

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**SHERRY L FLEENER**  
Claimant

**CUNNINGHAM ENTERPRISES INC**  
Employer

**APPEAL 17A-UI-13024-NM-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 11/19/17**  
**Claimant: Respondent (1R)**

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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 December 11, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on January 10, 2018. The claimant participated and testified. The employer participated through owner Sheri Cunningham and manager Amber Moritz. Employer's Exhibits 1 through 4 were received into evidence.

**ISSUES:**

Did claimant voluntarily quit the employment with good cause attributable to 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 laborer/sorter from September 21, 2017, until this employment ended on October 20, 2017, when she voluntarily quit.

According to claimant her first official day of work was September 25, 2017, but she worked for four and a half hours on September 22, 2017 for \$25.00 cash. Claimant testified it was her understanding that she was to be paid minimum wage of \$7.25 for her work that day and that her payment was short. The next time claimant worked was September 25, 2017. Claimant's rate of pay was \$8.00 per hour. Claimant testified she worked every day of that week from 8:30 a.m. to 5:30 p.m., with a half hour unpaid lunch break each day, for a total of 42.5 hours. When claimant received her pay check, the envelope contained a check for 34 hours of work as well as \$48.00 in cash. Claimant testified the week of October 2, 2017 she again worked Monday through Friday and when she received her payment for work that week the envelope again contained a check for 34 hours plus \$66.00 in cash. When claimant asked Cunningham about the payment she had received, Cunningham told her some employees preferred payment that way to avoid earning too much for Social Security Disability. Claimant explained she was

getting ready to draw social security in the next seven or eight years and would prefer all her wages be reported so she could get credit for them when applying for social security. According to claimant, the next week she only worked 39.5 hours because she had to leave work early on Tuesday, October 10 to attend a doctor's appointment. Claimant's hours for the week of October 9 were therefore correctly reflected in her check, but she testified she was still owed money from the employer for the prior weeks and her work on September 22.

On October 16, 2017, claimant was scheduled to be off work for a doctor's appointment. Claimant testified her next scheduled shift was October 17, 2017, but that she was unable to attend work because she was sick. Claimant testified her phone records show she called the employer to report the absence at 7:41 a.m. and that the call lasted for two minutes and 18 seconds. According to claimant no one answered the phone so she left a voicemail stating she would not be in and why. Claimant was still sick the following day and again called in. Claimant asked to speak to either Cunningham or Moritz, but was told by the individual who answered the phone they were not available. Claimant testified she asked the individual to please have one of them call her, as she wanted to speak to them about her health situation and when she would be back in to work. Moritz confirmed she was told claimant called that day, but that the individual who took the call said claimant was going to call back later, so no attempt was made to contact her. Claimant did not return to work the remainder of the week due to illness.

On October 20, 2017, claimant went in to work to speak to Cunningham about her absences that week, to provide her with a doctor's excuse, and to address the issues with her pay. When claimant went in she began speaking to Moritz. Cunningham then instructed Moritz to stop speaking to claimant and return to work. According to claimant Cunningham did not want to speak with her about the issues she came in to discuss and told her, "You don't deserve to have anyone talking to you." Claimant resigned effective immediately at that time. Claimant testified this was not the first time Cunningham had spoken to her in a harsh or abusive manner. According to claimant, during the short time she did work for the employer she was regularly berated and yelled at by Cunningham. Moritz confirmed claimant had previously mentioned to her that she felt picked on by Cunningham and had told claimant if she just did her job right Cunningham would leave her alone and she would not feel picked on.

Cunningham disputed much of claimant's testimony. Cunningham denied speaking to employees in a manner that was overly harsh or demeaning, but testified she did give necessary coaching, which claimant did not seem to appreciate. Cunningham denied that claimant, or any employee, was paid for any work in cash. According to Cunningham, claimant did not work at all on September 22, 2017. Cunningham initially testified claimant never worked on Tuesdays, when the employer is closed to the public, but agreed claimant was a full-time employee. When asked about the additional hours the week of October 9, Cunningham agreed claimant did work that Tuesday. Cunningham initially testified claimant worked four and a half hours on October 10, but changed that testimony several times before stating she did not have her records with her. Cunningham testified she never received any calls the week of October 16 indicating claimant would not be in, though she agreed she did have October 16 off as a planned absence. Cunningham initially denied speaking to claimant on October 20, 2017, but then testified she did speak to her, but only briefly. According to Cunningham, claimant came in to get her check and she handed it to her, stating she was disappointed claimant did not show up to work that week. Moritz similarly testified claimant did not work Tuesdays and denied employees are ever paid in cash.

The claimant filed a new claim for unemployment insurance benefits with an effective date of November 19, 2017. The claimant filed for and received a total of \$1,281.00 in unemployment insurance benefits for the weeks between November 19, 2017 and January 6, 2018. The employer did not participated in a fact finding interview regarding the separation on December 7, 2017, as it did not receive a phone call for the interview. The fact finder determined claimant qualified for benefits.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant voluntarily left the employment with good cause attributable to the employer.

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 Admin. Code r. 871-24.26 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:

(3) The claimant left due to unlawful working conditions.

(4) The claimant left due to intolerable or detrimental working conditions.

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 notice of an intent to quit had been required by *Cobb v. Emp't Appeal Bd.*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Emp't Appeal Bd.*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Emp't Appeal Bd.*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). Those cases required an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. However, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added 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 recently concluded that, because the intent-to-quit requirement was added to rule 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. Emp't Appeal Bd.*, 710 N.W.2d 1 (Iowa 2005).

The decision in this case rests, at least in part, on the credibility of the witnesses. 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. *Id.* 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. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events. When questioned

about her activities for the employer on Tuesdays claimant was specifically able to recall the hours she worked, the type of work she had done, and describe the other people she worked with. Claimant was also able to testify to the exact date, time, and duration for a call she made to the employer to report she would be absent on October 17, 2017. It does not follow that claimant would call in that day if she was not scheduled to work. The employer's testimony, on the other hand, was vague and inconsistent. Cunningham initially testified claimant never worked on Tuesdays, then changed her testimony to state claimant only worked on Tuesday, October 10, which happened to be the first Tuesday following claimant's alleged request not to be paid in cash, and was unable to clearly recall what hours she did work on that Tuesday. Additionally, the record was left open to allow the employer additional time to provide claimant's time clock records in support of its testimony. The employer indicated it would be able to produce these records by 10:00 a.m. on January 11, 2018, but as of 2:30 p.m. on that day no records had been received. For all of the reasons listed above, claimant has provided the more credible testimony.

Here, claimant resigned after being subjected to behavior from her employer which she found abusive as well as due to issues with being properly paid for work performed. In the absence of an agreement to the contrary, an employer's failure to pay wages when due constitutes good cause for leaving employment. *Deshler Broom Factory v. Kinney*, 140 Nebraska 889, 2 N.W.2d 332 (1942). No reasonable person should be expected to continue working under the conditions claimant was subjected to under this employer. Claimant has shown the manner in which she was treated by the employer, in combination with the issues surrounding her pay created an intolerable work environment for her that gave rise to a good cause reason for leaving the employment. As benefits are allowed, the issues of overpayment and participation are moot.

It is unclear from the testimony and record whether all of claimant's wages, specifically any paid in cash, have been properly reported to Iowa Workforce Development. Accordingly, this issue must be remanded to the Tax Bureau for initial investigation and determination.

**DECISION:**

The December 11, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant voluntarily left the employment with good cause attributable to the employer. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The issues of overpayment and participation are moot.

**REMAND:**

Information was provided which indicates the employer may not have fully reported wages for claimant. That issue is remanded to the Tax Bureau of Iowa Workforce Development for an investigation and determination with notice and appeal rights to both parties.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/scn