

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTINE REX
Claimant

APPEAL NO: 14R-UI-12316-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC
Employer

OC: 08/24/14
Claimant: Respondent (1)

Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 17, 2014, reference 01, decision that determined the claimant was allowed benefits. After an appeal hearing was held October 17, 2014, the claimant was denied benefits and it was determined the employer did not participate in the fact-finding hearing. Consequently, the claimant was not required to repay the overpayment of benefits in the amount of \$1127 and that amount was charged to the employer's account. The employer appealed that decision to the Employment Appeal Board who subsequently remanded the decision for a determination of whether the employer participated in the fact-finding interview within the meaning of the law in a decision dated November 26, 2014.

Brandi Carlton, Wal-Mart Fresh Assistant Manager, Yolanda Reeves, Talx Unemployment State Consultant and Ryan Flanery, Talx Unemployment State Consultant, participated in the hearing on behalf of the employer. The claimant did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Employer's Exhibit One was admitted into evidence. The administrative law judge takes official notice of the administrative file.

ISSUE:

The issue is whether the employer's action with regard to the fact-finding interview constitutes participation within the meaning of the law.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant filed a claim for unemployment insurance benefits with an effective date of August 24, 2014. A fact-finding interview was held in this matter on or about September 16, 2014. The employer submitted written documentation which stated, in part, "Please accept this written response in lieu of our participation in the telephone fact-finder" (Employer's Exhibit One). It provided a document in "question and answer form" including one question which asked, "Provide details of what happened during the final incident, where the incident occurred, if there were any witnesses and if he/she provided an explanation/admission" (Employer's Exhibit One). The document's answer to that question stated, "The claimant failed to take the café cook

temperatures and the Café hot holding temperatures are required for Spark. The claimant was currently on her third written warning” (Employer’s Exhibit One). The document concludes “For additional information, please contact me at 314-684-2225 or you can reach me via email at ryan.flanery@talx.com or fax (888)-604-5276” (Employer’s Exhibit One). The document was signed by Ryan Flanery, Unemployment State Consultant for Talx. After speaking to the claimant, the fact-finder called Mr. Flanery for clarification and further information and rebuttal and Mr. Flannery declined to provide additional information and told him to use the written documents he sent for the fact-finding interview.

The claimant’s fact-finding statement read, “I was fired by Randi my supervisor. She said I was let go. She said on a the Sunday before I did not take temperatures on the food. I think they just they wanted me gone. I had never take the temperature on the food I took orders and served food I never had any written or verbal warning on this issue” (From the fact finding worksheet for misconduct).

REASONING AND CONCLUSIONS OF LAW:

871 IAC 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 § 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 § 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 § 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 § 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 § 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 § 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The rule provides that if an employer or its representative chooses to participate in the fact-finding interview with written documentation it must be "detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer." The rule further states, "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. (Emphasis added). 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 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...The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. On the other hand, written or oral statements or general conclusions without supporting detailed factual information...are not considered participation within the meaning of the statute."

While the employer did provide a written statement in lieu of participation, which stated "For additional information, please contact me at..." Mr. Flanery testified he did not participate personally in the fact-finding interview because he could not provide "any first hand testimony of what occurred." The rule requires that if written documentation is provided instead of personal participation, the employer or representative must provide the name and phone number of the employee with firsthand information who may be contacted, if necessary, for rebuttal. The employer's representative did not do so. Although, the employer's representative did provide the name and phone number of Mr. Flanery, it did not provide the name and phone number of an individual from Wal-Mart who could answer questions or add relevant information. When the fact-finder contacted Mr. Flanery after speaking to the claimant he told the fact-finder to use the written documentation and declined to furnish further information.

The rule states the employer or its representative must provide "detailed information" regarding the reason for discharge and at a minimum the information must identify the dates and particular circumstances of the reason for the termination as well as the particular rule or policy violation. The employer's representative did provide some very basic information about the claimant's discharge but failed to provide specific, comprehensive evidence or the rule or policy violated in any meaningful manner. The employer did not send detailed factual information that if unrebutted would result in a decision favorable to the employer. It stated the claimant "failed to

take the café cook temperatures and the Café hot holding temperatures are required for Spark.” It did not offer any further explanation such as the significance of that information, why taking the temperatures was important, whether that was a violation of a health code, what Spark is, or what policy or procedure was violated.

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 administrative law judge must conclude the employer’s actions do not rise to the level of participation as that term is defined by rule. Consequently, the claimant’s overpayment of benefits in the amount of \$1127 is waived and the overpayment amount shall be charged to the employer’s account.

DECISION:

The September 17, 2014, reference 01, decision is affirmed. The employer’s actions do not rise to the level of participation as that term is defined by Iowa administrative rule. The claimant’s overpayment of benefits in the amount of \$1127 is waived as to the claimant and the overpayment shall be charged to the employer’s account.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css