

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

FRANCISCO S FERNANDES
Claimant

**DES MOINES INDEPENDENT COMMUNITY
SCHOOL DISTRICT**
Employer

APPEAL 19A-UI-00007-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/09/18
Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Leaving
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment
871 IAC 24.10 – Employer Participation in the fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the December 24, 2018, (reference 01) representative decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 17, 2019. Claimant did not participate and was represented by Louis Herrera. Employer participated through Rhonda Wagoner, Benefits Specialist and Tiffany O'Hara, Director of Human Resources. Employer's Exhibit 1 was admitted into the record. Official notice was taken of agency records.

ISSUE:

Was the claimant discharged due to job connected misconduct or did he voluntarily quit his employment without good cause attributable to the employer.

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 physical education teacher beginning in August 1994 through November 29, 2018, when he voluntarily resigned.

On October 15, 2018, another employee of the district complained that claimant was sexually harassing her. An investigation was conducted by two attorneys employed by a private law firm. The claimant was placed on paid leave beginning October 17, 2018, while the investigation was being conducted. The investigation was concluded on November 19.

On November 27, the results of the investigation were shared with the claimant and his representative during a meeting. At that time the district had not yet made a decision as to what, if any, discipline would be imposed upon the claimant. The claimant was given a copy of the findings at the November 27 meeting and told that another meeting would be held on November 29 to discuss any possible disciplinary action. At no time during the meeting on November 27 was the claimant told that he would be discharged or that he was required to resign in lieu of being discharged.

At the meeting on November 29, the claimant met with Ms. O'Hara without his representative present. Prior to beginning the disciplinary portion of the meeting, Ms. O'Hara gave the claimant a copy of the changes made to Iowa Code Chapter 22 during the prior year. The claimant asked for some time to speak to his representative Mr. Herrera on the telephone. Ms. O'Hara left the room to give the claimant time to have a private telephone discussion with Mr. Herrera. Ms. O'Hara left the room again to give the claimant more time to speak with his representative. When she returned to the room the claimant asked for more time to speak to Mr. Herrera. When Ms. O'Hara returned to the room the claimant asked about if he could resign his employment and how he would go about doing that. The claimant was never told that if he chose to resign, the district would keep confidential the results of the investigation. He was only told that the investigative report would not be placed in his personal file if he resigned. It was the claimant who brought up resigning from his employment, not the employer. At the claimant's request, Ms. O'Hara left the office to print off a copy of the resignation form found on the employer's website. She printed off a copy, brought it back into the office and gave the blank copy to the claimant who was still talking on the telephone to Mr. Herrera. Ms. O'Hara again left the room so the two of them could speak privately.

When Ms. O'Hara returned to the room again, the claimant had filled out the voluntary resignation form listing he was resigning his employment for "personal" reasons. The claimant asked whether he could keep his health insurance through the end of December. Ms. O'Hara agreed that claimant could be paid through the end of December 2018 and that his benefits would continue until December 31, 2018.

At no time did the claimant ask Ms. O'Hara about filing for unemployment insurance benefits. There was no discussion at all about the effects of claimant's resignation on whether he could receive unemployment insurance benefits.

Claimant has received unemployment benefits since filing a claim with an effective date of December 9, 2018.

The employer did participate personally in the fact-finding interview through Rhonda Wagoner who provided essentially the same information to the fact-finder as was provided at the appeal hearing.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(1) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

At no time was the claimant ever told that if he did not resign he would be discharged. The claimant was not forced or asked to resign; he simply chose to do so for personal reasons. When the claimant made the decision to resign, he had not even been told what, if any, discipline was going to be imposed upon him.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). 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).

While the claimant may have had good personal reasons for leaving his employment, he has not established any good cause attributable to the employer for leaving the employment. Benefits are denied.

Iowa Code section 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, benefits were paid to which the claimant 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. The employer will not be charged for benefits if it is determined that 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. Since the employer participated in the fact-finding interview the claimant is obligated to repay the benefits he received to the agency and the employer’s account shall not be charged.

DECISION:

The December 24, 2018, (reference 01) decision is reversed. The claimant voluntarily left his employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,455.00 and he is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs