IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOLENE HOLDEN
Claimant

SAC & FOX TRIBE
Employer

APPEAL NO: 15A-UI-07152-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/31/15
Claimant: Respondent (2)

Section 96.5-1 – Voluntary Leaving
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 12, 2015, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a telephone hearing was held before Administrative Law Judge Julie Elder on July 28, 2015. The claimant participated in the hearing. Anneka Davenport, Human Resources Specialist; Rudy Papakee, Acting Executive Director; Mylene Wanatee, Family Services Director; and Azadeh Tavakoli, Human Resources Director, participated in the hearing on behalf of the employer.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time Indian Child Welfare Act coordinator for Sac & Fox Tribe from January 13, 2014 to May 29, 2015. She voluntarily left her employment because she felt the environment was "toxic and hostile."

The claimant described on-going issue and an "undertone" of other employees being bullied. She cited an example of another employee being "bullied" when the staff joked about the way she drove. The claimant felt her supervisor, who is a native American, displayed racist behavior and quoted her as saying to another employee, "What does that white girl think she is doing," after the claimant made a presentation to the tribal council in April 2014. The claimant also stated that following a training session, her supervisor told her she "doesn't learn anything at training sessions given by white people." The claimant's supervisor denied making either of those statements.

The claimant also complained about her supervisor sitting in the back of the room during a training session their department was hosting rather than sitting in front and participating in the

training. The supervisor indicated she had just been through that same training recently in Des Moines and wanted others who had not shared in the training yet to have that opportunity.

The claimant was offended by other employees' use of profanity in the office, which occurred mostly with two of nine employees, and also complained that gossip was "rampant," with employees talking about clients, staff, and Mesqwaki settlements residents. The claimant talked to her supervisor on one occasion about the claimant's belief another employee showed a lack of confidentiality when talking about a client and at one point the claimant's supervisor moved the staff meetings regarding clients from the kitchen table to the conference room. The claimant also found it inappropriate that her supervisor brought in the book, "50 Shades of Gray" for another staff member and it was sitting on the table where employees gathered before ending up on the bookshelf.

On February 3, 2015, the claimant's supervisor stood in the hallway near the claimant's office and said one employee had "something contagious that could be spread from toilet seats." The following day the supervisor asked the claimant what she should do about the situation and the claimant showed her the handbook. A few minutes later the infected employee arrived and worked for one and one-half hours before her physician told her she should not be at work. The claimant found her supervisor's actions to be a "blatant disregard of the employer's policy and the health of others." The employee in question was determined to have MRSA. The claimant was off work until February 10, 2015, and called her supervisor to ask if anyone had cleaned the restrooms after her co-worker was diagnosed with MRSA. Her supervisor stated she did not believe anyone had done so but she would talk to someone about taking care of it. The claimant then found a handout on the kitchen table entitled "Living with MRSA."

On another occasion in 2015, the claimant was out of the office for a few days and her supervisor sent her and a co-worker an email regarding a complaint she received about the claimant and another co-worker in the claimant's co-worker's office discussing things in a whisper. The claimant did not respond to the email but felt her supervisor's behavior was "gossipy"

The "final straw" for the claimant occurred when she heard one co-worker call another a "fucking bitch" two weeks after the claimant overheard the two co-workers involved in a loud disagreement. After the last incident, the claimant's supervisor directed the co-worker who was called a "fucking bitch" to go online and look for team building exercise. The claimant also stated she had never worked any place where so many employees cried during work.

The claimant determined the work environment was negative and decided to voluntarily quit her job. She submitted her resignation letter May 15, 2015, but did not cite the reasons she was leaving. Although the employer's handbook outlines the process for an employee to submit reports or complaints about problems in the work place, the claimant never notified the employer of her concerns before submitting her notice. The claimant later had a conversation with the acting executive director who asked her if there was anything he should be concerned about. The claimant said yes and mentioned some of the issues listed above. He asked her if she would stay while he met with all of the staff members and asked human resources to intervene but she stated her mind was made up and she was going to resign. The claimant suggested he speak to another staff member but when the acting executive director reached out to that employee she did not respond or reply. The claimant's primary focus when describing the issues she was concerned about included unprofessionalism, use of profanity and arguments between co-workers. When the claimant told the acting director her mind was made up and she was leaving, her resignation was accepted.

The claimant has claimed and received unemployment insurance benefits in the amount of $3,024.00 for the eight weeks ending July 25, 2015.

The employer participated personally in the fact-finding interview through the statements of Human Resources Specialist/Acting Human Resources Director Lyle Davenport and Family Services Director Mylene Wanatee.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left her employment without 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.

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. 871 IAC 24.25. Leaving because of unlawful, intolerable, or detrimental working conditions would be good cause. 871 IAC 24.26(3),(4). Leaving because of dissatisfaction with the work environment is not good cause. 871 IAC 24.25(1). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code section 96.6-2.

The claimant catalogued a litany of complaints against the employer but few of those complaints involved her. She talked about one incident of what she determined to be bullying involving another staff member being teased about her driving ability. She accused her supervisor of racism for asking another staff member, in reference to the claimant, “What does that white girl think she is doing?” The claimant’s supervisor denies ever making that comment. On another occasion, the claimant’s supervisor was alleged to have told the claimant she did not “learn anything at trainings given by white people.” The claimant’s supervisor denied making that statement as well and indicated many of the training sessions she attends are taught by white people and she learns from everybody. Charges of racism are very serious. The claimant has not established that her supervisor was a racist or that she made the comments the claimant accused her of making. The claimant could not state the dates these incidents allegedly occurred and due to the serious nature of the charge it would seem the claimant would have documented those incidents and reported them to the employer.

The claimant also complained of the use of profanity, gossip and unprofessionalism, among her co-workers and the staff. Profanity in an office between co-workers is not uncommon. If it is said in anger toward a supervisor or in front of clients it becomes a different matter. The claimant did not establish that her co-workers’ use of profanity occurred under those circumstances. Likewise, gossip often occurs in workplace settings. The staff should not gossip about clients but discussions between co-workers regarding clients can be considered professional consultation. The claimant herself was effectively accused of gossiping with a co-worker by holding conversations in that employee’s office where other staff members could hear them whispering. When her supervisor inquired about the situation through an email, the claimant chose not to respond to her at all. Monthly staff meetings should not have been held at the kitchen table where anyone could walk in and overhear conversations about clients and

other business matters but when the claimant spoke to her supervisor about her concerns, the monthly meetings were moved to a conference room. The claimant also felt the workplace was not professional. The claimant was not a supervisor and if her supervisor found the staff was acting in an unprofessional manner it was her responsibility to take action against that employee. As a personnel matter, that conversation would have occurred away from the claimant and her co-workers and she would not have been informed about what disciplinary action, if any, was taken against the offending employee.

The claimant's supervisor did handle the employee with MRSA inappropriately in February 2015. She should not have announced that employee's illness or say it could be spread through contact with toilet seats and should have checked the employee handbook and with human resources before responding at all if she was not confident in how to handle the situation. There is no evidence the claimant complained about the incident or how her supervisor handled it however.

The last straw for the claimant occurred when two weeks after overhearing an argument between two co-workers, the claimant overheard another heated exchange between those two employees and one called the other a "fucking bitch." When the supervisor was informed of the incident, she directed the employee who had been called the name to go online and look for team building exercises.

While the claimant detailed her issues with the work environment, she did not document the concerns she complained of or report any of the situations to the employer. Although the circumstances the claimant described may have been unpleasant or uncomfortable, they do not rise to the level of unlawful, intolerable, or detrimental working conditions as those terms are defined by Iowa law and is required for a voluntary leaving to be considered attributable to the employer. The claimant has not met her burden of proving her leaving was for good cause attributable to the employer. Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
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> (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 requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for 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. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Human Resources Specialist/Acting Human Resources Director Lyle Davenport and Family Services Director Mylene Wanatee. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of $3,024.00.

DECISION:

The June 12, 2015, reference 01, decision is reversed. 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. The claimant is overpaid benefits in the amount of $3,024.00.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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