

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**GILDA I LOPEZ HERNANDEZ**  
Claimant

**THAMS AGENCY LLC**  
Employer

**APPEAL 17A-UI-11370-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/15/17  
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

**STATEMENT OF THE CASE:**

The employer filed an appeal from the November 1, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on November 28, 2017. The claimant participated and was represented by attorney Marlon Mormann. The employer participated through attorney Peter Leo and owner Todd Thams. Employer's Exhibits 1 through 3 and claimant's Exhibits A through I were received into evidence.

**ISSUES:**

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a receptionist from April, 2011, until this employment ended on October 13, 2017, when she voluntarily quit.

On October 13, 2017, Thams requested to meet with claimant. Thams wanted to speak with claimant regarding several areas of concern and his general impression that she was unhappy in her job. At one point in the conversation claimant indicated she felt like Thams was being too picky and then told him she could either leave that day or in two weeks. (Exhibit 3, page 11, lines 16-22). Thams tried to explain to claimant that he was just trying to communicate what was going on to her. Claimant responded she had told herself after their last coaching conversation that if there was another conversation like that she was done. (Exhibit 3, page 12, lines 2-6). Claimant then repeated she could either leave that day or in two weeks and the

decision was up to Thams. (Exhibit 3, page 12, lines 6-7). Thams responded claimant could leave right then. Claimant then went to her desk where she sent out an email to all staff members stating she was just discharged for being lazy. (Exhibit A). Claimant testified she believed it was obvious from the way the conversation was going that she was going to be discharged and she had no other choice but to leave. Claimant also acknowledged no one actually told her she was discharged from employment. Thams testified there were no plans to discharge claimant from employment and work would have continued to be available to her.

The claimant filed a new claim for unemployment insurance benefits with an effective date of October 15, 2017. The claimant filed for and received a total of \$2,262.00 in unemployment insurance benefits for the weeks between October 15 and November 25, 2017. The employer did not participate in the telephone fact-finding interview on October 30, 2017, but did submit documentation in lieu of participation. Thams testified he provided a written statement describing the circumstances surrounding claimant's separation and documents sent to her outlining her resignation to his attorney's office. (Exhibits 1 and 2). Thams further testified he confirmed his attorney's office then faxed those documents to Iowa Workforce Development at the fax number listed on the interview notice. The employer's attorney made a professional statement confirming he faxed the documents to the appropriate number and provided the date and time he received confirmation that the documents went through. Thams subsequently received a voicemail from the fact-finder with a call back number and appeal rights. Thams returned the call and was informed his documents were never received. The fact finder determined claimant qualified for benefits.

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

For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was without good cause attributable to the employer.

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.

Iowa Admin. Code r. 871-24.25 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:

- (28) The claimant left after being reprimanded.

...

- (33) The claimant left because such claimant felt that the job performance was not to the satisfaction of the employer; provided, the employer had not requested the claimant to leave and continued work was available.

...

(37) The claimant will be considered to have left employment voluntarily when such claimant gave the employer notice of an intention to resign and the employer accepted such resignation. This rule shall also apply to the claimant who was employed by an educational institution who has declined or refused to accept a new contract or reasonable assurance of work for a successive academic term or year and the offer of work was within the purview of the individual's training and experience.

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 resigned following a coaching conversation which she believed, incorrectly, was going to lead to her termination from employment. Claimant gave the employer the option of her resignation becoming effective immediately or in two weeks. The employer accepted the resignation effective immediately. There was no evidence presented that the employer intended at any time to discharge claimant from employment. While claimant's leaving may have been based upon good personal reasons, it was not for a good-cause reason attributable to the employer according to Iowa law. Benefits are denied.

The next issue in this case is whether the claimant was overpaid unemployment insurance benefits.

Iowa Code § 96.3(7) provides, in pertinent part:

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.

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 § 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 § 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.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides 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. The employer will not be charged for benefits if it is determined they did participate in the fact-finding interview. Iowa Code § 96.3(7).

In this case, the claimant has received benefits but was not eligible for those benefits. The benefits were not received due to any fraud or willful misrepresentation by claimant.

Additionally, employer did not participate in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits she received. The law also states 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, employer responded to the notice of a fact finding conference by faxing a written statement by the first hand witness, as well as other supporting documentation. For some unknown reason the fact-finder never received a copy of the employer's statement or supporting documents. Had the documents provided been received by the fact-finder they would be sufficient to meet the participation standard. Benefits were not paid because the employer failed to respond timely or adequately to IWD's request for information relating to the payment of benefits. Instead, benefits were paid because the agency did not receive the information provided by the employer. Employer thus cannot be charged. Since neither party is to be charged then the overpayment is absorbed by the fund.

**DECISION:**

The November 1, 2017, (reference 01) unemployment insurance 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 has been overpaid unemployment insurance benefits in the amount of \$2,262.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview through no fault of its own and its account shall not be charged. The overpayment must be charged to the fund.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs