

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELINDA A TIELEBEIN
Claimant

APPEAL NO. 10A-UI-08714-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CASEY'S MARKETING COMPANY
Employer

OC: 05/02/10
Claimant: Respondent (2R)

Section 96.5-1 – Voluntary Quit
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated June 11, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 4, 2010. Claimant participated. The claimant was represented by Gary McClintock, attorney at law. Employer participated by Bony Moyer, manager. The record consists of the testimony of Bony Moyer; the testimony of Melinda Tielebein; and Employer's Exhibits 1-5.

ISSUES:

Whether the claimant voluntarily left for good cause attributable to the employer; and
Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer owns and operates convenience stores. The claimant worked at the store located in Independence, Iowa. The claimant was hired on September 24, 2008. She worked in the kitchen and was a cashier. When an employee begins working for the employer, the employee signs a "Conditions of Employment" form. One of the provisions of that form is that business considerations may dictate overtime or split shifts in order to maintain adequate staffing. (Exhibit 5) The claimant worked both the day shift and the night shift.

For approximately two months prior to the separation of employment, the claimant had been scheduled for days. At the end of April 2010, a new manager was assigned to the Independence store where the claimant worked. In addition, the employer was extremely short handed. The claimant was told that she would have to work nights. The claimant told Mary Day, the district supervisor, that she was not going to work nights. Mary Day instructed Bony Moyer, the new supervisor, that the claimant's shifts would have to be covered since the claimant said she was no longer going to work for Casey's.

The claimant reiterated to Ms. Moyer in a later phone call that she was not going to work for the employer any longer. She then telephoned Ms. Moyer and asked for her job back. The employer declined to re-employ the claimant since her resignation had been accepted. Work was available for the claimant at the time she quit her job. The effective date of the claimant's resignation was May 3, 2010.

REASONING AND CONCLUSIONS OF LAW:

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.

A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

The issue that must be determined in this case is whether the claimant quit her job or was terminated by the employer. The claimant testified that she never refused to work the night shift and that she was told she was "no longer needed." She flatly contradicted the testimony of Ms. Moyer that she refused to work nights. Ms. Moyer was equally adamant that the claimant did refuse to work nights and on two occasions said that she was not going to come back to Casey's if she had to work nights. There is no way to reconcile the testimony of these witnesses.

The administrative law judge concludes that the claimant was upset about having to work nights and expressed herself in such a way that the employer concluded that she was refusing to work nights. Ms. Moyer testified that the employer was very short-handed at the time and that the claimant was told that it was necessary for her to work nights until the necessary personnel were in place. If this is correct, it makes no sense that the employer would have told the claimant that she was no longer needed. The greater weight of the evidence is that the claimant did tell the employer that she would not work for Casey's if she had to work nights. It was the claimant, therefore, who initiated the separation of employment. She voluntarily quit without good cause attributable to the employer.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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.

The overpayment issue is remanded to the claims section for determination.

DECISION:

The decision of the representative dated June 11, 2010, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid

wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs