

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

RUSSELL A DILLAVOU  
610 W STATE  
CENTERVILLE IA 52544

CARE INITIATIVES  
c/o JOHNSON & ASSOCIATES  
PO BOX 6007  
OMAHA NE 68106-6007

**AMENDED**

Appeal Number: 05A-UI-03911-JTT  
OC: 12/12/04 R: 03  
Claimant: Respondent (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Care Initiatives filed a timely appeal from the April 8, 2005, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 6, 2005. Russell Dillavou participated in the hearing, and presented additional testimony through Lisa Dillavou. Attorney Lynn Corbeil of Johnson & Associates represented the employer and presented testimony through Susan Chidester, Administrator, and Shirley Cline, Charge Nurse.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Russell Dillavou was employed by Care Initiatives at its Centerville nursing home as a full-time Dietary Supervisor from February 11, 2005 until February 28, 2005. Mr. Dillavou's immediate

supervisor was Susan Chidester, Administrator. During the first week of Mr. Dillavou's employment, he was engaged in getting oriented to the duties of the dietary supervisor position and participating in training.

During the second week of his employment, Mr. Dillavou was absent on February 21, due to illness. Mr. Dillavou reported for work on February 22. At that time, Ms. Chidester advised Mr. Dillavou that he was only allowed to miss three days during his probationary period. Ms. Chidester did not consider this to be a reprimand, but Mr. Dillavou did. On February 23, Mr. Dillavou was again absent due to illness. On February 24, Ms. Chidester informed Mr. Dillavou that the two absences would only be counted as one for purposes of the employer's attendance policy. Mr. Dillavou somehow perceived this comment as a reprimand. During the course of Mr. Dillavou's employment, he received no reprimands of any kind.

On Sunday, February 27, Ms. Chidester contacted Mr. Dillavou's home and left a message on his answering machine. In the message, Ms. Chidester indicated that two people had called in sick and she needed Mr. Dillavou to come into work. As part of Mr. Dillavou's supervisory duties, he was expected to cover the shifts of dietary staff if they were absent. Mr. Dillavou discovered the message when he came home to get some items he needed for a potluck of which he was in charge. Mr. Dillavou telephoned the nursing home and spoke with Charge Nurse Shirley Cline. Mr. Dillavou and Ms. Cline had not previously met. Mr. Dillavou indicated that he could not come into work because he was busy doing another job. Mr. Dillavou further indicated that if Ms. Chidester had a problem with that she should call him. Mr. Dillavou added that if it did not work out, he might have to quit. The message Ms. Chidester received was that Mr. Dillavou had called to say he was not coming to work because he had another job and was, therefore, quitting.

Mr. Dillavou was scheduled to work at noon on February 28. Ms. Chidester was functioning under the belief that Mr. Dillavou had quit the employment. Ms. Chidester left a message on Mr. Dillavou's answering machine at about 11:00 a.m., in which she reminded him that he needed to turn in his uniforms at the time he collected his final check. Mr. Dillavou did not contact Ms. Chidester for clarification of her message. Mr. Dillavou did not go into work. Mr. Dillavou had in fact already decided that he had started a job he did not like and a job that was not that great. Mr. Dillavou did not wish to return to the employment. Mr. Dillavou did not again have contact with Ms. Chidester until March 4, when he dropped off his uniforms. At that time, Ms. Chidester advised Mr. Dillavou that Care Initiatives usually does an exit interview with a departing employee and inquired whether she could ask him some questions, including whether he felt he had been properly trained. Mr. Dillavou told Ms. Chidester that his attorneys had instructed him not to participate in an exit interview. Mr. Dillavou then left. The employer continued to have work available to Mr. Dillavou.

Mr. Dillavou established an additional claim for benefits that was effective February 27, 2005 and has received benefits totaling \$3,410.00 since that time.

#### REASONING AND CONCLUSIONS OF LAW:

The claimant asserts that he thought he was discharged. The employer asserts this was not the case, that work continued to be available to Mr. Dillavou, and that he voluntarily quit.

The question for the administrative law judge is whether a reasonable person in Mr. Dillavou's position would have concluded they had been discharged from the employment based on

Ms. Chidester's phone message of February 28 and the attending 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).

Based on the evidence in the record, the administrative law judge concludes that a reasonable person in Mr. Dillavou's position would *not* have concluded that he had been discharged from the employment. When Mr. Dillavou contacted the employer on Sunday, February 27, he threatened to quit the employment if the employer had a problem with him not coming in to work on that day, rather than simply inform the employer that he was unavailable to work due to a prior commitment. It was only based on the unreasonable position Mr. Dillavou took in his telephone call on Sunday, February 27, that he was able to jump to the further unreasonable conclusion that Ms. Chidester's phone message on February 28 indicated he had been discharged. Mr. Dillavou indicated that he was getting ready for work when he received the message from Ms. Chidester on February 28. The administrative law judge questions the sincerity of that testimony. In any event, the administrative law judge concludes that if Mr. Dillavou indeed was preparing for work, a reasonable person would have contacted the employer in person or by telephone and asked for clarification of the message. Mr. Dillavou indicated he did not do this because he was shaken by the message from Ms. Chidester. The administrative law judge found this testimony unconvincing. The administrative law judge is able to infer from the evidence presented at the hearing that Mr. Dillavou jumped at the opportunity to misinterpret Ms. Chidester's message as a discharge, so that he would not have to return to employment that he did not like and that he did not think was so great. Mr. Dillavou then purposely avoided the opportunity to resolve what he appears to have known was a misunderstanding.

The question, then, is whether the evidence in the record establishes that Mr. Dillavou's voluntary quit was for good cause attributable to the employer.

A claimant who voluntarily quits employment is disqualified for benefits unless the Agency finds that the quit was for good cause attributable to the employer. See Iowa Code Section 96.5(1). Quits prompted by dissatisfaction with the work environment are presumed to be without good cause attributable to the employer. See 871 IAC 24.25(21).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Dillavou's quit was not for good cause attributable to the employer. Accordingly, Mr. Dillavou is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount.

The disqualification decision gives rise to the additional issue of overpayment of benefits.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Since establishing his additional claim for benefits, Mr. Dillavou has received benefits totaling \$3,410.00. Mr. Dillavou will have to repay that amount.

**DECISION:**

The Agency representative's decision dated April 8, 2005, reference 02, is reversed. The claimant voluntarily quit the employment without good cause attributable to the employer. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant is overpaid \$3,410.00.

jt/s/pjs