IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KAM D BOTTENFIELD Claimant **CROWN FOODS INC** Employer	**APPEAL 19A-UI-02176-H2** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/10/19** **Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Leaving
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the March 4, 2019, (reference 01) representative decision that allowed benefits. The parties were properly notified about the hearing. An in person hearing was held on March 28, 2019 at Des Moines, Iowa. Claimant did not participate. Employer participated through George Karaidos, Owner; (representative) Vicki Shepaerd, family friend and Cathy Edwards, Manager. Employer's Exhibit 1 was admitted into the record.

ISSUES:

Did the claimant voluntarily quit his employment without good cause attributable to the 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?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a prep cook beginning in June 2017 through May 1, 2018 when he voluntarily quit.

Claimant and his wife both worked the evening shift six days per week at George's Chili King. The shift was from 3:00 p.m. to 8:00 p.m. when the restaurant closed. The employer's long standing policy was that all employees had to clock out not later than fifteen minutes after their shift ended. Even if the employees had not finished all of the "closing" work, they were still to clock out and Don, the employee who opened the restaurant would complete any work left undone. The only time this rule was waived was when the restaurant was very busy, like on graffiti nights. When the claimant worked, no manager was present in the store. As the employer began to notice the claimant was regularly punching out more than fifteen minutes after the restaurant closed, Cathy the manager spoke to the claimant. Claimant was told multiple times that he was not to stay to finish closing work after the restaurant closed. The

employer could tell by the orders placed in the computer if the restaurant was busy or not. The claimant refused to follow the instructions that he not stay to complete work any later than fifteen minutes after the restaurant closed.

A staff meeting was called on April 25 by the employer to address the issues with the claimant and his wife working over fifteen minutes after the restaurant closed. The clamant never brought up the issue that he believed he was not being paid for all hours worked. Claimant was again instructed that he was not to continue working for more than fifteen minutes after the restaurant closed.

Employer's Exhibit 1 demonstrates that immediately after the April 25 meeting the claimant totally disregarded the explicit instructions he had been given and worked even longer past closing time. On April 30, 2018 claimant worked 43 minutes past closing, on April 27, claimant worked 59 minutes past closing time, on April 28, claimant worked 1 hour and 13 minutes past closing time and on April 30, claimant worked 45 minutes past closing time. Because the claimant was clearly disregarding the explicit instructions he had been given, another meeting was called on May 1. Claimant, his wife, the manager Cathy and the owner Mr. Karaidos were present at that meeting. The purpose of the meeting was to again instruct the claimant that he was not to keep working to complete closing tasks, but was to punch out no later than fifteen minutes after the store closed and let the person who opened the store complete the unfinished work in the morning. The employer was within his rights to decide who and when the closing work would be competed. The meeting became heated and claimant and his wife were both yelling and upset. Neither George nor Cathy yelled during the meeting.

After the meeting ended, claimant and his wife were left alone in the store as they were both scheduled to work. At 3:20 p.m., claimant's wife called Mr. Karaidos told him that both she and the claimant were quitting. She told him that they had left the store key on the counter and locked up the restaurant. Mr. Karaidos called Cathy, the manager, who immediately returned to the store. Cathy found that all of the equipment, (fryer and grill) had been left on and the store unattended. The claimant never returned to work despite Mr. Karaidos calling him the next day and leaving him a voice mail asking him to return to work.

Employer's Exhibit 1 makes clear that claimant was paid for all hours he worked; including the time he worked over fifteen minutes after closing time, with one exception. During the week of April 30, an addition mistake led to the claimant being shorted one hour of pay at $8.00 per hour. The employer made one mistake in payroll for one hour of pay. The employer was regularly and routinely paying claimant for all hours he worked.

Claimant has received unemployment benefits since filing a claim with an effective date of February 10, 2019. The employer did participate personally in the fact-finding interview through Mr. Karaidos who provided essentially the same information to the fact-finder as was provided at the appeal hearing.

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.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 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(27) 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:
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> (27) The claimant left rather than perform the assigned work as instructed.

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).

The claimant was paid all hours he worked with one inadvertent exception for one hour. There can be no conclusion that claimant voluntarily quit because he was not being paid for all hours worked; he was. Claimant simply did not want to follow the rules for working imposed by the employer. The employer wanted the claimant to stop working no later than fifteen minutes after the restaurant closed. Claimant did not want to do that, so he quit. It is clear the claimant quit as he left the key to the restaurant on the counter, left before his shift ended, never returned to the restaurant and had his wife tell Mr. Karaidos he was quitting. The claimant voluntarily quit his employment without good cause attributable to the employer. Benefits are denied.

Iowa Code section 96.3(7)a-b, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
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> 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.
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> 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.
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> (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 the claimant 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 participated in the fact-finding interview the claimant is obligated to repay the benefits he received to the agency and the employer's account shall not be charged.

DECISION:

The March 4, 2019, (reference 01) decision is reversed. The claimant voluntarily left his employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of $780.00 and he is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

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