

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**NICHOLAS PLUMLEY**  
Claimant

**50<sup>TH</sup> STREET SPORTS LLC**  
Employer

**APPEAL 17A-UI-00335-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 11/27/16  
Claimant: Respondent (2)**

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Iowa Code § 96.5(1) – Voluntary Leaving  
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment  
871 IAC 24.10 – Employer Participation in the fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the January 3, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on February 1, 2017. Claimant participated along with his witness Brandi Melcher. Ms. Melcher is a former employee and also the claimant's mother. Employer participated through Nick Fogle, General Manager.

**ISSUES:**

Did the claimant voluntarily quit his employment without good cause attributable to the employer?

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: Claimant was employed full-time as a cook beginning in October 2014 through December 2, 2016 when he voluntarily quit.

The claimant, his mother and his sister all worked at the same location. The claimant was a cook and his mother, Brandi Melcher, was the bar manager. On December 2, the bookkeeper (Kim) arrived at the bar and found a note on the bar note that said, "I think this is best for me and my family." Taped to the note were two keys to the doors of the business. One of the keys was pink and had a cupcake on it, which was identified as belonging to Ms. Melcher. The note was not signed by anyone.

In the back of the bar on a whiteboard was written, "I'm sorry we love you all Brandi Raven Nic".

When the employer saw the notes, they assumed that Ms. Melcher, the claimant and Raven had all quit. A general manager from another property, Mr. Fogle came to the 50th Street property that morning to see about getting coverage for the three employees who had just quit. The claimant spoke to his mother who told him what had occurred. The claimant did not intend to quit his job, despite the fact that his mother and sister did intend to quit. Instead of contacting the kitchen manager Jason to tell him that he was not quitting and that his mother did not speak for him, the claimant assumed he had been discharged based on what his mother, Ms. Melcher told him. The claimant could have simply called Jason, or the owner, spoke to either of them and learned that he was not discharged and that continued work was available for him. The claimant had the ability to contact his boss as he had Jason's telephone number.

Ms. Melcher never had a text or a call from Jason saying that the business wanted nothing more to do with her or her family. Ms. Melcher did not tell Jason that only she was quitting. If she had, there would have been no reason for Mr. Fogle and Jason to immediately try to find a replacement for the claimant. Additionally, Ms. Melcher did quit for her daughter Raven.

The claimant mistakenly believed his employment had ended, when in fact it had not. If the claimant has simply called the owner or Jason, the kitchen manager, and told him he was not quitting, the whole situation could have been resolved.

Claimant has received unemployment benefits since filing a claim with an effective date of November 27, 2016.

The employer did participate personally in the fact-finding interview through the owner Mr. McFadden and through Mr. Fogle who together provided essentially the same information as was provided at the appeal hearing.

#### **REASONING AND CONCLUSIONS OF LAW:**

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

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

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:

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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2) (amended 1998). 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.

The claimant knew that his employer thought Ms. Melcher had told them he was quitting. He also knew that at that point Ms. Melcher was no longer an employee that she had voluntarily quit. The claimant knew that his boss, Jason, was at work at that time and he had Jason's cell phone number and could reach him directly. At that point it was the claimant's responsibility to contact his employer to find out if he had been discharged instead of relying on a former employee who, even though she was his mother, had a contentious relationship with the employer. The information the claimant was given by Ms. Melcher was not correct. He had not been discharged and could have continued working. Since the claimant did not follow up with management personnel or the owner, and his assumption of having been fired was erroneous, claimant's failure to continue reporting to work was an abandonment of his job. Benefits are denied.

Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

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.

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 section 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.

(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 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.

(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.

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.

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 the claimant 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 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 they did participate in the fact-finding interview. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer participated in the fact-finding interview the claimant is obligated to repay the benefits he received to the agency and the employer’s account shall not be charged.

**DECISION:**

The January 3, 2017, (reference 01) decision is reversed. The claimant voluntarily left his employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$2,472.00 and he is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and their account shall not be charged.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/rvs

**NOTE TO EMPLOYER:**

If you wish to change the street name of record, please access your account at: <https://www.myiowaui.org/UITIPTaxWeb/>.  
Helpful information about using this site may be found at: <http://www.iowaworkforce.org/ui/uiemployers.htm> and <http://www.youtube.com/watch?v= mpCM8FGQoY>