

**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**

**MICHELLE L MUELLER
9506 BRIANS RUN
HELOTES TX 78023**

**WIEDERIN PIZZA CORPORATION
D/B/A PAUL REVERE'S PIZZA
325 E MARKET ST
IOWA CITY IA 52245**

**Appeal Number: 06A-UI-00173-RT
OC: 01-11-04 R: 03
Claimant: Appellant (1)**

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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Michelle L. Mueller, filed a timely appeal from an unemployment insurance decision dated December 28, 2005, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on January 23, 2006 with the claimant participating. Bret Wiederin, owner, participated in the hearing for the employer, Wiederin Pizza Corporation, doing business as Paul Revere's Pizza. Mark Nelson, Store Manager at an Ace Hardware store, testified for the employer under subpoena. Initially, the employer requested a subpoena of Mr. Nelson and what appeared to be a request for a subpoena for the claimant. The administrative law judge spoke to Bret Wiederin, owner, at 3:47 p.m. on January 13, 2006 in regard to the subpoena requests. The administrative law

judge informed Mr. Wiederin that he would not issue a subpoena for the claimant because it was up to her whether she wanted to participate in the hearing or not. Nevertheless, Mr. Wiederin informed the administrative law judge that he had not intended to subpoena the claimant but only Mark Nelson. Mr. Wiederin informed the administrative law judge that Mr. Nelson would not testify unless a subpoena was issued. The administrative law judge issued a subpoena for Mr. Nelson. During this conversation Mr. Wiederin informed the administrative law judge that he had subpoena requests for a number of other witnesses. The administrative law judge explained that time for the hearing was limited and that as many witnesses as Mr. Wiederin wanted would not be possible in the time allotted. Further, the administrative law judge explained that he would not need repetitive or cumulative evidence. The administrative law judge did inform Mr. Wiederin that he could keep the record open if a witness was crucial and issue a subpoena at that time and then reconvene to take the testimony of the necessary witness. Mr. Wiederin then sent another request for subpoenas. The administrative law judge disregarded this request having already explained to Mr. Wiederin that he was not going to issue any other subpoenas. After the completion of the hearing, the administrative law judge concluded that other witnesses for the employer were not necessary and therefore the record was closed and the hearing completed at 10:58 a.m.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time assistant manager from January 1, 2004 until she voluntarily quit effective January 15, 2004. The claimant was employed by the prior owner, Paul Revere's Pizza, Inc., which was owned entirely by her parents, Tom and Nancy Mueller. At that time the claimant was paid \$11.00 an hour for either a position as an assistant manager or a manager in which she worked between 30 and 40 hours per week. In addition, Paul Revere's Pizza, Inc. paid the claimant a \$300.00 car allowance and health insurance. Tom and Nancy Mueller sold the assets of Paul Revere's Pizza, Inc. to Wiederin Pizza Corporation effective January 1, 2004. Wiederin Pizza Corporation is owned by Bret Wiederin, the employer's witness. The entire assets were sold. The franchise name was included in the sale. The sale by Tom and Nancy Mueller of the assets of Paul Revere's Pizza, Inc. was not due to any forced sale or liquidation sale or bankruptcy sale. They had determined to move to Texas to be near their daughter and to consider other business opportunities there. The claimant was to accompany her parents in the move to Texas. The claimant quit to accompany her parents in moving to Texas.

When the claimant was employed by the employer herein, Wiederin Pizza Corporation, doing business as Paul Revere's Pizza, she was paid the identical wage that she had been paid by Paul Revere's Pizza, Inc. The claimant was an assistant manager averaging between 20 and 30 hours per week. The claimant never informed Mr. Wiederin about the car allowance or the health insurance. When the claimant quit on January 15, 2004, work remained for the claimant had she remained employed with the employer herein, Wiederin Pizza Corporation, doing business as Paul Revere's Pizza. Mr. Wiederin had retained all of the employees who had been employed by Paul Revere's Pizza, Inc. There had been no agreement by Mr. Wiederin or Wiederin Pizza Corporation, doing business as Paul Revere's Pizza, to employ the claimant or any other employee but Mr. Wiederin offered all of the employees, including the claimant, employment.

Prior to January 1, 2004, the claimant had planned to move to Texas with her parents and had told others about this, including coworkers and employees at an Ace Hardware store where the claimant was employed as well. The claimant left the employment with the Ace Hardware store

on January 31, 2004 to accompany her parents to move to Texas. The employer herein, Paul Revere's Pizza, Inc., filed the appropriate documents with Iowa Workforce Development indicating the sale of the business and obtained a separate and different employer identification number.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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(2) 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:

- (2) The claimant moved to a different locality.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant left her employment voluntarily to move to Texas in order to accompany her parents. The claimant seemed to maintain that she was laid off for a lack of work. However, both parties agree that the claimant was employed by the employer herein, Wiederin Pizza Corporation, doing business as Paul Revere's Pizza, owned by Mr. Wiederin, from January 1, 2004 to January 15, 2004. Further, Mr. Wiederin credibly testified that work remained for the claimant following January 15, 2004 but the claimant quit to move to Texas to accompany her parents. The claimant does not disagree with this but testified that she was told by her father, Tom Mueller, co-owner of Paul Revere's Pizza, Inc., that she was not part of the sale. The administrative law judge does not understand how an individual can be part of a sale. The claimant did testify that she had planned to move to Texas with her parents prior to January 1, 2004 before she was employed by the employer herein. The employer's witness, Mark Nelson, floor manager of an Ace Hardware store, confirmed that the claimant had left the employment of another Ace Hardware store to move to Texas with her parents. Mr. Nelson's testimony was hearsay but the administrative law judge concludes that it is the kind of evidence that a reasonably prudent person would be accustomed to rely upon the conduct of their serious affairs and the administrative law judge admits such testimony and, further, finds that it is credible. There is also evidence that Mr. Mueller had informed employees of Paul Revere's Pizza, Inc. and others that he and his wife were selling the assets to move to Texas to be near

his daughter and to follow other business opportunities. On the evidence here, the administrative law judge is constrained to conclude that the claimant voluntarily left her employment effective January 15, 2004.

The issue then becomes whether the claimant left her employment without good cause attributable to the employer. The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. As noted above, the evidence establishes the claimant left her employment voluntarily to move to Texas to accompany her parents who were moving to Texas. The claimant's parents, Tom and Nancy Mueller, owned Paul Revere's Pizza, Inc., and sold its assets to the employer herein effective January 1, 2004. The evidence establishes that the sale was not a forced sale or a liquidation sale but was rather a voluntary sale because Tom and Nancy Mueller wanted to relocate to Texas to be close to their daughter there and to pursue business opportunities there. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily to move to a different locality and this is not good cause attributable to the employer. The claimant testified that while working for the employer herein she was not paid a \$300.00 car allowance or health insurance as she had been paid by the selling employer, Paul Revere's Pizza, Inc., owned by Tom and Nancy Mueller, the claimant's parents. However, the evidence also establishes that the claimant never informed Mr. Wiederin of this or requested the \$300.00 car allowance and/or the health insurance. The evidence does establish that the claimant was paid the identical wage that she had been paid under the old owner. The claimant equivocated as to the position she held with the old employer and the hours worked for the old employer. The administrative law judge must conclude on the evidence here there is not a preponderance of the evidence that the claimant's employment with the employer herein, Wiederin Pizza Corporation, doing business as Paul Revere's Pizza, the purchaser of the business, was not substantially different than her employment with the prior business owner, Paul Revere's Pizza, Inc. Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant left her employment voluntarily as a result of any willful breach of her contract of hire by the old employer or any substantial change in such contract which would establish that she left her employment with good cause attributable to the employer. See 871 IAC 24.26(1).

In summary, and for all the reasons setout above, the administrative law judge concludes that the claimant left her employment voluntarily effective January 15, 2004 without good cause attributable to the employer and, as a consequence, she is disqualified to receive unemployment insurance benefits. The administrative law judge notes that in order to allow the claimant benefits, he would have to allow benefits to the claimant as the result of a sale of a business by the claimant's parents which sale was not as a result of any forced sale or liquidation sale but rather a voluntary sale so as to enable the parents to move to Texas to be near their daughter and pursue other business interests. The administrative law judge does not believe that a family member of one who sells a business voluntarily should be allowed to receive unemployment insurance benefits as a result of that sale. See Bartelt v. Employment Appeal Board, 494 N.W. 2d 684 (Iowa 1993). In that case the employee was allowed benefits but only because the sale was a sale pursuant to a voluntary petition in bankruptcy but that the employee had no practical choice because involuntary bankruptcy was imminent. The Iowa Supreme Court in that case held that the employee, which was the president and sole stock holder, was entitled to unemployment insurance benefits because the separation from employment was as a result of an involuntary sale and therefore it was not a "voluntary" quit.

Here, the evidence is clear that the sale was voluntary. Unemployment insurance benefits are denied to the claimant, until, or unless, she requalifies for such benefits.

The administrative law judge specifically notes that the claimant did receive unemployment insurance benefits pursuant to her claim for unemployment insurance benefits filed effective January 11, 2004. However, whether the claimant would be overpaid such unemployment insurance benefits was not set out on the notice of appeal and the administrative law judge does not now have jurisdiction to decide that issue. The administrative law judge concluded that that issue should be remanded to claims for an investigation and determination as to whether the claimant is overpaid unemployment insurance benefits as the result of a disqualifying separation from the employer herein, Wiederin Pizza Corporation, doing business as Paul Revere's Pizza. However, since the hearing, an authorized representative of Iowa Workforce Development issued a decision determining that the claimant is overpaid unemployment insurance benefits in the amount of \$3,722.31. An appeal hearing should be scheduled for the overpayment issue.

DECISION:

The representative's decision of December 28, 2005, reference 01, is affirmed. The claimant, Michelle L. Mueller, is not entitled to receive unemployment insurance benefits, until, or unless, she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer. An appeal hearing should be scheduled to determine whether the claimant is overpaid unemployment insurance benefits received by the claimant following her separation from the employer herein on or about January 15, 2004, pursuant to a decision by an authorized representative dated January 23, 2006, reference 02.

tjc/tjc