

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MELISSA R CLINE

Claimant

APPEAL 14A-UI-11224-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HOLY SPIRIT RETIREMENT HOME

Employer

OC: 09/28/14

Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the October 21, 2014, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on November 18, 2014. Claimant participated. Employer participated through DON Lisa Turner, human resources coordinator Dorene Becker, and RN/Nurse Manager for Second Floor Mindee Knudson. Employer's Exhibits 1 through 11 were received. Claimant's Exhibits A through D were received.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid 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?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a LPN and was separated from employment on October 3, 2014. She had been treated and released for pregnancy/antepartum care from July 3 through 8 and was released to return to work without restrictions on July 9. (Employer's Exhibits 2, 3) She and her sister, CNA Shaylee Cline, had also missed work because of their father's poor health in June, July and August. (Employer's Exhibits 1, 3) He died on September 21. After personal bereavement leave and complications with the pregnancy she returned to work on October 3. (Employer's Exhibit 4)

On Friday, October 3, at about 3:30 p.m., Shaylee Cline and the employer parted ways because of a scheduling issue. RN Mindy Knudson was at the second floor nurses' station when Shaylee got off the elevator crying and swearing about having just been fired. Shaylee and claimant went into the kitchenette. DON Turner called Knudson at the nurses' station and told her that Shaylee had just quit and asked if Shaylee was on that floor. Turner asked Knudson to escort Shaylee from the building. Knudson had Shaylee clock out at 3:59 p.m. and escorted her to her car and briefly returned to the basement where Becker and Turner were. Turner and Knudson took the elevator to the second floor where claimant confronted them saying, "I can't believe you just did that to my sister; I quit." (Employer's Exhibit 5, 8) Claimant clocked out and left at 4:07 p.m.

RN Amber Nelson was present and recalled that Shaylee got off the elevator and said, "I'm done" and claimant later said, "Shaylee is done and I'm not doing this shit. Can I go home?" Nelson did not hear the communication between claimant and Turner but afterwards heard claimant say as she was getting on the elevator, "Oh well, I just won't work until after I have this kid." (Employer's Exhibit 9) CMA Kim Simonson recalled hearing claimant on the phone with her fiancé/husband after Shaylee left asking if it was okay if she quit gave Turner her keys and left. (Employer's Exhibit 10) Continued work was available. Absences were not a reason for the separation and she had no related warnings. Claimant did not complain about her pregnancy or cramping or the employer would have sent her to the hospital. Turner did not tell her she would be fired if she left. The employer was not short-staffed so Turner did not call the nursing board to report a walk-off.

Claimant's fiancé Chad Robinson and her mother, labor and delivery RN Ronda Steck, were not present during the communication with the employer. Claimant did see a doctor on October 3 but the discharge document does not indicate a time of arrival, treatment or departure. (Claimant's Exhibit D) She did not return to the employer with medical documentation or to discuss her employment status. Claimant told former coworker CNA Chad after the separation that she intended to use her doctor visit as an excuse to get unemployment. (Employer's Exhibit 11)

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,985.00, since filing a claim with an effective date of September 28, 2014, for the five weeks ending November 22, 2014. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant voluntarily left the employment without good cause attributable to the employer.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). 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).

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(21), (22) 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:

(21) The claimant left because of dissatisfaction with the work environment.

(22) The claimant left because of a personality conflict with the supervisor.

The parties disagree about whether the separation was a voluntary quit or a forced quit (discharge), thus the witnesses' credibility must be determined. Shaylee Cline was not present for the communication about claimant's separation. The employer's witnesses, while having a slight variance in recollection, were overall consistent with the expression of the claimant's demonstrated intent to quit and her actions conveying that intention. Furthermore, even apart from claimant's statement to Chad, Turner's testimony, as a health care professional, is credible that claimant had not expressed concern about her pregnancy health, or she would have been sent to the hospital. Accordingly, claimant's decision to quit because of her sister Shaylee's separation from employment was not a good cause reason attributable to the employer. Benefits are denied.

Iowa Code § 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.

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). In this case, the claimant has received benefits but was not eligible for those benefits. 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.

DECISION:

The October 21, 2014, (reference 01) 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 \$1,985.00, 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.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs