**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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| **LEE P MONTGOMERY**<br>Claimant<br><br>**SKYBEAM INC**<br>Employer | **APPEAL 17A-UI-06015-LJ-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 05/14/17**<br>**Claimant: Respondent (2)** |

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Admin. Code r. 871-24.25(22) – Quit Due to Personality Conflict with Supervisor
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 June 2, 2017 (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant quit due to detrimental working conditions. The parties were properly notified of the hearing. A telephone hearing was held on June 28, 2017. The claimant, Lee P. Montgomery, Junior, participated. The employer, Skybeam, Inc., participated through Christine Sanchez, HR Manager; Richard Andrew Evans, Regional Enterprise Sales Manager; Shasta Schnittker, Claims Specialist with Employers Unity; and Alice Rose Thatch of Employers Unity represented the employer. Claimant's Exhibits 1 through 41 were received and admitted into the record without objection.

**ISSUE:**

Did claimant voluntarily quit the employment with good cause attributable to employer?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can 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, most recently as an Enterprise Account Executive, from July 6, 2015, until May 19, 2017, when he quit. Claimant submitted a resignation on May 1, 2017, expressing that he wished for his last day to be May 19. The employer retrieved its property from him on May 8, and he did not perform any work after that day. However, he was paid through May 19.

Claimant testified that his decision to resign from employment was prompted by the employer promoting Brie Henico to a Sales Manager position over Iowa and Illinois. According to claimant, this would have meant that she was in a position of authority over him. Claimant testified that Henico gave away his leads to other employees. Specifically, Henico and claimant's coworker, Mike, scheduled a meeting with Bertch Cabinets, even though claimant

had been dealing with Bertch Cabinets for a year and that business was assigned to him in the lead-tracking system. Claimant provided an email from Henico dated February 28, 2017, in which she explained that the business was listed with an asterisk before its name in the lead-tracking system, so it did not come up as being assigned to any employee. She continues, "We are happy to trade one of the businesses we originally put on our list for Bertch as we will not be canceling this meeting with them (unnecessary confusion for the customer)." Evans testified that no one has actually sold anything to Bertch Cabinets at this point, and so no one has earned any commission.

On another occasion, claimant testified he made a sale to McGrath Automotive in Cedar Rapids which should have earned him $242.50 commission. However, the employer only paid him $100.00 commission. Evans testified that the employer's commission structure was based on a sales employee selling, at minimum, a twelve-month contract. Claimant's sale was for a term far shorter than that length, and it would not be profitable for the employer to pay commission under the established structure. Therefore, the Vice-President determined claimant could earn 25% commission on the sale, which amounted to $100.00. Evans explained this to claimant, though he admits claimant was unhappy with the explanation. Evans testified that claimant did not lose any clients from whom he was actually earning commission.

Claimant testified that the employer's commission structure changed multiple times during his employment. It had changed in December 2016, and the employer had announced that it was going to change again at the time claimant resigned. Documentation of the changes that occurred in December indicates the date of the commission payout changed at that time. (Exhibit 1). Additionally at that time, the employer changed some requirements for items and amounts a customer could or was required to purchase. (Exhibits 2 and 3) Claimant does not know what the most recent changes were, as those were not revealed before he resigned.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2,530.00, since filing a claim with an effective date of May 14, 2017, for the six weeks ending June 24, 2017. The administrative record also establishes that the employer did not participate in the fact-finding interview, make a first-hand witness available for rebuttal, or provide written documentation that, without rebuttal, would have resulted in disqualification. Schnittker testified that she is the individual who would have received a notice for the fact-finding interview, and she was never notified that it was taking place. The employer first learned about the fact-finding interview when it received the decision allowing claimant benefits.

**REASONING AND CONCLUSIONS OF LAW:**

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

Iowa Code §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. 871-24.26(1) provides:

> The following are reasons for a claimant leaving employment with good cause attributable to the employer:

> A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

In general, a substantial pay reduction of 25 to 35 percent or a similar reduction of working hours creates good cause attributable to the employer for a resignation. *Dehmel v. Emp't Appeal Bd.*, 433 N.W.2d 700 (Iowa 1988). Claimant testified that the compensation structure was changed several times, and each time it was changed to his detriment. The commission structure was modified most recently in December 2016, and claimant continued to work for five months after that change without specific complaint to the employer, thus acquiescing to the changes. Claimant has not established that he quit due to a change in his contract of hire.

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:
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> (22) The claimant left because of a personality conflict with the supervisor.

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). The average person in claimant's position would not have felt similarly compelled to end his or her employment without first securing another job. 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 delivered a resignation notice to Evans and ended his employment. While he may have disagreed with Henico's management decisions, his personal decision to quit was without good cause attributable to the employer. Benefits are withheld.

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer's account will be charged. 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, benefits were paid 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. The benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, the employer did not participate in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits he received.

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, an employee from the employer representative testified that it never received a notice for the fact-finding interview. Benefits were not paid because the employer failed to respond timely or adequately to the agency's request for information relating to the payment of benefits. Instead, benefits were paid because employer had no notice of the fact-finding interview and therefore had no opportunity to prepare a response and be available for the telephone call. Employer thus cannot be charged. Since neither party is to be charged then the overpayment is absorbed by the fund.

**DECISION:**

The June 2, 2017 (reference 01) unemployment insurance decision is reversed. Claimant separated from 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 $2,530.00 and is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview through no faults of its own, and therefore its account shall not be charged. The overpayment shall be absorbed by the fund.

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Elizabeth A. Johnson
Administrative Law Judge

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Decision Dated and Mailed

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