IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

PENYA WILLIAMS Claimant **NKCS LLC** Employer	**APPEAL 19A-UI-09371-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/20/19** **Claimant: Respondent (2)**

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/appellant filed an appeal from the November 21, 2019 (reference 01) unemployment insurance decision that allowed unemployment insurance benefits to the claimant based upon her discharge from employment. The parties were properly notified of the hearing. A telephone hearing was held on December 23, 2019. The claimant, Penya Williams, participated personally. The employer, NKCS LLC, participated through witnesses Paul Schwegler and Nicole Chavas-Schwegler. Employer's Exhibits 1 and 2 were admitted. The administrative law judge took official notice of the claimant's unemployment insurance benefits records.

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 laundry attendant. This employer operates a laundromat. Claimant was employed from November 28, 2017 until October 20, 2019. Claimant's job duties involved cleaning the laundromat, making change for customers, and helping customers operate the machines. Paul Schwegler and Nicole Chavas-Schwegler were the claimant's supervisors.

The final incident leading to claimant's separation from employment occurred on October 20, 2019. Claimant was late to work for her scheduled shift. See Exhibit 2. Tyrone was the co-worker that the claimant was supposed to be replacing when she was starting her shift. Claimant came into the office and was laughing at Tyrone. See Exhibit 2. Tyrone was upset with her for being late and asked her what her problem was. See Exhibit 2. Claimant told Tyrone "goodbye" and waived at him. See Exhibit 2. Tyrone then told the claimant that he was

going to call Paul and Nicole (referring to the claimant's supervisors). See Exhibit 2. Tyrone then left the building. See Exhibit 2. Claimant immediately followed Tyrone out of the building after he stated that he was going to call the claimant's supervisors. See Exhibit 2.

Once outside, claimant and her boyfriend both yelled and hit Tyrone. Tyrone hit the claimant. Tyrone, claimant and claimant's boyfriend all telephoned Mrs. Chavas-Schwegler to come to the laundromat. Upon arriving at the laundromat, Mr. Schwegler and Mrs. Chavas-Schwegler both spoke to claimant about the incident. See Exhibit 2. Claimant told Mr. Schwegler and Mrs. Chavas-Schwegler that she did not want her job anymore. See Exhibit 2. Claimant had already packed her personal belongings prior to Mr. Schwegler and Mrs. Chavas-Schwegler arriving at the laundromat. See Exhibit 2. Claimant's resignation was accepted by the employer. No further investigation was conducted by the employer regarding whether or not the final incident was sufficient for the employer to discharge the claimant because the claimant had already voluntarily resigned. Claimant believed that she would be fired because of the incident she had previously with another co-worker named D.J. See Exhibit 2.

Claimant had received a written warning for having a verbal altercation in the office with another co-worker named D.J. See Exhibits 1 and 2. This incident occurred on September 1, 2019. See Exhibit 1. Claimant yelled at D.J. and called her a "worthless piece of shit" after preventing her from leaving the office at the laundromat. See Exhibits 1 and 2. The written warning stated that further discipline may result in additional discipline up to and including dismissal. See Exhibit 1.

Claimant's administrative records establish that she has received unemployment insurance benefits of $1,899.00 for nine weeks between October 20, 2019 and December 21, 2019. The employer participated in the fact-finding interview by telephone and provided information regarding the claimant's separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily quit 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.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). 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). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

The decision in this case rests, at least in part, upon the credibility of the parties. The issue must be resolved by an examination of witness credibility and burden of proof. 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, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds that the employer's version of events is more credible than the claimant's version of events.

Claimant had an intention to quit and carried out that intention by tendering her verbal resignation to the employer. Claimant had already packed her personal belongings prior to her supervisors even arriving at the laundromat. It is clear that the claimant intended to quit that day.

Because the claimant voluntarily quit, she 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).

In this case, claimant voluntarily quit because she did not get along with her co-worker and she believed that she would be discharged.

Iowa Admin. Code r. 871-24.25(6) provides:

> 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 section 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 section 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:
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> (6) The claimant left as a result of an inability to work with other employees.

As such, claimant's leaving was not for a good-cause reason attributable to the employer according to Iowa law. Benefits must be denied.

Even if the claimant is not considered to have voluntarily quit, the final incident leading to her separation would be considered disqualifying job-related misconduct sufficient to warrant a denial of unemployment insurance benefits. While the employer was not given the opportunity to investigate the final incident in order to make a decision whether it would discharge the

claimant, the final incident on October 20, 2019 would have been considered substantial job-related misconduct.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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 Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job-related misconduct in a discharge case. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

Prior to the final incident on October 20, 2019, claimant had been warned that yelling at co-workers was not acceptable. The credible evidence establishes that the claimant was laughing at a co-worker, yelling at a co-worker, and then pursued the co-worker outside where she participated in an altercation with the co-worker. She never attempted to retreat or seek supervisor assistance. Claimant was the person who pursued the co-worker outside.

The employer has a right to expect civility among its employees. An employer does not have to tolerate violence in the workplace because it diminishes the overall expectation of safety, well-being and respect among employees in the work environment. Where a claimant participated in a confrontation without attempt to retreat, the Iowa Court of Appeals rejected a self-defense argument stating that to establish such a defense the claimant must show freedom from fault in bringing on the encounter, a necessity to fight back, and an attempt to retreat unless there is no means of escape or that peril would increase by doing so. *Savage v. Emp't Appeal Bd.*, 529 N.W.2d 640 (Iowa Ct. App. 1995).

It is clear that the claimant was not free from fault in bringing on the encounter. Claimant was the party who instigated the encounter and pursued the co-worker outside. Further, the claimant did not have a necessity to fight back and could have retreated instead of engaging in the physical altercation. Claimant chose not to, pursued her co-worker outside after yelling at him, and engaged in fighting at work. This behavior was contrary to the best interests of employer and would be considered disqualifying misconduct if the claimant had not voluntarily quit. Benefits are denied. Because benefits are denied, the issues of overpayment and chargeability must be addressed.

Iowa Code § 96.3(7)a-b 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.

(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.

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. The employer participated in the fact-finding interview by submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer, so the claimant is obligated to repay to the agency the benefits she received, $1,899.00 for the nine weeks between October 20, 2019 and December 21, 2019, and this employer’s account shall not be charged.

DECISION:

The November 21, 2019 (reference 01) unemployment insurance decision is reversed. Claimant voluntarily quit her employment, without good cause attributable to the employer. Unemployment insurance benefits are denied until claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount after her separation date, and provided she is otherwise eligible. The claimant has been overpaid unemployment insurance benefits of $1,899.00 for the nine weeks between October 20, 2019 and December 21, 2019 and is obligated to repay the agency those benefits. The employer participated 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

db/scn