IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

DOROTHY I EDGETON
Claimant

APAC CUSTOMER SERVICES OF IOWA LLC
Employer

APPEAL NO. 11A-UI-04914-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/06/11
Claimant: Appellant (2)

Iowa Code § 96.5(1) – Voluntary Leaving

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 31, 2011 (reference 01) decision that denied benefits. After due notice was issued, a telephone conference hearing was held on May 9, 2011. Claimant participated. Employer responded to the hearing notice instructions but was not available when the hearing was called, did not respond to the voice mail message, and did not participate. The employer called after the hearing record was closed and indicated their representative ADP provided a number to the front desk rather than the witness' desk.

ISSUE:

The issue is whether claimant voluntarily left the employment with good cause attributable to the employer.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a customer service representative from November 24, 2008 and was separated from employment on February 7, 2011. A coworker wore a lot of cologne and the employer knew that claimant was sensitive to chemicals that would cause her to have a migraine headache. She told her supervisor Lance that the smell was causing problems for her and was going home for the day. The same thing happened the next day and when her supervisor did not do anything about it she told him that she would take the concern above his head to Angie. He told her to "fucking take it to Angie then." Angie put her off until the following Monday and declined to move claimant to another schedule so she could avoid the cologne and abusive language. The cologne wearer also confronted her in the parking lot about having moved to another area and increased his cologne usage.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the employer's request to reopen the hearing should be granted or denied.

871 IAC 26.14(7) provides:

> (7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.
>
> a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.
>
> b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.
>
> c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

Inasmuch as the employer is bound by its agent's actions, no good cause reason has been established to reopen the record because of the agent's failure to provide a correct number at which to reach the employer. Therefore, the appellant's request to reopen the hearing is denied.

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

871 IAC 24.26(2), (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:
>
> (2) The claimant left due to unsafe working conditions.
>
> (4) The claimant left due to intolerable or detrimental working conditions.

A notice of an intent to quit had been required by *Cobb v. Employment Appeal Board*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Employment Appeal Board*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Employment Appeal Board*, 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 IAC 24.26(6)(b), the provision addressing work-related health problems. No intent-to-quit requirement was added to rule 871 IAC 24.26(4), the intolerable working conditions provision. Our supreme court recently concluded that, because the intent-to-quit requirement was added to 871 IAC 24.26(6)(b) but not 871 IAC 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).

"The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. EAB*, 462 N.W.2d 734 (Iowa App. 1990). Inasmuch as an employer can expect professional conduct and language from its employees, claimant is entitled to a working environment without being the target of abusive, obscene, name-calling. An employee should not have to endure abusive or foul language directed at them in order to retain employment any more than an employer would tolerate it from an employee. Lance's response to claimant's notice she would take her concern above his head was abusive. The employer's failure to curb the amount of cologne worn by a coworker that was making claimant ill was intolerable, detrimental, and unsafe to claimant. This gave rise to a good cause reason for leaving the employment. Benefits are allowed.

DECISION:

The March 31, 2011 (reference 01) decision is reversed. The claimant voluntarily left her employment with good cause attributable to the employer. Benefits are allowed, provided the claimant is otherwise eligible. The benefits withheld shall be paid to claimant.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs