IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOHN W THOMAS
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 14A-UI-02384-NT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/02/14
Claimant: Respondent (2)

Section 96.5-1 – Voluntary Quit
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Wal-Mart Stores, Inc. filed a timely appeal from a representative's decision dated February 20, 2014, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on March 25, 2014. Claimant participated. The employer participated by Ms. Elena Rocha, Shift Manager.

ISSUE:

The issue is whether the claimant left employment with good cause attributable to the employer and whether the claimant has been overpayment job insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: John Thomas was employed by Wal-Mart Stores, Inc. from October 5, 2010 until February 2, 2014 when he left employment without notice. Mr. Thomas was employed as a full-time people greeter and was paid by the hour. His immediate supervisor was Steven Kane.

On February 2, 2014, a shift manager, Elena Rocha, was observing company employees via the company security system. Ms. Rocha noted that Mr. Thomas had let a number of individuals leave the Wal-Mart facility, without checking unbagged items in or beneath their shopping carts. Because a new focus was on having the people greeters improve security for the company, Ms. Rocha went to Mr. Thomas' work area to speak with him about company expectations.

During the short conversation, Ms. Rocha reminded the claimant that he needed to check unbagged items in shopping carts, as well as unbagged items that were beneath shopping carts as shoppers exited the facility. The shift manager's comments were made in the work area as customers passed in and out and the shift manager's purpose was only to remind Mr. Thomas of the new requirement and to insure that he complied. The shift manager's intention at that time was not to warn, counsel or discharge Mr. Thomas. After leaving Mr. Thomas' area,

Ms. Rocha remained in the general area observing cashiers as they checked patrons out. Mr. Thomas also observed Ms. Rocha in the general work area and concluded that Ms. Rocha was “watching” him.

Ms. Rocha had not been trained specifically on his duties as a people greeter but was aware that he was to greet patrons as they arrived at the facility, and that he was to check unbagged items that were under shopping carts to verify that the patron had a valid receipt for the items that were being removed from the store. Although Ms. Rocha did not raise her voice and no patrons stopped to observe as they passed by, Mr. Thomas believed that Ms. Rocha should have taken him to a private office to remind him of his duties and that her failure to do so caused him embarrassment in front of customers. Because Mr. Thomas felt the conversation was in the form of a reprimand and should have been handled privately, he decided to leave his employment with Wal-Mart Stores at that time. Mr. Thomas clocked out and left the premises prior to the end of his working shift and was then considered to have abandoned his job by the company.

The following day, Mr. Thomas contacted upper management via telephone and the company’s hot line to complain about Ms. Rocha’s actions the preceding day. The claimant was told that he had abandoned his job the previous day by walking off the job. Company employees are made aware that if they have a dispute with an immediate supervisor or a shift manager that they are able to go up the chain of command for resolutions of their dissatisfactions. The employees are also aware that the company maintains a “hot line” that allows employees to call an 800 number 24-hours per day with job concerns.

Although Mr. Thomas quit his job on February 2, 2014, he later re-applied with Wal-Mart Stores for the same position as a people greeter.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant voluntarily left his employment without good cause attributable to the employer.

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.

871 IAC 24.25(28) 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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> (28) The claimant left after being reprimanded.

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code section 96.6(2). An individual who voluntarily leaves their employment must first give notice to the employer of the reason for quitting in order to give the employer an opportunity to address or resolve the complaint. Cobb v. Employment Appeal Board, 506 N.W.2d 445 (Iowa 1993). Claimants are not required to give notice of intention to quit due to intolerable, detrimental or unsafe working environments if the employer had or should have had reasonable knowledge of the condition. Hy-Vee, Inc. v. Employment Appeal Board, 710 N.W.2d 1 (Iowa 2005).

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 Services, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Board, 494 N.W.2d 660 (Iowa 1993). When a person voluntarily quits the employment due to dissatisfaction with the work environment or the inability to work with another employee or supervisor, the quit is presumed to be without good cause attributable to the employer. See 871 IAC 24.25(21) and (6).

In this case the evidence establishes that Mr. Thomas was not being reprimanded publicly or that the shift manager was acting inappropriately so as to cause embarrassment to the claimant on February 2, 2014. On that date the shift manager merely reminded Mr. Thomas that he should be checking unbagged items inside of shopping carts, as well as underneath the carts as patrons left the facility. The shift manager was performing her duties to supervise employees on the shift and was merely reminding Mr. Thomas at the time that he needed to be checking the outgoing carts and their contents more closely. The shift supervisor's comments were not made loudly, nor did they cause patrons to stop and observe. Ms. Rocha made her comments and suggestions to Mr. Thomas as patrons entered and left the store but not in a way so as to distract the patrons or humiliate the claimant or embarrass him. The claimant was not taken to a private area because the shift supervisor's intention was not to warn him, but merely to advise him that he needed to do the checking a little more closely.

The administrative law judge concludes based upon the evidence in the record that the circumstances on February 2, 2014 were not of such a nature as to cause a detrimental or intolerable working condition. Reasonable alternatives were available to Mr. Thomas that day but he did not exercise them. Subsequently, the claimant applied for the same job with the same employer.

For the reasons stated herein, the administrative law judge concludes that the claimant left employment without good cause attributable to the employer. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of $1,074.00 since filing a claim with an effective date of February 2, 2014 for the weeks ending February 8, 2014 through March 22, 2014. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a firsthand witness available for rebuttal.

Iowa Code section 96.3-7, as amended in 2008, 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) 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. 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. The employer shall not be charged with the benefits.
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> (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.

871 IAC 24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
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> (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 upon a reversal on an appeal of an initial determination to award benefits on an issue regarding the claimant's unemployment 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 they did participate in the fact-finding interview. Iowa Code section 96.3-7. In this case the claimant has received benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay to the agency the benefits he received and the employer's account shall be charged.

DECISION:

The representative's decision dated February 20, 2014, reference 01, is reversed. Claimant left employment without good cause attributable to the employer. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The claimant has been overpaid job insurance benefits in the amount of $1,074.00. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay the agency the benefits he received in overpayment and the employer's account shall be charged for those benefits.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

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