IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANN L ESSY Claimant **ACUTE CARE INC** Employer	**APPEAL 16A-UI-11598-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/25/16** **Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
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/appellant filed an appeal from the October 17, 2016 (reference 01) unemployment insurance decision that allowed claimant unemployment insurance benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 30, 2016. Claimant, Ann L. Essy, participated personally. Employer, Acute Care Inc., was represented by Attorney Jeff Oliver. Employer participated through witnesses Jared Smith, Hannah Menadue, and Jeff Oliver. Claimant Exhibits A – L were admitted. Employer's Exhibits 1 – 5 were admitted. The administrative law judge took administrative notice of the claimant's unemployment insurance record including the fact-finding documents.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?
Was the claimant discharged for disqualifying job-related misconduct?
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 the Director of Physician Recruitment. This employer is a medical practice management company that contracts with hospitals and other medical facilities in providing emergency physicians to fulfill the medical facilities' needs. Claimant began her employment on April 4, 2016 and she separated from employment on September 14, 2016, when she voluntarily quit. See Exhibit 1. Claimant's immediate supervisor at the time of hire was Paul Hudson, Chief Operating Officer. Claimant's job duties consisted of hiring and training staff members; organizing the department to ensure that there was an appropriate amount of physicians available for the needs of the employer's clients; and recruitment of new physicians.

When claimant began her employment she had one staff member that she supervised. During the course of claimant's employment she had six staff members who she was supervising.

On June 15, 2016 claimant received an email from Mark Menadue, the President and CEO of the company. See Exhibit A. This email congratulated claimant in the work she had done with the department to date, but reiterated that productivity, especially in Minnesota, needed to increase. See Exhibit A. Claimant responded to the email the same day with several examples of improvements to the department which she believed would lead to increased productivity. See Exhibit A. Claimant's email sets forth that she had been previously working with Jared Smith in order to revamp the physician recruiter's incentive plan. See Exhibit A.

In July of 2016, claimant and Mr. Hudson had a conversation about the recruiters (claimant's staff members) each making at least 75 telephone calls per day. One of the changes claimant had instituted when she started included changing the 75 telephone call per day requirement for recruiters to a 75 activities per day requirement. The activities could include telephone calls, follow up calls, emails, letters or reviewing online websites for leads. Mr. Hudson believed that the recruiters needed to focus on the telephone calls rather than the other activities. Claimant reiterated to her staff on July 7, 2016 that they needed to strive to reach the 75 activities per day goal with an emphasis on phone calls. See Exhibit B.

On August 30, 2016 claimant met with Mr. Hudson to discuss the productivity of the department. During this meeting claimant was told that Jared Smith would be assuming a more formal leadership role with the recruitment department. See Exhibit C. Mr. Smith would be claimant's direct supervisor, along with Mr. Hudson. This change was put into place because Mr. Hudson was out of the office on numerous occasions. Management believed that the recruitment department needed a supervisor who was at the office regularly. Part of the discussion entailed claimant sharing information from staff meetings; agendas; and the performance of her staff with Mr. Smith. See Exhibit C. During the meeting claimant indicated that she intended to set up a desk in the pod. See Exhibit C. The reason for the move from claimant's office to the pod was so that she could have a workspace closer to the team. See Exhibit D.

On September 6, 2016 Mr. Smith cancelled one of the recruiters planned trips to a job fair without claimant's knowledge or approval. See Exhibit H. This was because the workload had increased. See Exhibit I.

On September 7, 2016 claimant was out of the office for personal reasons. Mr. Smith and Anthony Cauterucci held a meeting with claimant's staff members to show them how to make contacts with potential physicians. They attempted to contact physicians on two occasions but their attempts failed. Claimant became aware of this when she returned to work.

On Friday, September 9, 2016 claimant emailed Mr. Hudson with her concerns regarding Mr. Smith's supervision. See Exhibit I. Those concerns included her staff members receiving conflicting direction (between herself and Mr. Smith); Mr. Smith cancelling the recruiter trip without consulting or informing her; the need to hire additional staff due to resignations; that there was a high level of stress within the department; claimant's concern that Mr. Smith was only available to attend one of the newly implemented huddles, as well as changing them from a twice daily occurrence to once daily; and Mr. Smith and Mr. Cauterucci holding a meeting with her staff regarding the proper way to contact the ER. See Exhibit I. Claimant did not receive an immediate response to her email. Claimant sent another email to Mr. Hudson on Sunday, September 11, 2016 at 2:43 p.m. See Exhibit J. Mr. Hudson responded back six minutes later

stating that he was getting on a plane and would discuss these issues on Wednesday, September 14, 2016 when he was back in the office.

From September 1, 2016 through September 14, 2016 it is clear that Mr. Smith took a hands-on approach to supervising claimant. Claimant argues that Mr. Smith was put into a position to effectually take over her job as director rather than as a supervisor to her. Claimant argues that she was stripped of her job duties as Director of Recruiting and that this was a change in her contract of hire, or, alternatively, that it was an intolerable or detrimental working condition.

On Friday, September 9, 2016 Jeff Oliver, Vice-President and General Counsel, approached claimant in the hallway and asked to have her meet with him before she left for the day. This was unusual as Mr. Oliver was not her direct supervisor. She had previously witnessed Mr. Oliver discharge another employee from employment. Claimant did not meet with Mr. Oliver prior to leaving work on September 9, 2016.

Claimant failed to report to work on Monday, September 12, 2016 due to illness. See Exhibit 2. Claimant failed to report to work on Tuesday, September 13, 2016 due to appointments. See Exhibit 2. Claimant tendered a written resignation to Mr. Hudson via email correspondence on Wednesday, September 14, 2016 at 7:00 a.m. See Exhibit 1. Continuing work was available to the claimant if she had not voluntarily quit her employment. She was not going to be discharged or laid off for lack of work. Claimant had no discipline during the course of her employment.

The claimant's administrative record establishes that she has received unemployment insurance benefits in the gross amount of $4,176.00 for the nine weeks between October 1, 2016 and November 26, 2016. Employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily quit her employment without good cause attributable to the employer. Benefits are denied.

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. 871-24.26(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.

In general, a substantial pay reduction of 25 to 35 percent or a similar reduction of working hours creates good cause attributable to the employer for a resignation. *Dehmel v. Emp't Appeal Bd.*, 433 N.W.2d 700 (Iowa 1988). If claimant could establish that she left due to a substantial change in the contract of hire, benefits would be allowed.

Iowa Admin. Code r. 871-24.26(4) 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:
>
> (4) The claimant left due to intolerable or detrimental working conditions.

As such, if claimant establishes that she left due to intolerable or detrimental working conditions, benefits would be allowed. Generally notice of an intent to quit is required by *Cobb v. Employment Appeal Board*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Employment Appeal Bd.*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Employment Appeal Bd.*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). These cases require an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. Accordingly, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added, however, to rule 871-24.26(6)(b), the provision addressing work-related health problems. No intent-to-quit requirement was added to rule 871-24.26(4), the intolerable working conditions provision. Our supreme court concluded that, because the intent-to-quit requirement was added to 871-24.26(6)(b) but not 871-24.26(4), notice of intent to quit is not required for intolerable working conditions. *Hy-Vee, Inc. v. Employment Appeal Bd.,* 710 N.W.2d 1 (Iowa 2005).

"Good cause attributable to the employer" does not require fault, negligence, wrongdoing or bad faith by the employer. *Dehmel v. Employment Appeal Bd.*, 433 N.W.2d 700, 702 (Iowa 1988)("[G]ood cause attributable to the employer can exist even though the employer is free from all negligence or wrongdoing in connection therewith"); *Shontz v. Iowa Employment Sec. Commission*, 248 N.W.2d 88, 91 (Iowa 1976)(benefits payable even though employer "free from fault"); *Raffety v. Iowa Employment Security Commission*, 76 N.W.2d 787, 788 (Iowa 1956)("The good cause attributable to the employer need not be based upon a fault or wrong of such employer."). Good cause may be attributable to "the employment itself" rather than the employer personally and still satisfy the requirements of the Act. *Raffety*, 76 N.W.2d at 788 (Iowa 1956). Therefore, claimant was not required to give the employer any notice with regard to the intolerable or detrimental working conditions prior to her quitting. However, claimant must prove that her working conditions were intolerable, detrimental, or that there was a substantial change in the contract of hire.

In order for the claimant to prove that there was a change to the terms of hire which would constitute good cause for her to quit, she must prove that the changes were substantial. The changes in claimant's job duties were minor. The fact that Mr. Smith was her new supervisor and was more "hands-on" does not rise to the level of substantial change in her contract of hire. In fact, Mr. Smith only attended one huddle and claimant simply was required to keep Mr. Smith informed on the progress of her department. Claimant made the decision to move from her office to a pod with the recruiters and this was so that she would be closer to them for support. Lastly, the fact that Mr. Smith cancelled a planned trip for one of the recruiters due to increased workload does not establish any change in the contract of hire. In this case, the claimant has failed to establish that there was a *substantial* change in the contract of hire.

Claimant also argues that her working conditions were intolerable or detrimental. Intolerable working conditions have been found when the claimant was subjected to working in two different job positions with two different supervisors who had given him conflicting instructions. *See McCunn Equipment Company, Inc. v. Employment Appeal Bd.*, 451 N.W.2d 510 (Iowa Ct. App. 1989). However, this case is factually distinguishable from *McCunn* in that claimant was not working two separate job positions and her complaint was not that Mr. Hudson and Mr. Smith were giving her conflicting instructions.

While it is clear that Mr. Smith had more suggestions with how claimant was running the department than Mr. Hudson did, the facts delineated in the findings of fact listed above do not rise to the level of intolerable or detrimental working conditions which would be good cause for the claimant to voluntarily quit. There is no indication that claimant was being demoted in any way or that her job duties were being stripped away from her. Claimant has failed to prove that she was subjected to intolerable or detrimental working conditions. Thus, the separation was without good cause attributable to the employer. Benefits are denied. Because benefits are denied, the issues of overpayment and chargeability must be addressed.

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

> 7. Recovery of overpayment of benefits.
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> 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.
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> 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.
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> (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.
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> (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.
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> (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.
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> (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.
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> (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.
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> (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 she 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 those 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 did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received in connection with this employer's account, and this employer's account shall not be charged.

DECISION:

The October 17, 2016 (reference 01) unemployment insurance decision is reversed. The claimant voluntarily left the employment without good cause attributable to the employer. Unemployment insurance benefits shall be withheld in regards to this employer until such time as claimant is deemed eligible. The claimant has been overpaid unemployment insurance benefits in the amount of $4,176.00 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.

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Dawn Boucher
Administrative Law Judge

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Decision Dated and Mailed

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