

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VICTORIA A NUNNALLY
Claimant

WAL-MART STORES INC
Employer

APPEAL 16A-UI-07695-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 06/12/16
Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 8, 2016, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 1, 2016. Claimant participated. Dan Witkoske testified on behalf of claimant. Employer participated through personnel coordinator Kristina Randolph and shift manager Sally Ward. Assistant manager Michael Kostboth registered for the hearing on behalf of the employer, but he did not attend the hearing.

ISSUE:

Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time in lawn and garden from July 27, 2013, and was separated from employment on December 29, 2015, when she quit.

Around the first week of December 2015, claimant gave the employer her written resignation notice that she was going to resign effective January 1, 2016. Claimant's last scheduled work day was December 29, 2015 (the next days were scheduled days off). Claimant put the notice in the blue box in personnel. Claimant did not state a reason as to why she was resigning in her written notice. The employer did not talk to claimant until about two or three days before December 29, 2015; then the employer started talking with her about staying. The employer told claimant that they were taking care of the issue (harassment); however, that is what the employer had been saying for the past couple of months. The employer told claimant that it could not tell claimant what they were doing with her coworker because of employee confidentiality.

Claimant resigned because a coworker had been constantly harassing her since October 2015. The coworker would call claimant stupid and dumb and yelling at her in front of customers. Claimant spoke to a manager about the harassment and the manager did talk to the coworker.

The coworker then stopped the harassment for a couple of days, but then started back it up again.

In November 2015, claimant spoke to Ms. Ward on multiple occasions about being harassed by her coworker. Ms. Ward told claimant that the employer was taking care of it, but after a month, nothing was done, so claimant decided to quit. Claimant testified she was not the only employee that had issues with the coworker. Claimant does not believe the employer disciplined the coworker. Claimant did not speak to human resources about the harassment. One of the other employees had spoken to Wanda, in human resources, and was told it was being taken care of, but nothing changed.

Mr. Witkoske worked for the employer from September 2014 to June 2016. Mr. Witkoske observed that claimant was harassed by a coworker and management did not do anything to stop the harassment. Mr. Witkoske observed two different occasions where the coworker harassed claimant. The first time, claimant had picked some items off the shelf and was going to put it in the system. Mr. Witkoske heard the coworker say to claimant "what the hell are you doing here" and "you need to get the [f@#k] out of my face". During the second incident, there was a line of people at the photo lab register and claimant went to help the people in line. The coworker came over and told claimant that she had it and claimant needed to leave. As claimant walked away, Mr. Witkoske overheard the coworker state in front of customers, "that dumb bitch, I don't know why she is working here I know more about this job than she does."

After claimant separated from the employer, Mr. Witkoske made at least ten complaints to management about the coworker's behavior, but the situation did not improve after he reported it.

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. Benefits are allowed.

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 finds claimant's version of events to be more credible than the employer's recollection of those events.

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(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.

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 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. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. 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 bullying in order to retain employment.

In October 2015, claimant informed a manager that she was being harassed by a coworker. The manager spoke with the coworker and the situation improved for couple of days, but then the coworker started harassing claimant again. Claimant testified she then reported the harassment to Ms. Ward on multiple occasions and was told the employer was taking care of the situation; however, the coworker did not stop harassing claimant. After another month of harassment, claimant informed the employer she was resigning. Claimant's testimony that she was being harassed by the coworker was bolstered by Mr. Witkoske's testimony. Although Mr. Witkoske was not able to definitively identify the dates that he observed the coworker harassing claimant, Mr. Witkoske did credibly testify to what he observed the coworker saying. Furthermore, Mr. Witkoske also complained to the employer about the coworker's conduct and like when claimant complained, the situation did not improve after he reported it to the employer.

Claimant's coworker created an intolerable work environment for claimant, which gave rise to a good cause reason for leaving the employment. Claimant reported the conduct to the employer and the employer failed to adequately address the coworker's conduct as the situation did not improve. Benefits are allowed.

DECISION:

The July 8, 2016, (reference 02) unemployment insurance decision is reversed. Claimant voluntarily left the employment with good cause attributable to the employer. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/pjs