IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ELIZABETH F MCCLURG
Claimant

INFINITY INVESTMENTS INC
Employer

APPEAL NO. 06A-UI-07815-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/02/06 R: 03
Claimant: Respondent (2)

Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Infinity Investments, Inc. (employer) appealed a representative's July 27, 2006 decision (reference 01) that concluded Elizabeth F. McClurg (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on November 15, 2006. The claimant failed to respond to the hearing notice and appear at the time and place set for the hearing, and therefore did not participate in the hearing. Armond Dawson appeared on the employer's behalf and presented testimony from one other witness, Gary Kaufman. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on April 27, 2005. She worked full time as a contact center supervisor in the employer's telemarketing call center. Her regular schedule was Monday through Thursday 12:00 p.m. to 9:00 p.m. with an alternating Friday 12:00 p.m. to 9:00 p.m. or Saturday 8:00 a.m. to 4:00 p.m. Her last day of work was June 27, 2006.

On June 13 the claimant had been issued a corrective action warning relating to actions of some of her subordinates. On June 19 at 9:19 p.m. she sent an email to her immediate supervisor, Mr. Dawson, the director of center operations, in which she stated she was unhappy about having been issued the warning but was further disappointed that the warning was in a computer folder accessible to all supervisors, including those lateral to her. She did not assert that any other supervisor or lateral had in fact accessed and viewed the warning issued to her. She concluded the email by stating, "With everything that has transpired including my write-up

being displayed for all my direct peers to view I will be taking PTO on 6/20/06 to determine my position with the company. I will resume to my regular shift with further opinions on the matter on 6/21/06."

Mr. Dawson's shift had ended at approximately 6:00 p.m., so he did not receive the claimant's email until the morning of June 20. He did accept the claimant's absence that day as excused PTO. He had not previously been aware that the claimant's disciplinary file might be viewable by other lateral supervisors, as there had not previously been any warnings issued to a supervisor. He immediately had the claimant's disciplinary record removed from the computer folder, and when the claimant return to work on June 21 informed her of that fact.

In further discussion on June 21, the claimant informed Mr. Dawson that she was actively pursuing "other opportunities," and that she had a job interview scheduled for June 26. Mr. Dawson replied that he would therefore begin preparations to have a replacement available to fill the claimant's position. A comparable discussion occurred on June 23. After these discussions, Mr. Dawson began reviewing the profiles of existing staff by starting to do a stack ranking of the current team members. He had not completed that process or spoken to any potential candidates as of June 27. At that point he had not entertained the thought as to what his response would be should the claimant indicate that she was going to cease her pursuit of "other opportunities" to stay with the employer.

On June 27 at 8:14 a.m., Mr. Dawson sent the claimant an email stating in its entirety:

> Elizabeth, based on our conversation 6/21 and 6/23 it is my understanding that you are actively pursuing other employment opportunities therefore we are actively pursuing your replacement. Please understand that due to the nature of your position with the company, we may have to terminate your employment prior to you finding another job. If you have any questions please let me know.
>
> Thanks.

The claimant reported for work that day as scheduled at approximately 12:00 p.m. She did not reply to Mr. Dawson's email, nor did she have any other discussions with anyone in a management or personnel position within the company. At about 1:30 p.m. she left the facility, telling another employee that she was "walking out," that she was finished with the company. That employee advised Mr. Dawson of his contact with the claimant a short time later. At approximately 2:15 p.m. Mr. Dawson placed a call to the claimant's home and reached an answering system; he left a message indicating that he had learned she was not at work and asking her to call him. He did not receive a return call from the claimant. The claimant did not return to work or contact the employer thereafter.

As of June 27 Mr. Dawson had not made a determination on any timetable as to at what point he would hire someone into the claimant's position or at what point "prior to [the claimant] finding another job" the employer might have to terminate her employment. The search for a replacement was not completed until the position was filled approximately August 1.

The claimant established a claim for unemployment insurance benefits effective July 2, 2006. The claimant has received unemployment insurance benefits after the separation from employment in the amount of $6,542.28.

REASONING AND CONCLUSIONS OF LAW:

A voluntary quit is a termination of employment initiated by the employee – where the employee has taken the action which directly results in the separation; a discharge is a termination of employment initiated by the employer – where the employer has taken the action which directly results in the separation from employment. 871 IAC 24.1(113)(b), (c). A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct.

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.

The representative's decision had treated the separation as a discharge for which the employer would bear the burden to establish it was for misconduct, in contrast to a voluntary quit under which the claimant would bear the burden to show that it was for good cause attributable to the employer. Iowa Code §96.6-2; 871 IAC 24.26(21). Rule 871 IAC 24.25 provides that, 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 intent to quit can be inferred in certain circumstances. For example, a three-day no-call, no-show in violation of company rule is considered to be a voluntary quit. 871 IAC 24.25(4).

871 IAC 24.25(27), (33) 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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> (27) The claimant left rather than perform the assigned work as instructed.
>
> (33) The claimant left because such claimant felt that the job performance was not to the satisfaction of the employer; provided, the employer had not requested the claimant to leave and continued work was available.

The question here is not whether the claimant was discharged in essence because she announced she intended to seek and find other employment; the employer did not inform the claimant she was discharged, only that "we <u>may</u> have to terminate your employment" – at some unspecified date – "prior to you finding another job." Just as an employee's simple announcement that he or she is looking for another job and intends at some unspecified time in the future to leave employment is not paramount to an a quit at that point, an employer's announcement that it is looking for a replacement for the employee and might at some unspecified time in the future need to terminate the employee in order to hire the replacement is

not tantamount to a discharge at that point. Until the claimant either announced she was in fact quitting as of a specific date or indicated as a result of specific actions that she had in fact quit, she could have changed her mind and ended her pursuit of "other opportunities." At that point the employer would have had to have made a decision as to whether it needed or desired to continue with its stated pursuit to find a replacement for the position it had anticipated the claimant would be vacating; depending on the employer's decision, the employment relationship would then either continue or result in a separation. The employer had not made a decision as of June 27 as to what it would do if the claimant decided to stay, as the only intention voiced by the claimant as of that date was that she intended to find other employment. At least as of that date, the employer had taken no action that would mean that continued work was not available for the claimant should she continue in her employment. The employer did not discharge the claimant on June 27 nor had it established a time at which she would definitely be discharged if she had not already left for other employment.

In contrast, the claimant's actions on June 27 of leaving the workplace, making the statements to the other employee, failing to respond to Mr. Dawson's message, and failing to return to work thereafter, establish that it was the claimant's actions which ended the employment, not the employer's actions; therefore, the separation is a voluntary quit. The claimant then has the burden of proving that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. Leaving because of unlawful, intolerable, or detrimental working conditions would be good cause. 871 IAC 24.26(3), (4). Leaving because of a dissatisfaction with the work environment or a personality conflict with a supervisor is not good cause. 871 IAC 24.25(21), (23). Quitting because a reprimand has been given is not good cause. 871 IAC 24.25(28). The claimant has not provided sufficient evidence to conclude that a reasonable person would find the employer's work environment detrimental or intolerable. O'Brien v. Employment Appeal Board, 494 N.W.2d 660 (Iowa 1993); Uniweld Products v. Industrial Relations Commission, 277 So.2d 827 (FL App. 1973). The claimant has not satisfied her burden. Benefits are denied.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. 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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> 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's July 27, 2006 decision (reference 01) is reversed. The claimant voluntarily left her employment without good cause attributable to the employer. As of June 27, 2006, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of $6,542.28.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw