to the payment of benefits. . .” Iowa Code § 96.3(7)(b)(1)(a). Here, the employer had a telephone number on file for their corporate office and had instructions to the corporate office for staff there to direct the call to Wikan. Based on Wikan’s testimony and the fact-finder’s notes, it appears technical issues prevented the call from going through to the corporate office. Benefits were paid, but not because the employer failed to respond timely or adequately to the agency’s request for information relating to the payment of benefits. Instead, benefits were paid because the call could not successfully go through. Employer thus cannot fairly be charged. Since neither party is to be charged then the overpayment is absorbed by the fund.

DECISION:

The March 17, 2023 (reference 01) unemployment insurance decision is reversed. Claimant was not discharged; she voluntarily separated from employment without good cause attributable to the employer. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of \$1,102.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview through no fault of its own, and its account will not be charged. The overpayment shall be absorbed by the fund.



Elizabeth A. Johnson
Administrative Law Judge

April 12, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.