

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

SEAN P KELLEY
Claimant

APPEAL NO. 11A-UI-14459-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WS LIVE LLC
Employer

OC: 10/09/11
Claimant: Respondent (2-R)

Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 2, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 1, 2011. Claimant Sean Kelley participated. Jennie Bauer represented the employer and presented additional testimony through Darrell Walker and Tina Bausman. Exhibit One was received into evidence.

ISSUE:

Whether Mr. Kelley separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Sean Kelley was employed by WS Live, L.L.C., as a full-time customer service representative from May 9, 2011 until October 9, 2011, when he voluntarily quit. Mr. Kelley last performed work for the employer on October 6, 2011. Mr. Kelley's immediate supervisor was Tina Bausman. After the shift on October 6, 2011, Mr. Kelley was next scheduled to work on Sunday, October 9, 2011. Mr. Kelley did not appear for work that day or notify the employer he would be absent. On that day, Darrell Walker was the acting supervisor while Ms. Bausman was away. Mr. Walker and Mr. Kelley are friends. When Mr. Walker telephoned Mr. Kelley to find out why he was not at work, Mr. Kelley indicated that he needed to resign for personal reasons. Mr. Kelley did not disclose the personal reasons. Mr. Kelley was calling from Chicago. Mr. Kelley told Mr. Walker that he would be dropping off his employee badge and parking permit when he came to collect his final paycheck. Mr. Walker promptly sent an e-mail message to Ms. Bausman to document the conversation.

The next day, Mr. Kelley contacted Ms. Bausman from Chicago and requested a leave of absence because he needed to be in Chicago. Ms. Bauman told him he was not eligible for a leave of absence because he had already resigned from the employment. Mr. Kelley denied that he had resigned from the employment. Mr. Kelley asserted that he had merely told Mr. Walker that he might need to resign from the employment. Ms. Bauman forwarded

Mr. Kelley's call to Human Resources Generalist Jennie Bauer. The employer has already notified the client on whose account Mr. Kelley had worked that Mr. Kelley had separated from the employment. The employer did consider Mr. Kelley a model employee and the employer was not sure it wanted to allow Mr. Kelley to return to the employment in light of what the employer perceived as a voluntary resignation from the employment. The employer agreed to review the matter and schedule a further meeting with Mr. Kelley to discuss whether he could return to the employment. Ms. Bausman was out on leave from October 11 and was due to return on October 24. The employer set up an appointment on that day. On that day, the employer acknowledged the possibility of a misunderstanding, or at least the absence of absolute certainty of a quit, and decided to allow Mr. Kelley to return to the employment with all conditions as they had been prior to October 9.

Mr. Kelley was to report for work on October 26, 2011. Mr. Kelley reported for work on October 26, but only to deliver his parking permit and to tell the employer that he was not going to return to the employment. Mr. Kelley was upset that the employer had not immediately reinstated him to the employment once he made contact with the employer on October 10. Mr. Kelley was upset that he had less money in his most recent paycheck than he desired. However, when he had made contact with the employer on October 10, he was in Chicago and not available to work. Mr. Kelley thought the employer subjected him to disparate treatment. The employer had immediately reinstated another employee to her employment under different circumstances. The employer did not have concerns about the work performance of that other employee.

REASONING AND CONCLUSIONS OF LAW:

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.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 24.26(4). The test is whether a reasonable person would have quit under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993). Aside from quits based on medical reasons, prior notification of the employer before a resignation for intolerable or detrimental working conditions is not required. See Hy-Vee v. EAB, 710 N.W.2d (Iowa 2005).

The weight of the evidence indicates that Mr. Walker accurately documented the October 9, 2011 conversation with Mr. Kelley in the e-mail message he sent to Mr. Bausman immediately after the call. The details in the e-mail message regarding the return of the employer's property and collection of the final check are details that would most likely have arisen only in the context of a resignation. The weight of the evidence indicates that Mr. Kelley changed his mind after

speaking with Mr. Walker and wanted to reinterpret that conversation. The employer took reasonable steps to review the matter and ultimately decided to allow Mr. Kelley to return to the employment. This was not enough to satisfy Mr. Kelley, who elected not to return to the employment. Mr. Kelley's fickle behavior between October 24 and 26 suggests that his decision making between October 9 and 11 was equally fickle. Mr. Kelley was in no manner discharged from the employment. Despite the opportunity to step back into the employment after a break he had created, Mr. Kelley voluntarily declined to return to the employment from the employment. The weight of the evidence fails to establish any intolerable or detrimental working condition as the basis either for the initial separation or for Mr. Kelley's decision not to return.

Mr. Kelley voluntarily quit the employment without good cause attributable to the employer. Accordingly, Mr. Kelley is disqualified for benefits until 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 employer's account shall not be charged for benefits paid to Mr. Kelley.

Iowa Code section 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's November 2, 2011, reference 01, decision is reversed. The claimant voluntarily quit the employment without good cause attributable to the employer. The claimant is disqualified for benefits until 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 employer's account shall not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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