IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ALEXIANNA BRANDHAGEN
Claimant

HUMACH LLC
Employer

APPEAL NO: 18A-UI-10062-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/09/18
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 September 24, 2018, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 19, 2018. The claimant participated personally. The employer participated through Suzi Whitman, contact center manager.

Employer Exhibit 1 was admitted into evidence without objection. During the course of his employment, the claimant used the name "Dante Brandhagen" which is also reflected in Employer Exhibit 1. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct or did the claimant voluntarily quit the employment with 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: The claimant was employed full-time as a members' relations specialist and was separated from employment on September 4, 2018, after three consecutive no-calls/no-shows.

The employer has a policy that three no-call/no-show absences are considered job abandonment. The employer's attendance policy requires employees to call or email the

employer if they will be absent. Most recently, the claimant was given a verbal warning for his attendance on August 24, 2018.

The claimant last performed work on August 29, 2018. Before his shift ended, he informed the employer that he intended to seek in-patient medical care (Employer Exhibit 1). The employer explained to the claimant he did not qualify for FMLA but that a leave of absence could be discussed upon information from his treating physician (Employer Exhibit 1). The claimant responded that he had not met with a doctor yet, and did not follow up with the employer to secure a leave of absence.

On August 30, 2018, the claimant went to the emergency room and was admitted. He remained hospitalized until September 7, 2018. He did not contact the employer between August 30, 2018 and September 7, 2018 but had access to a shared patient phone. He did not have anyone notify the employer on his behalf of his extended absence. He stated he asked a nurse to send in documentation to the employer but it was not received. He did not update the employer of his condition or secure a leave of absence. Consequently, the claimant was a no-call/no-show for his shifts on August 31, September 1, and September 3, 2018.

Upon release from the hospital, the claimant read his email which reflected a membership he had through his employment had been cancelled. He interpreted the email to mean he had been separated for being absent too long. He did not make efforts or arrangements to return to work. He went to the employer on September 7, 2018 to retrieve his paycheck but did not discuss his separation with the employer or attempt to provide medical documentation that he reportedly thought had been sent for him.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2,235.00, since filing a claim with an effective date of September 9, 2018. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Jenni Bauer, human resources generalist, was called and a voicemail was provided to allow her to participate. She did not respond. There is no evidence that the employer attempted to submit written participation in lieu of attending the fact-finding interview. Ms. Bauer did not attend the hearing to explain why she did not respond to the call or voicemail for the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged but voluntarily left his employment without good cause attributable to the employer. Benefits are denied.

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.

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

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the employer's version of events.

In this case, the claimant was aware of the employer's attendance policy which required he both notify the employer of an intended absence by phone or email, and that failure to do so for three shifts would lead to separation due to job abandonment. It cannot be ignored that the claimant was warned about his attendance on August 24, 2018, less than one week before his last day worked. The undisputed evidence is the claimant alerted the employer via email on August 29, 2018, that he wanted to receive in-patient care for personal health issues. The employer acknowledged the claimant's request and stated he would need to furnish a doctor's note to support the absence, at which time the claimant stated he had not yet seen his doctor. The claimant then voluntarily admitted himself to the hospital on August 30, 2018 and remained until September 7, 2018. The claimant did not alert the employer before he went to the hospital or at any time when he had access to the patient phone, to notify the employer of his absences. The claimant stated he requested documentation be sent by a nurse but it was not received.

When the claimant was released on September 7, 2018, he did not make any attempts to return to employment. He assumed the cancellation of a work benefit meant separation had occurred and made no efforts to explain to the employer he thought documentation had been sent or offer proof of his hospitalization. The administrative law judge is sympathetic to the claimant but is not persuaded he intended to return to employment post-hospitalization based upon his lack of notification and subsequent actions. Based on the communications received by the employer on August 29, 2018, (Employer Exhibit 1) it was not reasonable for the employer to assume or hold the claimant's position open indefinitely.

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. As the claimant failed to report for work or notify the employer for three consecutive workdays in violation of the employer policy, the claimant is considered to have voluntarily left employment without good cause attributable to the employer. Benefits are denied.

The next issue is whether the claimant must repay the benefits he received.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits in the amount of $2,235.00. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

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.
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> (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.

The employer failed to participate in the fact-finding interview and did not provide evidence that it was due to Agency or Postal Service error. Jenni Bauer was contacted for the fact-finding interview but did not respond or attend the hearing to explain her non-participation. Therefore, the employer cannot be relieved of charges. Because the claimant did not receive benefits due to fraud or willful misrepresentation and the employer failed to participate in the fact finding interview, the claimant is not required to repay the overpayment, and the employer remains subject to charge for the overpaid benefits.

DECISION:

The September 24, 2018, (reference 01) unemployment insurance decision is reversed. The claimant was not discharged but quit the 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 benefits in the amount of $2,235.00 but does not have to pay benefits because the employer failed to participate in the fact-finding interview. The employer's account cannot be relieved of charges.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn