

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TIMOTHY D WEAVER
Claimant

APPEAL 15A-UI-08449-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CELLULAR ADVANTAGE INC
Employer

**OC: 07/05/15
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the July 23, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon the determination the employer did not furnish sufficient evidence to show the claimant was discharged for disqualifying job-related misconduct. The parties were properly notified about the hearing. A telephone hearing was held on August 19, 2015. Claimant Timothy Weaver participated on his own behalf. Employer Cellular Advantage, Inc. participated through Chief Financial Officer Matt Hayertz and VP of Sales Nick Villotti. Employer's Exhibit 1 was received. Department's Exhibit D-1 was received.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to employer or did the employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can 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: The claimant was employed full time as a store manager at the Atlantic, Iowa location beginning February 2, 2015, and was separated from employment on July 25, 2015. The employer is a company that contracts with US Cellular to sell its phones and services utilizing its name. It has policies related to professionalism regarding an employee's appearance and actions.

On July 7, 2015, a customer submitted a photograph from the claimant's Facebook page to US Cellular's Social Media division. The photograph shows the claimant in his work attire and

name badge standing in front of the store with two women. One woman has her hand placed on the claimant's crotch and he is looking down. The customer noted they loved their service and was excited to have the store move to their town until they saw the photograph. A US Cellular representative notified Vice President of Sales Nick Villotti of the situation and asked the employer to take action.

On July 9, 2015, Villotti and Director of Sales for the Iowa Market Chuck Richmond met with the claimant to discuss the situation. They explained he was suspended for two weeks through July 23, 2015 at which time he would be demoted to a sales consultant at the Merle Hay Mall location, the only location that had an open position. This was an action that had been used before when a store manager needed to be disciplined. They also took the claimant's name badge which identified him as a store manager and keys to the Atlantic location. The claimant acknowledged taking the picture, but was not sure he was going to accept the new position. Villotti sent a follow-up email to the claimant reiterating he was not being terminated, but suspended and transferred.

The claimant called Villotti later that afternoon and asked additional questions about the pay and whether he would be compensated for his increased fuel expense. During the conversation, the claimant stated he felt he was being treated unfairly and being subjected to discrimination. He told Villotti he would be taking the company to court and Villotti said they would see him there should he chose not to return to work. The claimant believed he was terminated at that time.

The claimant filed for unemployment benefits for the week beginning July 5, 2015. The employer protested his claim stating he was still employed. He and the employer participated in a fact-finding interview on July 22, 2015, the day before the claimant was to return to work. During the fact finding, the employer stated the claimant was still employed and scheduled to start work at the Merle Hay Mall location the following day. The claimant did not show up to work on July 23, 24, or 25.

The administrative record reflects that the claimant has received unemployment benefits in the amount of \$1,205.00, since filing a claim with an effective date of July 5, 2015, for the six weeks ending August 15, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was a voluntary quit without good cause attributable to the employer. Benefits are denied.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events. Notably, the claimant testified he did not know he was to report to work following his suspension and denied the employer stated during the fact-finding interview that he was supposed to report to the Merle Hay Mall location on July 23, 2015. However, the fact-finder's notes, Department's Exhibit D1, show the employer did state the claimant was still employed and expected to show up at work on July 23. Additionally, the claimant's testimony during the hearing was inconsistent with the notes taken during the fact-finding interview. During the fact-finding interview, the claimant denied that during the July 9th meeting the possibility of transferring to Des Moines was discussed. Yet during his testimony during the hearing, the claimant stated transferring to the Merle Hay Mall location was an option that was discussed during the July 9 meeting.

The claimant was not discharged on July 9, 2015. The employer credibly testified the claimant was placed on a two-week suspension and demoted to a sales consultant at the Merle Hay Mall location. The issue becomes whether the claimant voluntarily quit his employment with good cause attributable to his employer.

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.

Iowa Admin. Code r. 871-24.25(4) and (28) provide:

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 § 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 § 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:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

(28) The claimant left after being reprimanded.

Iowa Admin. Code r. 871-24.26(1) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the

worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). 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).

Even if the claimant had mistakenly believed he was terminated, 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 did not contact the employer to follow-up on his conversation with Villotti. He did not follow-up with the employer after the fact finding when it was stated he was expected to report to work the following day.

The claimant did not report for work for three consecutive days beginning on July 23, 2015 nor did he notify the employer he would not be at work on those days. An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. Inasmuch as the claimant failed to report for work or notify the employer for three consecutive workdays in violation of the employer policy, the claimant is considered to have voluntarily left employment without good cause attributable to the employer.

The claimant argued during the hearing that the employer instituted a change in his contract of hire when he was to be demoted and transferred to the Merle Hay Mall location. He would be losing pay and required to commute a much further distance. While the circumstances might be considered a change in the contract of hire, the employer demoted the claimant because of misconduct, specifically the photograph posted on his Facebook account. Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). The claimant took an offensive picture in his work attire, in front of the employer's store, and published it on his public Facebook profile. The one-time incident with the photograph is disqualifying job-related misconduct as it is showed a deliberate disregard of the employer's interest. Therefore, the employer's action to demote and transfer the claimant rather than discharge him, did not give the claimant a good-cause reason for leaving the employment. Benefits are denied.

Iowa Code § 96.7 provides, in pertinent part:

7. Recover 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.

871 IAC 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 § 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 § 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 § 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 § 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 § 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 § 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 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), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The July 23, 2015, (reference 01) unemployment insurance decision is reversed. The claimant voluntarily left the 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 \$1,205.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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