IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TERESA PHILLIPS
Claimant

KUM & GO LC
Employer

APPEAL NO: 14A-UI-13312-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/30/14
Claimant: Respondent (2)

Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 16, 2014, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a telephone hearing was held before Administrative Law Judge Julie Elder on January 22, 2015. The claimant did not respond to the hearing notice by providing a phone number where she could be reached at the date and time of the hearing as evidenced by the absence of her name and phone number on the Clear2There screen showing whether the parties have called in for the hearing as instructed by the hearing notice. The claimant did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Melissa Chaires, Food Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the claimant voluntarily left her employment with good cause attributable to the employer.

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 cook/kitchen helper for Kum & Go from September 30, 2013 to November 25, 2014. She voluntarily left her employment by texting the employer December 1, 2014, stating she would return her uniform sometime during the upcoming week.

The claimant was scheduled to work from 3:00 p.m. to 10:00 p.m. September 26, 2014, but texted the employer and stated she hurt her back. She texted the employer again at 5:00 p.m. and stated she would not be in the remainder of the weekend. Consequently, she missed her scheduled shifts September 27 and 28, 2014. The employer called the claimant and left a voice mail message for her and then texted her stating she needed to call the employer rather than text her. The claimant was scheduled to work from 5:00 p.m. to 8:00 p.m. October 21, 2014, and texted the employer at 3:00 p.m. and said her back hurt. The employer sent the claimant a text October 22, 2014, asking if she was coming in to work her 8:00 a.m. to 3:00 p.m. shift October 23, 2014, and the claimant responded she would not be coming in and was going to the doctor. On October 23, 2014, the employer texted the claimant to ask if she had been to the

doctor and whether she was working the rest of the week and the claimant did not respond. The employer then called and left her a voice mail message and texted her several times because she needed to know if the claimant was working or not so she could redo the schedule and cover the claimant's shifts if she was not coming in. The claimant did not reply. The claimant was scheduled to work from 9:00 a.m. to 4:00 p.m. October 24, 2014, but texted the employer at 7:54 a.m. and stated she just found her phone and she would not be in the rest of the weekend. She did not give a reason for her absence. She was scheduled to work from 2:00 p.m. to 10:00 p.m. October 25, 2014. The claimant was not scheduled to work October 26, 2014, but texted the employer and said she had been in the emergency room the night before and would not be in until she felt better. She provided a doctor's note stating she could return to work October 28, 2014, with no restrictions. On October 27, 2014, the employer tried to call the claimant several times and texted her about when she was going to the doctor again and asked her what was going on but the claimant did not respond. On October 28, 2014, the claimant texted the employer at 10:38 a.m. and said she was going to the doctor again October 30, 2014, and would let the employer know what was going on at that time. The claimant had been scheduled to work October 27, 28 and 29, 2014. On October 30, 2014, the employer received a doctor's note from the claimant from her appointment October 30, 2014, stating she was off work until November 5, 2014, due to back problems associated with arthritis. The claimant had been scheduled to work November 1 through 4, 2014. She returned to work November 5, 2014. On November 26, 2014, the claimant was scheduled to work from 9:00 a.m. to 5:00 p.m. She texted the employer and said she tried to call but could not get through although the work phone as well as the employer's cell phone were both free. She stated she would not be at work that day. The claimant was on call November 27, 2014, and the employer tried to contact her several times that day by text and phone to see if she was available that evening if needed but the claimant did not respond or return the employer's phone calls or texts. The employer wanted to know if the claimant was planning to work her shift November 28, 2014, but again the claimant did not reply. The claimant was scheduled to work from 8:00 a.m. to 4:00 p.m. She texted the employer at 6:40 a.m. and said, "I will not be at work. Back hurts." The claimant was not scheduled to work November 29 or 30, 2014, but the employer tried to contact her November 29, 2014, and left her a voice mail stating she needed to contact the employer and let her know what was going on, that she needed to stop texting the employer and call her directly, and she needed to know the claimant's plans so she knew what to do about scheduling. The claimant did not respond November 29 or 30, 2014, and then sent the text message December 1, 2014, saying she would return her uniform sometime that week. At that point the employer determined the claimant voluntarily quit her job. The claimant's job was not in jeopardy and the employer had continuing work available, assuming she could provide a doctor's excuse and she maintained contact with the employer.

The claimant has claimed and received unemployment insurance benefits in the amount of $1,134.00 since her separation from this employer.

The employer did not participate in the fact-finding interview either through personal statements made or through written documentation.

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:
>
> 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 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. 871 IAC 24.25. Leaving because of unlawful, intolerable, or detrimental working conditions would be good cause. 871 IAC 24.26(3),(4). Leaving because of dissatisfaction with the work environment is not good cause. 871 IAC 24.25(1). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code section 96.6-2.

The claimant voluntarily quit her job December 1, 2014, by texting the employer she would be turning in her uniforms that week. That evinced her intention to leave her position with the employer. Despite several absences that the claimant failed to properly report by calling rather than texting the employer, and her failure to maintain contact with the employer on a consistent basis, the employer had no intention of terminating the claimant's employment and had continuing work available for the claimant.

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.
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> (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 § 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 claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

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. In this case, the claimant has received

benefits but was not eligible for those benefits. There is no evidence the claimant received benefits due to fraud or willful misrepresentation, and the employer did not participate in the fact-finding interview. Consequently, the claimant's overpayment of benefits is waived and the claimant's overpayment, in the amount of $1,134.00, will be charged to the employer's account.

DECISION:

The December 16, 2014, reference 02, 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's overpayment, in the amount of $1,134.00, will be charged to the employer's account.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/pjs