

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MISTY G WHIPPLE
Claimant

APPEAL NO: 17A-UI-09322-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

VON MAUR INC
Employer

OC: 08/13/17
Claimant: Respondent (2)

Section 96.5-1 – Voluntary Leaving
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 31, 2017, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 28, 2017. The claimant participated in the hearing. MacKenzie Schreier, Store Manager and Jessica McCollam, Human Resources Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the claimant voluntarily left her employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time sales associate in the jewelry department for Von Maur from August 15, 2016 to August 17, 2017. The employer determined she voluntarily quit her job by failing to return from a leave of absence.

The claimant was on a leave of absence due to a back problem. On June 24, 2017, Store Manager MacKenzie Schreier spoke with the claimant and reminded her that her leave of absence ended August 14, 2017, and she would need to return to work August 15, 2017. The claimant indicated she understood and would let the employer know when her surgery was scheduled and she could return. On August 2, 2017, Human Resources Manager Jessica McCollam called the claimant and left her a voice mail message about her return but the claimant did not respond. On August 11 and 12, 2017, Ms. McCollam called the claimant and left her voice mail messages and asked her to return her calls but the claimant failed to do so. On August 12, 2017, the employer sent the claimant a letter stating her return to work date was August 15, 2017, and sent her a copy of her scheduled start time. On August 15, 2017, the claimant was a no-call/no-show for her 9:45 a.m. shift. The employer attempted to call the claimant but the claimant did not answer or respond to its request for the claimant to contact it. On August 16, 2017, the claimant was a no-call/no-show and the employer called the claimant and asked her to call back. The employer also called the claimant's emergency contact, which

was her husband, but did not receive an answer or return call from either of them. On August 17, 2017, the claimant was a no-call/no-show and the employer again called the claimant but on that date the phone rang twice and then dropped off. The employer determined the claimant voluntarily quit her job by failing to report for work or call the employer to state she would not be in for three consecutive workdays in violation of the employer's policy.

The claimant said her phone was disconnected and she told the employer she would not be back before August 18, 2017, when she had another medical appointment. The employer disputes the claimant told it she would not be in before August 18, 2017.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

The employer participated personally in the fact-finding interview through the statements of Unemployment Insurance Consultant Joy Myers.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 96.5-1 provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 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:

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

While the claimant maintains she told the employer she would not return to work before August 18, 2017, because that is when her next medical appointment was scheduled, that her phone was disconnected prior to the dates the employer attempted to call her at least five times, and she did not receive the employer's letter which was mailed August 12, 2017, the administrative law judge did not find her testimony persuasive. The employer has no recollection of the claimant stating she would not be back before August 18, 2017, and if it did know, it is unreasonable to believe it scheduled the claimant and repeatedly called her to inquire as to where she was when she did not report for her shifts August 15, 16 and 17, 2017.

Additionally, the employer was able to leave a message for the claimant on her cell phone voice mail every time it called with the exception of August 17, 2017, when it rang twice before the call was dropped. If her phone was disconnected, the employer would not have heard her voice mail and been able to leave a message for her. The claimant also stated she did not receive the letter the employer sent her August 12, 2017, stating she was scheduled to work August 15, 2017, at 9:45 a.m. for more than 10 days, which strains credibility.

Under these circumstances, the administrative law judge must conclude the claimant failed to report for work or notify the employer for three consecutive work days in violation of the employer's policy, and consequently is considered to have voluntarily left her employment without good cause attributable to the employer. Therefore, benefits are denied.

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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The employer participated in the fact-finding interview personally through the statements of Unemployment Insurance Consultant Joy Myers. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of \$1,360.00 for the six weeks ending September 23, 2017.

DECISION:

The August 31, 2017, reference 01, decision is reversed. The claimant voluntarily left her 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 is overpaid benefits in the amount of \$1,360.00 for the six weeks ending September 23, 2017.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn