IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU

KELLY C FICKEN Claimant **SHOTTENKIRK-INDIANOLA INC** Employer	**APPEAL NO. 22A-UI-15768-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/26/22** **Claimant: Appellant (1)**

Iowa Code § 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

The claimant, Kelly C. Ficken, filed an appeal from the July 22, 2022, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion she quit because she was dissatisfied with her working conditions. The parties were properly notified of the hearing. A telephone hearing was held on September 6, 2022. The claimant participated and testified. The claimant was represented by Whitney Judkins, attorney at law. The employer participated through General Manager Paul DeYarman and Owner Doug DeYarman. Official notice was taken of the agency records. Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, A, B, and C were received into the record.

The hearing notice incorrectly stated the issues for appeal were reasonable assurance and the claimant's ability to and availability for work. The administrative records show the claimant was granted benefits by the Benefits Bureau regarding these two issues. The administrative law judge only has jurisdiction regarding issues that have been appealed and the employer did not appeal these allowances. Both parties waived that the issue of separation was not listed on the hearing notice. The administrative law judge notes that the underlying decision appealed was separation in this case.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant worked as a business development manager / sales consultant from August 21, 2017, until she was separated from employment on June 18, 2022, when she quit. The claimant's immediate supervisor was Sales Manager Rashaun Long. Owner Doug DeYarman took full possession of the employer on September 1, 2020. Prior to that date, Doug DeYarman owned 49% of the company.

The employer has an employee handbook. Within its employee handbook, the employer has an equal opportunity and a harassment policy. The equal opportunity policy and harassment

policies prohibit discrimination and harassment on the basis of sex, as well as other characteristics protected by state and federal law. The policy instructs employees to "provide a written or verbal report to human resources, the general manager, the president of the company, or the employee hotline at 877-416-1405 or hotline@thosgroup.com. The employer provided a copy of the employee handbook. The policy forbids employees from retaliating in response to a complaint of discrimination or sexual harassment. (Exhibit 1) The employer provided a training history log that shows the claimant was trained on these policies several times in the past. (Exhibits 2, 3, 4, and 5)

The employer also regularly asks its staff if they have experienced circumstances, they believe constitute a hostile work environment. The employer provided the claimant's responses to these questionnaires dated August 10, 2021, November 15, 2021, January 18, 2022 and April 6, 2022. The questionnaire asks whether the employee has witnessed or been a victim of sexual harassment in the last three months, the claimant replied, "No," in response to this question on questionnaires dated April 5, 2021, June 8, 2021, August 10, 2021, November 15, 2021, January 18, 2022, and April 6, 2022. (Exhibits 6, 7, 8, 9, 10, 11, 12).

On the questionnaire dated January 18, 2022, the claimant wrote she had witnessed or been a victim of an incident of sexual harassment, but wrote, "qqqqqqq," in the field asking for an explanation. Shortly after providing this response on January 18, 2022, the claimant received an email from the employer's third-party complaint servicer, Ethos, requesting for more information. The claimant did not provide any additional information. That same day, Doug DeYarman asked the claimant to meet in his office. During that meeting, the claimant denied she meant to report an incident of harassment on January 18, 2022.

On June 13, 2022, the claimant brought her car in to be serviced by the employer. Service Advisor Morgan Huff repaired her car that night. The two employees hugged and kissed that night.

On June 17, 2022, the claimant sent a text message to Paul DeYarman and Doug DeYarman stating she had a family emergency and would not be reporting to work that day. The employer provided a copy of this text message. (Exhibit 14) That same day, the claimant reported to Ethos that she had previously been in an affair with another employee, Brett Dowell, from 2018 until 2020. She explained that while they were in this consensual relationship, Mr. Dowell took pictures of her and distributed them around the office place. The claimant explained her husband had just become aware of the affair earlier that day. According to this internal report, Mr. Dowell allegedly shared nude pictures of the claimant at work. The claimant provided a copy of this email. (Exhibit C)

On June 20, 2022, Paul DeYarman sent a text message back to the claimant requesting that they meet regarding "what the next steps were." In response, the claimant replied via text that she was unwilling to meet because of how many staff had guns and "[c]onsidering how many people knew about this and did nothing from the top down." The claimant then wrote "there's no way" that she could work there because she had been "sexually harassed and sexually assaulted and everybody knew" for four years. The claimant then requested her responses to the questionnaires. Paul DeYarman replied that neither he nor Doug DeYarman were aware of any incidents of sexual harassment because they had not been reported through the Ethos questionnaires. The claimant promised to update her responses to the questionnaires, but she declined to meet regarding the matter. The claimant requested the name of the employer's attorney and requested that agents of the employer stop contacting her. The employer provided copies of these text messages. (Exhibit 14)

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant quit without good cause attributable to her 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.

On June 17, 2022, the claimant informed the employer there was "no way" she would return to work for the employer. Despite attempts made by the employer to speak with her and investigate her allegations, the claimant refused to change her mind and instead asked for the employer's attorney. She added she did not want to be contacted by any staff in the future. The claimant contends she did not quit, but the administrative law judge disagrees. Indeed, it is difficult to imagine how she could have returned given her efforts to severe communication with all of the employer's staff on June 17, 2022.

As such, 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).

"Good cause attributable to the employer" does not require fault, negligence, wrongdoing or bad faith by the employer. *Dehmel v. Employment Appeal Bd.*, 433 N.W.2d 700, 702 (Iowa 1988)("[G]ood cause attributable to the employer can exist even though the employer is free from all negligence or wrongdoing in connection therewith"); *Shontz v. Iowa Employment Sec. Commission*, 248 N.W.2d 88, 91 (Iowa 1976)(benefits payable even though employer "free from fault"); *Raffety v. Iowa Employment Security Commission*, 76 N.W.2d 787, 788 (Iowa 1956)("The good cause attributable to the employer need not be based upon a fault or wrong of such employer."). Good cause may be attributable to "the employment itself" rather than the employer personally and still satisfy the requirements of the Act. *Raffety*, 76 N.W.2d at 788 (Iowa 1956).

The claimant contends that she quit due to intolerable working conditions. Specifically, the claimant contends she quit because she was working in an intolerable working environment. If the claimant can meet that burden, benefits are allowed.

Generally, notice of an intent to quit is required by *Cobb v. Employment Appeal Board*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Employment Appeal Bd.*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Employment Appeal Bd.*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). These cases require an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. Accordingly, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added, however, 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 concluded that, because the intent-to-quit requirement was added to 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. Employment Appeal Bd.,* 710 N.W.2d 1 (Iowa 2005).

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.

The standard of what a reasonable person would have believed under the circumstances is applied in determining whether a claimant left work voluntarily with good cause attributable to the employer. *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (Iowa 1993).

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 his own common sense and experience, the administrative law judge finds the employer's testimony more credible.

Specifically, the administrative law judge finds the record establishes the claimant was not subject to incidents of sexual harassment she claims occurred prior to the June 13, 2022 incident. The administrative law judge makes this finding given the following observations:

1. The claimant said testified one employee, Shawn Martin, made several sexually explicit statements and offered her money in exchange for sex in the hearing and in her Iowa Civil Rights Commission complaint. Yet, the claimant's internal report to Ethos states this regarded a Brett Dowell.

2. In her Iowa Civil Rights Commission complaint, the claimant stated that a Maranda (last name unknown) overheard sexual statements Dan Carpenter directed at her. In the hearing, the claimant said these statements were made on the sales floor and no one could hear them.

3. Indeed, Brett Dowell, is the main subject of her internal complaint that she filed on June 17, 2022, but he was not mentioned in her ICRC complaint or the hearing, until the employer specifically raised him as a harasser.

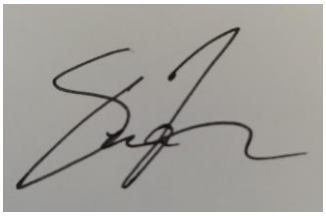
4. The claimant acknowledged she did not report these incidents through the employer's complaint reporting system. The claimant claims she was fearful of retaliation on the basis of an office manager allegedly telling her that those who reported would be

retaliated against. Yet, the claimant acknowledged this employee did not hold a position of authority and was not even working there in 2022.

While it is technically not required to lodge work-related concerns before quitting due to alleged hostile working conditions, the administrative law judge finds the claimant's decision to quit without reporting these concerns to be unreasonable. The claimant quit without good cause attributable to the employer. Furthermore, the claimant appears to have voluntarily quit because her husband became aware of an adulterous affair on June 17, 2022 as she allegedly reported to Ethos herself. This is a reason for quitting that is not attributable to the employer. See Iowa Admin. Code r. 871-24.25 (24) (leaving due to serious family responsibilities or serious family needs is not attributable to the employer.) Benefits are denied.

DECISION:

The unemployment insurance decision dated July 22, 2022, (reference 01) is AFFIRMED. The claimant voluntarily left her employment without good cause attributable to the employer. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.



Sean M. Nelson
Administrative Law Judge II
Iowa Department of Inspections & Appeals
Administrative Hearings Division – UI Appeals Bureau

October 6, 2022
Decision Dated and Mailed

smn/ar

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:
1) The name, address, and social security number of the claimant.
2) A reference to the decision from which the appeal is taken.
3) That an appeal from such decision is being made and such appeal is signed.
4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at https://www.legis.iowa.gov/docs/code/17A.19.pdf or by contacting the District Court Clerk of Court https:///www.iowacourts.gov/iowa-courts/court-directory/.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:
A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:
1) El nombre, dirección y número de seguro social del reclamante.
2) Una referencia a la decisión de la que se toma la apelación.
3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en https://www.legis.iowa.gov/docs/code/17A.19.pdf o comunicándose con el Tribunal de Distrito Secretario del tribunal https:///www.iowacourts.gov/iowa-courts/court-directory/.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:
Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.