

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**TONIA K SMITH**  
Claimant

**APPEAL 17A-UI-11248-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IOWA COLLEGE AID COMMISSION**  
Employer

**OC: 10/01/17  
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 October 24, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on December 15, 2017. The claimant participated and testified. The employer participated through Hearing Representative Sam Krauss and witnesses Julie Leeper and Todd Brown. Employer's Exhibits 2 through 19 were received into evidence. Official notice was taken of the fact-finding documents.

**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 program planner 2 from September 21, 2007, until this employment ended on June 20, 2017, when she voluntarily quit.

The last day claimant worked was May 3, 2017. At that time, claimant was approved for intermittent FMLA leave attributable to several chronic medical conditions. Under the employer's policies all absences that are not approved continuous leave need to be reported to the employee's supervisor and, if they are FMLA qualifying, to a third party administrator called the

Reed Group. (Exhibit 15). This policy is located in the employee handbook, which claimant last received a copy of on September 23, 2017. (Exhibit 10). Claimant had been reporting her absences to her supervisor, Todd Brown. (Exhibits 16 and 17). On May 18, 2017, claimant sent an email to Brown stating that she was using FMLA and would not be in until further notice. (Exhibit 5). The email went on to explain that her phone was broken, that she had ordered a new one, but would not have the new phone for seven to ten business days, though she indicated she would figure out with the Reed Group how to do her reporting.

On May 31, 2017, Brown still had not heard from claimant. Brown therefore sent claimant an email asking if she had followed up with the Reed Group about getting approval for continuous FMLA leave and informed her the employer had not received anything from the Reed Group to that effect. (Exhibit 6). When Brown still had not heard anything from the claimant by June 6, he sent another, similar, email asking her to respond by Friday, June 9. (Exhibit 7). Brown testified he also sent claimant a text message and a letter asking her to contact him and Julie Leeper by June 9, 2017. (Exhibit 4). Claimant testified she was unable to receive Brown's calls, texts, or emails, during this time because she was on leave without pay and did not have money for a phone. Rather, she was using the phone of a neighbor or her mother. On June 13, 2017, when the employer still had not heard from the claimant it sent another letter informing her they still had no record of her requesting continuous FMLA leave from the Reed Group and that she had failed to respond to any communication from Brown. (Exhibit 3). The letter informed claimant she either had to report to work on June 19, 2017, or contact the Reed Group to provide certification that she needed to be off work. The letter also specifically directed claimant to contact Brown and Leeper to report her absence and warned that failure to comply would result in removal from payroll effective June 19, 2017.

Claimant testified she and her doctor had made multiple attempts to provide the appropriate paperwork to the Reed Group as requested, but for some reason the Reed Group continued to report they had not received the paperwork. According to claimant she regularly experienced issues with the Reed Group receiving her paperwork and suspected they would frequently place it in the incorrect file, as she had several FMLA claim files. Claimant had expressed this frustration to Brown in a text message on May 12, but indicated to him the issue had been resolved at that time. Claimant admitted she did not call Brown or Leeper as directed in the June 13 letter, though she did contact the Reed Group and her doctor, who again sent the appropriate paperwork to the Reed Group, though the Reed Group indicated to the employer it still have not received this paperwork by June 20, 2017. (Exhibit 2). Claimant was subsequently separated from employment.

The claimant filed a new claim for unemployment insurance benefits with an effective date of October 1, 2017. The claimant filed for and received a total of \$4,550.00 in unemployment insurance benefits for the weeks between October 1 and December 9, 2017. The employer did not participate in the telephone fact finding interview regarding the separation on October 23, 2017. Rather, the employer submitted a statement written by a third-party agent at Employer's Edge, along with the letters sent to claimant on June 6, 13, and 20, 2017, however, a direct, first-hand witness was not available for the hearing. The fact finder determined claimant qualified for benefits.

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

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

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

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 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). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2) (amended 1998). Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. *LaGrange v. Iowa Dep't of Job Serv.*, (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984).

Claimant was given notice in writing by the employer that she should either report to work or contact Brown and Leeper regarding her absences by June 19, 2017. Claimant was specifically advised in the letter that if she failed to contact the employer by that date, the employment relationship would end. Claimant was working with her doctor and a third-party administrator to get approval for continuous FMLA leave during this time. Claimant was in contact with her doctor and the third-party administrator, but not with the employer. 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. Since claimant did not follow up with the employer regarding her ability to return to work, her failure to continue reporting to work or to otherwise maintain contact with the employer was an abandonment of the job. 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). The regulation provides that “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.” 871 IAC 24.10(1). The Employer provided the phone number of a third party representative who would not normally have firsthand knowledge. While this may be enough if the third party administrator had ready access to a person with firsthand knowledge, the first-hand witness was not available for the call when actually contacted for rebuttal. Under these circumstances the employer has not shown it satisfied the requirements of the participation rule. Since the employer did not participate in the fact-finding interview claimant is not obligated to repay to the agency the benefits she received and the employer's account shall be charged.

**DECISION:**

The October 24, 2017, (reference 01) unemployment insurance decision is reversed. Claimant voluntarily left the 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 \$4,550.00 but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview and its account shall be charged.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs