

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUAN M GOMEZ

Claimant

APPEAL NO: 10A-UI-17051-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCHENKER LOGISTICS INC

Employer

OC: 11/07/10

Claimant: Respondent (2/R)

Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Schenker Logistics, Inc. (employer) appealed a representative's December 3, 2010 decision (reference 01) that concluded Juan M. Gomez (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 24, 2011. The claimant participated in the hearing. Nicki Brick appeared on the employer's behalf. During the hearing, Employer's Exhibit One was entered into evidence. 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.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on April 19, 2010. He worked full time as a forklift operator at the employer's Iowa City, Iowa distribution center, working a 6:00 p.m. to 6:00 a.m. shift on a rotating weekly schedule. His last day of work was the shift that began at 6:00 p.m. on October 22, scheduled to end at 6:00 a.m. on October 23.

The claimant left about 45 minutes early on the morning of October 23. He was scheduled to work an overtime shift that evening, and wanted a little more personal time that day, as he needed to work on his vehicle. He did work on his vehicle and then became somewhat ill, and fell asleep. He was then a no-call/no-show for his overtime shift that day.

The claimant understood that he was scheduled to work an overtime shift also on the night of October 24, although the employer did not have any record of him being scheduled for that shift. The claimant again worked on his vehicle during the day and then became somewhat ill, and fell asleep. He did not call the employer by the start of his shift, but called his immediate supervisor directly at about 7:00 p.m. There was no discussion about attendance points or the claimant's job status.

The claimant was scheduled for regular shifts on the evening of October 26 and October 27. On those two nights he was not feeling well and called in directly to his supervisor rather than using the employer's attendance call in system, calling at about 5:30 p.m. the first night, and about 6:00 p.m. the second night. There was no discussion about attendance points or the claimant's job status.

While nothing had been said about points, the claimant assumed he had exceeded the employer's allowable ten attendance points. On about October 28 he called in to the dock office to inquire about his points, but he was told he would need to come in and speak to a supervisor to check on his points. He did not come in and speak to a supervisor, as about that date he determined that he would need to leave on October 29 to go to Texas to deal with a personal legal matter. He had previously advised his supervisors that he would need to go to Texas to attend to an issue, and they had advised him that he could seek a leave of absence if it was not going to be for an extended time. However, the claimant was unsure of how much time would be needed, and so did not seek a leave of absence. The employer considered the claimant to have voluntarily quit by job abandonment as of November 1, 2010.

On October 29, assuming he had been discharged for attendance even though he had not been so informed, the claimant left for Texas. He has remained in Texas since then. During November he was primarily dealing with his personal legal issue. In about mid-December he began training for some new employment in Texas; he believes that employment could be long-term, and does not have a current plan to return to Iowa. He does continue to receive some mail through his Iowa address, as his brother still lives at that address.

The claimant established a claim for unemployment insurance benefits effective November 7, 2010. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

A voluntary quit is a termination of employment initiated by the employee – where the employee has taken the action which directly results in the separation; a discharge is a termination of employment initiated by the employer – where the employer has taken the action which directly results in the separation from employment. 871 IAC 24.1(113)(b), (c). A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code sections 96.5-1; 96.5-2-a.

The claimant asserts that his separation was not “voluntary” as he believes had exceeded the employer's attendance points and was going to be discharged, and therefore the separation should be treated as a discharge for which the employer would bear the burden to establish it was for misconduct. Iowa Code section 96.6-2; 871 IAC 24.26(21). Rule 871 IAC 24.25 provides that, 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 rule further provides that there are some actions by an employee which are construed as being voluntary quit of the employment, such as where an employee ceases reporting for work because of a belief he is going to be discharged, but was not in fact ever informed by the employer there had been such a decision. 871 IAC 24.25(33). Further, failing to report and perform duties as assigned is considered to be a voluntary quit. 871 IAC 24.25(27). The claimant did exhibit the intent to quit and did act to carry it out.

The claimant had not been told he had been discharged, yet ceased reporting for work. He further ceased reporting for work because he had decided to go to Texas indefinitely to deal

with his personal legal matter; therefore, the separation is considered to be a voluntary quit. The claimant then has the burden of proving that the voluntary quit was for a good cause that would not disqualify him. Iowa Code section 96.6-2. Leaving because of personal issues is not a cause attributable to the employer. 871 IAC 24.25(20). The claimant has not satisfied his burden. Benefits are denied.

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 whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code section 96.3-7-b is remanded the Claims Section.

An issue as to whether the claimant was able and available for work after establishing his claim for benefits also arose during the hearing, as well as whether he may have failed to report wages earned in weeks in which he received. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5). A further determination would then need to be made as to whether any overpayment resulting from a disqualification on these issues would be covered by any waiver provision of Iowa Code section 96.3-7-b.

DECISION:

The representative's December 3, 2010 decision (reference 01) is reversed. The claimant voluntarily left his employment without good cause attributable to the employer. As of November 1, 2010, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue. The matter is further remanded to the Claims Section for investigation and determination of the able and available and unreported wage issues.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css