

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

BRANDON L ETTE
Claimant

MENARD INC
Employer

APPEAL 17A-UI-05305-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/23/16
Claimant: Respondent (4R)

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 May 15, 2017, (reference 03) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 5, 2017. Claimant participated. Employer participated through attorney Paul Hammell, assistant general manager Ben Schultz, and general manager John Ryan. Employer Exhibit 1 was admitted into evidence with no objection. Official notice was taken of the administrative record, including claimant's benefit history and wage history, with no objection.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the 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: Claimant was employed part-time as a sales team member from January 18, 2017, and was separated from employment on April 15, 2017.

The employer has an attendance policy which applies point values to attendance infractions, including absences and tardies. The policy also provides that an employee will be warned as points are accumulated, and will be discharged upon receiving ten points in a rolling ninety day period. The employer requires employees contact the employer and report their absence prior to the start of their shift. When an employee calls into the employer to report an absence, the

department manager notifies the human resources coordinator to ensure that the employee gets the correct amount of points. Claimant was aware of the employer's policy.

The final incidents occurred when claimant was absent on April 5, 6, 7, 8, 9, 12, 14, and 15, 2017 from his scheduled shifts. Employer Exhibit 1. Claimant properly reported his absences on April 5 and 6, 2017. Employer Exhibit 1. Claimant was a no-call/no-show on April 7, 8, 9, 12, 14, and 15, 2017. Employer Exhibit 1. The employer did try to contact claimant during these absences. When the employer tried to contact claimant after April 2, 2017, the employer requested documentation from claimant about his absences. On April 15, 2017, the employer attempted to contact claimant, but it was unsuccessful. The employer determined that claimant had abandoned his job. Claimant did not contact the employer after April 15, 2017. The last time the employer had contact with claimant was on April 6, 2017. The department managers did not report any contact with claimant on April 7, 8, 9, 12, 14, and 15, 2017.

Claimant testified that around April 15, 2017, he came to the employer and he was no longer on the schedule. Claimant testified he had a conversation with his direct supervisors about his employment and was told he could go talk to Mr. Schultz about his employment, but he chose not to. Claimant testified his direct supervisors told him that he was discharged because of his points and they did not know if he was coming back.

Claimant was last warned on February 26, 2017, that he faced termination from employment upon another incident of unexcused absenteeism. Employer Exhibit 1. Claimant was also issued a written warning for his attendance infractions on February 25, 2017. Employer Exhibit 1.

The administrative record reflects that claimant has not requalified for benefits and had other base period wages but the record is unclear as to whether he is otherwise monetarily eligible.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was not discharged, but voluntarily quit this part-time employment without good cause attributable to the employer, but has not requalified and the record is unclear as to whether claimant is otherwise monetarily eligible after removal of these wage credits.

It is the duty of an administrative law judge and 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, as the finder of fact, 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 evidence you believe; whether a witness has made inconsistent statements; the witness's 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).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibit admitted into evidence. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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.

Iowa Code section 96.5(1)g 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. But the individual shall not be disqualified if the department finds that:

g. The individual left work voluntarily without good cause attributable to the employer under circumstances which did or would disqualify the individual for benefits, except as provided in paragraph "a" of this subsection but, subsequent to the leaving, the individual worked in and was paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.27 provides:

Voluntary quit of part-time employment and requalification. An individual who voluntarily quits without good cause part-time employment and has not requalified for benefits following the voluntary quit of part-time employment, yet is otherwise monetarily eligible for benefits based on wages paid by the regular or other base period employers, shall not be disqualified for voluntarily quitting the part-time employment. The individual and the part-time employer which was voluntarily quit shall be notified on the Form 65-5323 or 60-0186, Unemployment Insurance Decision, that benefit payments shall not be made which are based on the wages paid by the part-time employer and benefit charges shall not be assessed against the part-time employer's account; however, once the individual has met the requalification requirements following the voluntary quit without good cause of the part-time employer, the wages paid in the part-time employment shall be available for benefit payment purposes. For benefit charging purposes and as determined by the applicable requalification requirements, the wages paid by the part-time employer shall be transferred to the balancing account.

This rule is intended to implement Iowa Code section 96.5(1)"g."

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).

Claimant was absent from his scheduled shifts on April 5, 6, 7, 8, 9, 12, 14, and 15, 2017; however, he did properly report his absences on April 5 and 6, 2017. After April 6, 2017, claimant stopped contacting the employer to report his absences and was a no-call/no-show on April 7, 8, 9, 12, 14, and 15, 2017. Claimant's argument that he contacted his direct supervisors is not persuasive. Although the employer did not present claimant's direct supervisors to provide sworn testimony or submit to cross-examination, the combination of employer exhibit one and Mr. Schultz's testimony, when compared to claimant's recollection of the events, establish the employer's evidence as credible. Claimant's leaving the employment without

notice or reason and his failure to maintain contact with the employer for six consecutive shifts renders the separation job abandonment without good cause attributable to the employer. Furthermore, claimant testified that he did return to the employer around April 15, 2017 and his direct supervisors told him he was separated, but he could speak to Mr. Schultz if he wanted too; however, claimant elected not to speak to Mr. Schultz. 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. *LaGrange v. Iowa Dep't of Job Serv.*, (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984). Since claimant did not follow up with Mr. Schultz, his failure to continue reporting to work or report his absences was an abandonment of the job.

Claimant's leaving the employment without notice or reason and his failure to maintain contact with the employer for six consecutive shifts renders the separation job abandonment without good cause attributable to the employer. Inasmuch as abandoned his job without good cause attributable to the employer, the separation is disqualifying. Claimant has not requalified for benefits since the separation but may be otherwise monetarily eligible according to base period wages.

DECISION:

The May 15, 2017, (reference 03) unemployment insurance decision is modified in favor of the appellant. Claimant voluntarily left the part-time employment without good cause attributable to the employer and has not requalified for benefits but may be otherwise monetarily eligible. Benefits are allowed, provided the claimant is otherwise eligible. The employer's account (employer account number 016752-001) shall not be charged.

REMAND: Claimant's monetary eligibility after the quit of this part-time employment (employer account number 016752-001) as delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs