

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**HANNAH G SHEWRY**  
Claimant

**HY-VEE INC**  
Employer

**APPEAL 20A-UI-11960-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/05/20**  
**Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview  
PL116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation (FPUC)

**STATEMENT OF THE CASE:**

The employer/appellant, Hy-Vee Inc., filed an appeal from the September 18, 2020 (reference 01) Iowa Workforce Development (“IWD”) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 1, 2020. The claimant, Hannah G. Shewry, did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Barbara Buss, hearing representative for Corporate Cost Control. Tammy Van Wyk and Chris Knowles testified.

The administrative law judge took official notice of the administrative records. Employer Exhibits 1-4 were admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Did claimant voluntarily quit the employment with good cause attributable to employer?  
Has the claimant been overpaid any 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?  
Is the claimant eligible for Federal Pandemic Unemployment Compensation?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part-time as a kitchen clerk and was separated from employment on July 3, 2020.

Employer has a written attendance policy and tracks attendance infractions on a points basis. Employer stated eighteen points in a rolling one year period is grounds for dismissal. Employer also stated three no call/no shows can lead to separation. Claimant was trained at hire on employer rules and procedures (Employer Exhibit 3).

Prior to July 1, 2020, claimant had no call/no shows on November 4, 2019, December 3, 2019, and January 6, 2020. Claimant overslept her shift on June 21, 2020. She left early due to go to the doctor on July 1, 2020 and presented a doctor's note. Employer stated claimant had recently been warned verbally for being over the allowable points, but that the employer had not discharged claimant because she was a sweet girl. Claimant was then a no call/no show on July 3, 2020.

Employer was unaware if claimant worked Fridays, prior to being scheduled on July 3, 2020. Claimant sent in a series of text messages to employer that she did not work Fridays and had made appointments because she was not scheduled for Fridays. She did not report the absence and she did not work the shift. Employer stated claimant was confronted about the absence and said "then I will no longer work here." No documentation was provided that claimant quit by text message or in writing. Claimant would have accrued more points for missing her July 3, 2020 and was already over the established threshold.

On the separation form, (Employer Exhibit 1), employer documented the reason for separation as voluntarily quitting without notice. Below that was written "no reason given" which was then crossed out. Employer then wrote the reason for quit was another job. Employer then documented below that "No call/no show" and listed dates January 5, June 20, July 1 and July 3. Employer then crossed out January 5, 2020" (Employer Exhibit 1).

The administrative record reflects that claimant has not received unemployment benefits or Federal Pandemic Unemployment Compensation (FPUC) since establishing her claim for benefits with an effective date of July 5, 2020.

The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal.

#### **REASONING AND CONCLUSIONS OF LAW:**

An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa Code § 96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer" Iowa Code § 96.5(1) or (2) is discharged for work -connected misconduct, Iowa Code § 96.5(2) a, or (3) fails to accept suitable work without good cause, Iowa Code § 96.5(3).

The first two disqualifications are premised on the occurrence of a separation of employment. To be disqualified based on the nature of the separation, the claimant must either have been fired for misconduct or have quit but not for good cause attributable to the employer. Generally, the employer bears the burden of proving disqualification of the claimant. Iowa Code § 96.6(2). Where a claimant has quit, however, the claimant has "the burden of proving that a voluntary quit was for good cause attributable to the employer pursuant to Iowa Code section § 96.5(1). Since the employer has the burden of proving disqualification, and the claimant only has the

burden of proving the justification for a quit, the employer also has the burden of providing that a particular separation was a quit. The Iowa Supreme Court has thus been explicitly, “the employer has the burden of proving that a claimant’s departure from employment was voluntary.” *Irving v. Employment Appeal Board*, 883, NW 2d 179, 210 (Iowa 2016).

*Quit not shown:* 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 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). Generally, a quit is defined to be a “termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.” The employer has the burden of providing that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5.

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 carefully evaluated the evidence, which included two witnesses with limited knowledge of the claimant’s employment history, coupled with statements that were inconsistent with written documents it submitted (such as the separation form). Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant voluntarily quit the employment.

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). The evidence in this case does not support that claimant intended to quit the employment. She did not submit a resignation letter or even text message. Her last text messages to the employer were on July 3, 2020 when she explained she was never scheduled on Fridays and had an appointment that day as a result. The employer’s own separation document lists three different explanations for her separation: that she quit with no reason, for another job and due to no call/no shows (with dates that were inconsistent with the testimony). In this case, the claimant did not have the option of remaining employed nor did she express intent to terminate the employment relationship. Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp’t Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

Iowa Administrative Code rule 871-24.32(1)a provides:

“Misconduct” is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

In this case, employer stated claimant had exceeded her allotted attendance points but was permitted to retain employment because she was a sweet girl. Employer also had not followed its policy as it relates to no call/no shows. There was no evidence that they had placed claimant on a final warning and allowed her to remain employed due to some extenuating circumstances.

As a result, the administrative law judge is not persuaded that the claimant knew or should have known her job was in jeopardy if she missed her July 3 shift, which was scheduled on a day she normally did not work. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment of regular unemployment insurance benefits and relief of charges are moot. *At this time, claimant has not received any benefits.*

The final issue to address is whether the claimant is eligible for Federal Pandemic Unemployment Compensation (FPUC).

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

(b) Provisions of Agreement

(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

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

....

(f) Fraud and Overpayments

(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...

Because the claimant is allowed regular unemployment insurance benefits, she is also eligible for FPUC, provided she is otherwise eligible. The employer is not charged for these federal benefits.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

**DECISION:**

The September 18, 2020, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. She is not overpaid benefits. The employer's account cannot be relieved of charges associated with the claim for regular unemployment insurance benefits. The claimant is also eligible for FPUC, provided she is otherwise eligible.



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December 14, 2020  
Decision Dated and Mailed

jlb/scn