

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**MICHELLE D GARCIA**  
Claimant

**APPEAL 22A-UI-00662-DH-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SUMMIT FOOD SERVICE LLC**  
Employer

**OC: 10/24/21  
Claimant: Respondent (2)**

Iowa Code § 96.5(1) - Voluntary Quitting  
Iowa Code § 96.5(2)a - Discharge for Misconduct  
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 - Employer/Representative Participation Fact-finding Interview  
Iowa Admin. Code r. 871-24.25(4) - Absent Three Days with no Notice

**STATEMENT OF THE CASE:**

Employer/appellant, Summit Food Services, LLC., filed an appeal from the November 23, 2021, (reference 01) unemployment insurance decision that granted benefits so long as claimant met all other eligibility requirements, as the record for the 10/17/21 separation from work did not show misconduct. After proper notice, a telephone hearing was conducted on January 28, 2022. Claimant, Michelle Garcia, did not participate. Employer participated through Roxanne Rose, part representative and Cheryl Duckworth, food services director. Judicial notice was taken of the administrative records. Employer's Exhibits 1-4 were admitted.

**ISSUES:**

Was the separation a layoff, discharge for misconduct or voluntarily quit without good cause?  
Was claimant overpaid benefits, and if so, should claimant repay those benefits?  
Can any charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having heard the testimony and reviewed the evidence and record, the undersigned finds:

Claimant's first day of work was August 15, 2019. Her last day of work was October 15, 2021. She was hired as a fulltime food service worker with a set schedule. Employer has an employee handbook, which claimant was provided when she began employment. Employer has an attendance policy, which claimant most recently signed off on receiving on August 17, 2021.

Regarding no call/no shows, employer's policy was two NC/NS in any twelve-month period would result in discharge from employment. Claimant NC/NS on April 28, 2021 and May 5, 2021. Claimant was scheduled to work on October 16, 18, 19, and 21, 2021. Claimant was a no call/no show for all four dates. For the October 16, 2021 incident, employer was unable to reach claimant by phone, so Ms. Duckworth drove by claimant's house. Ms. Duckworth saw claimant inside her

home behind her screen door, and upon claimant and Ms. Duckworth making eye contact, claimant slammed her main door closed. Claimant's NC/NS for the four consecutive shifts was taken as a voluntary quit by employer, but assigned to October 16, as opposed to October 19.

Records from DBRO show claimant has received \$3,816.00 in benefits on this claim, with her weekly benefit amount being \$318.00. Employer asserts they submitted some response/documents for fact finding and provided a telephone number to be called at for the telephone interview. However, employer did not submit in the appeal what that documentation was and the representative's notes show employer was called twice, with no voicemail left as the voicemail was full. Further, employer does not assert they called in to find out why they had not received their call. The employer left a message but was not called back. The employer did not participate in fact finding. See Iowa Admin. Code r. 871-24.10(1).

### **REASONING AND CONCLUSIONS OF LAW:**

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

Iowa Admin. Code r. 871-24.25(4) and (20) 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.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). 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).

Claimant failed to call in and failed to show up for work on four consecutive workdays, October 16, 18, 19, and 21, 2021. This is a voluntary quit without good cause attributable to the employer and benefits are denied. Employer was concerned about claimant and tried to contact claimant as addressed in the findings of facts section. Employer considered her quitting on October 16, but it would actually be October 19, on the third no call/no show day, even though she was scheduled and no call/no showed the 21st as well. While employer's policy is two days no-call/no-show, unemployment law requires three, and employer gave claimant four no-call/no-show days.

The next issue is whether claimant has been overpaid benefits. Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

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.

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.

(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, any benefits paid on the claim would be benefits to which he 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. Claimant received \$3,816.00 in benefits on this claim.

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ."

Iowa Code § 96.3(7)(b)(1)(a). Here, the employer did not respond adequately and thus failed to participate per the definition.

Since employer did not participate in fact finding, claimant does not have to repay benefits received and the employer's account is charged.

**DECISION:**

The November 23, 2021, (reference 01) unemployment insurance decision that allowed benefits is **REVERSED**. Claimant voluntarily quit and is disqualified. 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. Claimant received unemployment insurance benefits in the amount of \$3,816.00 on this claim. Employer did not participate in fact finding so claimant does not have to repay the benefits and the benefits are charged to the employer's account.



Darrin T. Hamilton  
Administrative Law Judge

March 25, 2022  
Decision Dated and Mailed

dh/scn