IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

ALYSIA M SWEET Claimant **HY-VEE INC** Employer	**APPEAL 16A-UI-04683-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/27/16** **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 April 13, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on May 17, 2016. The claimant participated personally. The employer participated through Sabrina Bentler with Corporate Cost Control. Scott Foster, Store Manager, and Gina Pelc, Assistant Store Manager, testified for the employer. Kristin Brewer attended the hearing but did not testify. Claimant's Exhibit A and Employer's Exhibit One was admitted into evidence. The administrative law judge took official notice of the administrative record, including fact-finding documents. Based on the evidence, the arguments of the parties, 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 leave the employment with good cause attributable to the employer or did the 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: The claimant was employed part time as a delivery driver and was separated from employment on March 29, 2016. The evidence presented was disputed as to whether the claimant quit or was discharged.

The claimant was initially hired to work in the Market Grille but was moved to delivery driver after continued complaints (Employer's Exhibit One, Page Four). The claimant continued to perform work as a delivery driver until March 29. On that day, in a meeting with Gina Pelc and Scott Foster, she was informed she would be moving to a courtesy counter or cashier role; due to concerns with regarding to production (Employer's Exhibit One, Page Seven). During the conversation, the claimant referenced the floral manager as being a "smart ass" (Employer's Exhibit One, Page Seven) and became upset. When the claimant was informed she would need to work in the front of the store on that day, she stated first that she lacked the proper shoes, even though she had tennis shoes on and that was acceptable foot attire, and then stated she could not stand on her feet for eight hours. The employer had no medical documentation to support the claimant's assertions but offered her the option to return home to change or return home and take the day off. The meeting was conducted with Scott Foster and Gina Perc, who denied the claimant was ever discharged or told not to return.

The claimant was next scheduled to work on March 31, 2016 at 9:00 a.m. She did not return to work after March 29, 2016 and did not call the employer to notify of her absence. Mr. Foster made two attempts to call the claimant but learned her phone was out of service. The employer's policies state that after two no-call/no-show, an employee can be discharged. The claimant was made aware of the policies upon hire. The claimant previously had a no-call/no-show on December 29, 2015, when did not notify the employer she would be out of work due to illness of her child and spouse. Separation subsequently occurred when the claimant failed to return to work after March 29, 2015.

At the hearing, the claimant denied that she voluntarily quit the employment but rather was discharged. The claimant denied that she had no-call/no-showed on December 29, 2015 and denied being a no-call/no-show on March 31, 2016 but rather that Mr. Foster told her that she was terminated from the position of delivery driver, which she interpreted to mean as she was fired from Hy-Vee altogether. The claimant further denied any discussion of moving to the courtesy or checking positions, complaining about standing on her feet for eight hours or the shoes she was wearing. The claimant did not follow up with the employer but indicated she was upset and surprised.

The administrative record reflects that claimant has received unemployment benefits in the amount of $366.00 since filing a claim with an effective date of March 27, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview by way of Scott Foster.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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 § 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.

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 witnesses 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 claimant was not discharged but voluntary quit. The administrative law judge found the employer's testimony to be more credible than the claimant's based on the specificity of detail offered by two witnesses, and the contemporaneous notes about the conversation that were prepared on March 29, 2016 (Employer's Exhibit One, Page Seven). The evidence presented does not support the employer discharged the claimant, but rather, she was counseled on March 29, 2016 and was informed she would be moving to a courtesy counter or cashier role, due to continued complaints while she was a delivery driver. During the conversation, the claimant referenced the floral manager as being a "smart ass". When the claimant was informed she would need to work in the front of the store on that day, she stated first that she lacked the proper shoes, even though she had tennis shoes on and that was acceptable foot attire, and then stated she could not stand on her feet for eight hours. The employer had no medical documentation to support the claimant's assertions but offered her the option to return home to change or return home and take the day off. If the employer intended to fire her, they would not have moved her to another department or offered to let her go home and change shoes. The meeting was conducted with Scott Foster and Gina Pelc, who denied the claimant was ever discharged or told not to return, and expected she would return on March 31, 2016. While the claimant had been counseled, the employer did not intend to discharge the claimant.

Even if the claimant believed she had been discharged based on the verbal reprimand that took place, it was in error. 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. Since the evidence presented does not support the claimant was discharged, and the claimant did not follow up with management personnel, and her assumption of having been fired was erroneous, her failure to continue reporting to work was an abandonment of the job. Benefits are denied.

Alternately, if this case was decided as a discharge, rather than voluntary quit, the claimant would remain disqualified. The law defines misconduct as:

> 1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
> 2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
> 3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Inasmuch as the claimant had been previously issued discipline for her no call/no show on December 29, 2016, as well as reprimanded on her final day of work for her job performance and calling the floral manager a smartass, she could have reasonably anticipated her job was in jeopardy. By not returning to work on March 31, 2016 for her shift, the claimant knew or should have known her conduct was in disregard of the employer's interests and reasonable standards of behavior that the employer has a right to expect of its employees. Whether a quit or a discharge, benefits are withheld.

The next issue is whether the claimant has been overpaid benefits.

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.
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> (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.
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> 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 benefits in the amount of $366.00. 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. In this case, the claimant has received benefits but was not eligible for those benefits. The employer satisfactorily participated in the fact-finding interview by way of Scott Foster. 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 April 13, 2016 (reference 01) unemployment insurance decision is reversed. The claimant was not discharged but 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 $366.00 in benefits and must repay the benefits. The employer's account shall be relieved of charges.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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