IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

PAIGE R BOKEN Claimant **PARTNERSHIP FOR PROGRESS INC** Employer	**APPEAL 16A-UI-09728-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/14/16** **Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
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 August 30, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 22, 2016. The claimant participated personally. The employer participated through Lori Richter, CEO. Employer exhibits 1-10 were received into evidence. 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:

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 CNA and was separated from employment on August 13, 2016, when she quit without notice. Continuing work was available.

On August 13, 2016, the claimant's final day of employment, she sent her manager, Sheryl Nelson, and employer CEO, Lori Richter, an email stating she had been confronted by a resident who said there was a rumor that the claimant was dating a male co-worker. In the email, the claimant also stated she was close to quitting (Employer exhibit 3). The email was sent at 6:34 p.m. (Employer exhibit 3). Then at 10:03 p.m., the claimant sent a text message to her manager and CEO that stated, "If one of you could take time from your Saturday night to address the email I sent 3 hours ago, that'd be great" (Employer exhibit 4). Twenty six minutes later, the claimant tendered her resignation via email and followed up with printed copies,

stating she would be quitting effective August 13, 2016 (Employer exhibit 5 and 5A). When Ms. Nelson responded to the claimant's resignation, she requested to hold a meeting on Monday with her, but the claimant declined, believing the issues could not be resolved.

According to the claimant, she and a co-worker, Jenna, had gone to high school with a third employee, Trent, and both reportedly had a relationship of some sort with him at some point. Neither was engaged in a relationship with him at the time the claimant was employed, and the claimant was unaware of any conflict with Jenna, personally or professionally. Early into the claimant's employment, employees told her that Jenna was spreading rumors that the claimant was engaged in sexual relations with Trent, at the workplace. The claimant never confronted Jenna but in April 2016, reported to her manager, Sheryl Nelson, that she did not want to work with Jenna anymore because of rumors, and was removed from shifts with Jenna. Then in May 2016, the employer held a staff meeting, and afterwards, Ms. Nelson asked the claimant and Trent about the rumors circulating, as they had been reported by someone to the CEO. Both the claimant and Trent denied the rumors. Between May 5 and August 13, 2016, the claimant reported the rumors continued as unnamed employees would tell the claimant about rumors being spread about her, about once or twice a week. The rumors included references to the claimant performing sexual acts at the workplace and threats that the employer was watching her and Trent on video when they worked together. The claimant did not report to Ms. Nelson or anyone that the rumors continued after being separated from Jenna. Subsequently, Jenna quit the employment in July after getting married. The rumors continued but the claimant did not inform the employer of any other incidents or provide any other specific people telling her the rumors or reporting the rumors. The next time the employer was informed about the rumors was on the claimant's final day of employment, after the resident alluded to the rumor.

The claimant did not report ongoing concerns about circulating rumors because she tried to ignore them. The claimant did not escalate her concerns to Lori Richter, CEO, in accordance with employer policy, because she did not think Ms. Richter could be impartial, given a relationship with Jenna's mom, which had included a trip to Minnesota with Jenna, her mom, Ms. Richter, and Ms. Richter's daughter.

The administrative record reflects that claimant has received unemployment benefits in the amount of $980.00, since filing a claim with an effective date of August 14, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview by way of written statement and documentation.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
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> 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(6), (27) and (37) 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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> (6) The claimant left as a result of an inability to work with other employees.
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> (27) The claimant left rather than perform the assigned work as instructed.
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> (37) The claimant will be considered to have left employment voluntarily when such claimant gave the employer notice of an intention to resign and the employer accepted such resignation. This rule shall also apply to the claimant who was employed by an educational institution who has declined or refused to accept a new contract or reasonable assurance of work for a successive academic term or year and the offer of work was within the purview of the individual's training and experience.

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. "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. Industrial Relations Commission*, 277 So.2d 827 (Fla. App. 1973). Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 24.26(4). The test is whether a reasonable person would have quit under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.,* 494 N.W.2d 660 (1993).

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*. After assessing the credibility of the claimant who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the weight of the evidence in the record fails to establish intolerable and/or detrimental working conditions that would have prompted a reasonable person to quit the employment without notice.

In this case, and on the claimant's final day of work, a resident approached the claimant. He said to her that he heard a rumor that the claimant had been engaged in sexual relations at the workplace with a male co-worker. The resident would not report who he heard the rumor from or who the male co-worker was, and stated only it was a secret. The claimant worked overnight and so there was no supervisor available to report her concerns to about the comment. The claimant was upset because she believed the rumor was the product of rumors that had been circulating about her since early in her employment. When the claimant began

employment, she worked with two former classmates, Jenna, and Trenton. The claimant believes she and Jenna had both had relationships with Trenton at one point, but neither were engaged in relationships with him when employment began, and the claimant did not believe there was any conflict with either during employment. The claimant denied having relations with Trent while employed.

Prior to quitting the claimant had made the employer aware of the rumors upsetting her in April 2016, and in response, Ms. Nelson, removed the claimant from working shifts with Ms. Ferguson. The claimant reported the rumors continued to circulate after April 2016 but the claimant chose not to report to the employer. The administrative law judge is sympathetic to the frustrations the claimant felt with both co-workers and a resident engaging in gossip about her. Certainly, an employee should not be subject to repeated rumors or gossip of engaging in sexual relations at the work place, but it is troubling that the claimant would not make either Ms. Nelson or Ms. Richter aware that the employer's response of removing Jenna from the claimant's shift was insufficient to quash the rumors. The employer had no way to reasonably know that they continued or were upsetting the claimant still until she sent an email on a Saturday evening shift, based on the resident's (not co-worker's) comment to her. Given the stale dates of the other complaints, they are not individually addressed as the claimant acquiesced to them by not raising concerns with her supervisor or quitting earlier when they arose.

Further, inasmuch as the claimant gave the employer three hours to respond on a weekend before quitting, the administrative law judge is not persuaded the employer could have done anything to help the claimant preserve her employment. A claimant with work issues or grievances must make some effort to provide notice to the employer to give the employer an opportunity to work out whatever issues led to the dissatisfaction. Failure to do so precludes the employer from an opportunity to make adjustments which would alleviate the need to quit. *Denvy v. Board of Review*, 567 Pacific 2d 626 (Utah 1977). It cannot be ignored that the employer offered to meet with the claimant on Monday about her concerns and resignation letter, after she quit on a Saturday night, but the claimant declined. This further illustrates that when the employer was made aware of issues, they had taken them seriously and tried to remedy them, just as when the claimant reported to Ms. Nelson in April, and was removed from shifts with Jenna.

Based on the evidence presented, the administrative law judge concludes that the claimant's leaving the employment may have been based upon good personal reasons, but it was not for a good-cause reason attributable to the employer according to Iowa law. Benefits must be denied.

Iowa Code § 96.3(7)a-b provides:

> 7. Recovery of overpayment of benefits.
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> 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.
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> 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 § 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 § 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 states pursuant to § 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 she was not entitled. The claimant has been overpaid $980 in unemployment insurance benefits. 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 it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. The administrative law judge is persuaded that the employer's written statement and documentation in advance of the fact-finding interview satisfies the requirements of participation in accordance with Iowa Administrative Code rule 817 IAC24.10(1). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay the benefits she received and the employer's account shall not be charged.

DECISION:

The August 30, 2016, (reference 01) decision is reversed. The 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 $980.00, and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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