

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KELSI N RUPERT
Claimant

HY-VEE INC
Employer

APPEAL 21A-UI-17138-AR-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/25/21
Claimant: Respondent (2R)**

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
PL 116-136, Sec. 2104 – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

The employer, Hy-Vee, Inc., filed an appeal from the July 26, 2021, (reference 02) unemployment insurance decision that allowed benefits based upon the determination that claimant, Kelsi N. Rupert, did not quit but was discharged for no disqualifying reason. The parties were properly notified of the hearing. A telephone hearing was held on September 28, 2021. The claimant participated personally, with witness Vicki Rupert. The employer participated through its hearing representative, Alice Rose Thatch, with testifying witness Antonio Romeo. The administrative law judge took official notice of the administrative record.

ISSUES:

Did the claimant quit employment without good cause attributable to the employer, or was she discharged due to job-related misconduct?
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?
Is claimant eligible for Federal Pandemic Unemployment Compensation?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as an Aisles Online clerk from April 25, 2020, until this employment ended on May 2, 2021, after claimant ceased to report for or call in to work.

In late March or early April 2021, claimant and her family contracted COVID-19. On March 28, 2021, claimant's mother, Rupert, called late at night to the store and reported that claimant would need to be out of work due to COVID-19. Nevertheless, claimant reported for work the following Sunday, April 4, 2021. On that day, she spoke to a manager, Frankie Montenez, to tell

him that she needed to be off work due to COVID-19. She indicated that she did not know when she would be able to return.

At some point in the past, claimant had requested a schedule change with the other manager, Jennifer Lewis. Lewis asserted that claimant had to work Sundays or she would not schedule her. Claimant was aware that she was scheduled Sundays through the month of April. Claimant did not pursue the issue of changing her schedule.

After she last worked on April 4, 2021, claimant was scheduled to work April 11, 18, and 25, 2021, and May 2, 2021. She did not call in or report for any of these shifts.

The employer maintains a policy that indicates three no call/no shows is considered job abandonment. After claimant did not call in or report for her May 2, 2021, shift, the employer considered her separated from employment.

The employer submitted written responses to questions regarding claimant's separation from Iowa Workforce Development. In its responses, it indicated that claimant had been separated due to job abandonment, and it provided the shifts on which it based its determination.

The administrative record, specifically the DUA2 claim detail, reflects that claimant applied for Pandemic Unemployment Assistance (PUA) benefits. A determination denying her application based on her eligibility for regular UI benefits issued August 12, 2021. DUA2 claim detail explicitly states that the reason for the denial of claimant's application was due to her eligibility for regular UI benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was without good cause attributable to the employer.

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 Admin. Code r. 871—24.25(4) 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 § 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 § 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:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Though claimant testified that she had COVID-19 during the period when the employer considered her absent from work without proper notification, claimant did not adhere to the absence notification requirements after the initial absence that occurred on March 28, 2021. However, the employer could not have been expected to know that claimant needed to be absent due to COVID-19 after March 28, 2021, because claimant attended work for her shift on April 4, 2021, despite her mother's call that she needed to be out. Though she alleges she spoke to a manager on April 4, 2021, she did not thereafter provide the employer with a doctor's note outlining her need for leave, nor did she call in as absent on the subsequent Sundays, though she knew she was scheduled. It was claimant's responsibility to take active steps to maintain her employment if she wished to do so. The record indicates she did not take active steps to maintain her employment.

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. Inasmuch as the claimant failed to report for work or notify the employer for four consecutive workdays in violation of the employer policy, the claimant is considered to have voluntarily left employment without good cause attributable to the employer.

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 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.

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. In this case, the claimant has received benefits but was not eligible for those benefits. The employer provided written responses to questions by Iowa Workforce Development, which was its participation in the fact-finding process. It provided the dates on which it based its determination that claimant had voluntarily separated from employment by failing to report for work or call out as absent.

Claimant filed a claim for benefits each week from the benefit week ending May 1, 2021, and continuing through the benefit week ending July 10, 2021. She has received a total benefit amount of \$1,320.00 for that period.

Since the employer did participate in the fact-finding interview, the claimant is obligated to repay to the agency the benefits she received and the employer’s account shall not be charged.

The next issues to be determined are whether claimant was eligible for FPUC and whether claimant has been overpaid FPUC. For the reasons that follow, the administrative law judge concludes claimant was not eligible for FPUC and was overpaid FPUC, which must be repaid.

PL 116-136, 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 disqualified from receiving regular unemployment insurance (UI) benefits, she is also disqualified from receiving FPUC. Claimant has therefore been overpaid FPUC in the amount of \$2,100.00. Claimant is required to repay that amount.

In light of the determination that claimant is ineligible for regular UI benefits, the matter of claimant's eligibility for PUA benefits will be remanded to the Benefits Bureau of Iowa Workforce Development for consideration.

DECISION:

The July 26, 2021, (reference 02), unemployment insurance decision is reversed. Claimant voluntarily left the 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 \$1,320.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Claimant has been overpaid Federal Pandemic Unemployment Compensation in the gross amount of \$2,100.00, which must be repaid.

REMAND:

The issue of claimant's eligibility for PUA benefits is remanded to the Benefits Bureau of Iowa Workforce Development for consideration in light of the decision disallowing regular unemployment benefits.



Alexis D. Rowe
Administrative Law Judge

October 1, 2021
Decision Dated and Mailed

ar/scn

NOTE TO CLAIMANT:

- This decision determines you have been overpaid FPUC 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.
- You may also request a waiver of this overpayment. The written request must include the following information:
 1. Claimant name & address.
 2. Decision number/date of decision.
 3. Dollar amount of overpayment requested for waiver.
 4. Relevant facts that you feel would justify a waiver.
- The request should be sent to:

Iowa Workforce Development
Overpayment waiver request
1000 East Grand Avenue
Des Moines, IA 50319

- This Information can also be found on the Iowa Workforce Development website at: <https://www.iowaworkforcedevelopment.gov/unemployment-insurance-overpayment-and-recovery>.
- If this decision becomes final and you are not eligible for a waiver, you will have to repay the benefits you received.