

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

DOUG A FLYNN
Claimant

SSB MANUFACTURING COMPANY
Employer

APPEAL 19R-UI-00184-LJ-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/28/18
Claimant: Respondent (1)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the November 14, 2018, (reference 01) unemployment insurance decision that allowed benefits based upon a determination that claimant quit due to detrimental working conditions. The parties were properly notified of the hearing. A telephone hearing was held on January 23, 2019. The claimant, Doug Flynn, participated along with witness Saij Layne. The employer, SSB Manufacturing Company, participated through Rhonda Krause, Human Resources Manager. The administrative law judge took official notice of the administrative record.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?
Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time, most recently as a nail-down employee, from February 5, 1996 until October 25, 2018, when he quit. Claimant put in a two-week notice on October 11, 2018, and he was allowed to continue working until his desired last date of employment.

In early October, the employer was revamping claimant's work area to make it more efficient. Because of this revamp, on October 11, 2018, there were hoses dangling from the ceiling in claimant's work area. Claimant and his co-worker were upset by this, and claimant viewed it as a safety concern. They pointed out the dangling hoses to Markulec. Markulec responded by coming over, putting his face inches from claimant's face, and repeating, "Do I look like a fucking mechanic to you?" Claimant felt threatened and was afraid to respond to Markulec. Markulec ended up walking away, calming down, and then returning to report that the employer would fix the issue the next day. At that point, claimant immediately went to Manager Jeff Baker and put in his two-week notice.

The employer conducted an investigation after learning about the incident between claimant and Markulec. They interviewed the lead person in the area and several of claimant's co-workers. The employer did not interview Saij Layne, even though Layne was standing nearby and witnessed the incident. Layne testified that he heard Markulec swear at claimant while standing "a hand and three fingers away" from claimant's face.

Claimant had complained about Markulec multiple times in the past. The employer described Markulec as being "too direct" on occasion, which caused friction between himself and subordinates. Claimant described Markulec as a bully and testified that he has been sent home in the past for yelling at employees. On one occasion during a morning meeting, an employee said "Pardon me" after Markulec spoke, and Markulec blew up at him and sent him home. Markulec then yelled, "Do you know who I am" at the remaining meeting attendees.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$5,404.00, since filing a claim with an effective date of October 28, 2018, for the twelve weeks ending January 19, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a first-hand witness available for rebuttal. Krause missed the telephone call for the fact-finding interview, and by the time she returned the message she had from the fact-finder, she was too late.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation was with good cause attributable to the employer. Benefits are allowed.

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.

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). 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).

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 her own common sense and experience, the administrative law judge finds claimant and his witness credible.

"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 with abusive language directed at him in order to retain employment any more than an employer would tolerate it from an employee. In this case, claimant has established through credible testimony that he was sworn at in a threatening manner by his supervisor. This behavior amounts to an intolerable working environment. Benefits are allowed, provided claimant is otherwise eligible. As claimant's separation from employment is not disqualifying, the issues of overpayment, repayment, and chargeability are moot.

DECISION:

The November 14, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant quit the employment with good cause attributable to the employer. Benefits are allowed, provided he is otherwise eligible. The issues of overpayment, repayment, and chargeability are moot.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn