

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 05A-UI-03884-RT
OC: 03-20-05 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary

STATEMENT OF THE CASE:

The claimant, Audrey A. Mitchell, filed a timely appeal from an unemployment insurance decision dated April 6, 2005, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on August 9, 2005, with the claimant participating. The claimant was represented by Barry Kaplan, Attorney at Law. Ric Anderson, Store Director in the employer's store in Marshalltown, Iowa, and Phil Diggins, Assistant Manager in the same store, participated in the hearing for the employer, Hy-Vee, Inc. The employer was represented by David Williams of TALX UC eXpress. Karee White sat in on the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

An initial hearing was held in this matter on May 3, 2005, without the employer's participation. The administrative law judge who conducted that hearing issued a decision reversing the representative's decision and allowing benefits to the claimant. However, the administrative law judge had overlooked the employer's request for a continuance. Therefore, the administrative law judge, by order dated May 24, 2005, vacated the decision and ordered that the record be reopened and another hearing scheduled. A new hearing was scheduled for July 7, 2005 at 11:00 a.m. and rescheduled at the employer's request to July 14, 2005 at 11:00 a.m. and rescheduled a second time at the claimant's request.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time worker in the employer's pizza department in its store in Marshalltown, Iowa, from October 23, 2001 until she voluntarily quit effective March 18, 2005. On that day the claimant presented a letter of resignation to her manager, Bruce Brown, Manager of the pizza department, and left a copy of her resignation with the Human Resources Manager, Mark Carley. The claimant's resignation was effective immediately. The claimant quit because of an incident with the store director the day before, March 17, 2005.

At approximately 9:00 a.m. on March 17, 2005, the store director, Ric Anderson, one of the employer's witnesses, received an order for between 40 and 50 pizzas. Mr. Anderson went to the pizza department and informed the claimant of the order and asked to speak to Mr. Brown. The claimant informed Mr. Anderson that Mr. Brown was not there yet and was to arrive at 10:30 a.m. Mr. Anderson told the claimant to tell Mr. Brown that he, Mr. Anderson, wanted to see Mr. Brown. When Mr. Brown arrived at 10:30 a.m. the claimant told him that he needed to see Mr. Anderson. However, because the pizza department was busy, Mr. Brown did not immediately go to see Mr. Anderson. At approximately 11:05 a.m. the claimant asked Mr. Brown if she could take a break and he consented. The claimant then took a break and was going to the ladies' restroom. At that point she went to the front of the store near the camera department and saw Phil Diggins, Assistant Manager. She spoke briefly to Mr. Diggins and continued on her way to the ladies' restroom when Mr. Anderson approached her. Mr. Anderson was impatient because he believed that the claimant had not informed Mr. Brown of the message that Mr. Anderson had left with the claimant earlier. Mr. Anderson raised his left hand and the claimant could observe his watch and noted the time was 11:05 a.m. Mr. Anderson explained to the claimant that he had wanted to see Mr. Brown at 10:30 a.m. The claimant explained that they were very busy. Mr. Anderson then raised his right hand, which contained a pistol grip cordless electric drill or screwdriver. He pointed it directly at the claimant about shoulder height and pulled the trigger turning the electric drill on. The drill was between four to five feet and three to four inches from the claimant. Mr. Anderson told the claimant that he needed to see Mr. Brown as soon as possible. Mr. Anderson lowered the electric drill and then raised it again pointing it at the claimant's waist and turned it on a second time again between four to five feet and three to four inches from the claimant's body. The claimant then turned around and went to tell Mr. Brown that Mr. Anderson wanted to see him.

When the drill was pointed at the claimant she felt terrible and scared and did not believe that Mr. Anderson was joking. He appeared to her mad and loud. When the claimant saw Mr. Brown she explained to him what had happened but did not say that she was quitting because she had not yet considered what she was going to do. The claimant had had no problems previously with Mr. Anderson. When the claimant went home that night she thought

about the situation and decided that she could no longer work with Mr. Anderson because of his conduct as noted above. She prepared a resignation letter and then delivered it the next day. At approximately 3:00 p.m. that day Mr. Anderson called the claimant at home and apologized and said it was a misunderstanding and that the claimant was a good worker and he would hate to have her quit over a misunderstanding. He asked the claimant to think about her resignation. The claimant said that she would. Mr. Anderson then said that he needed to know by the next day, Saturday, March 19, 2005. At that time the claimant said that she would not be back. The claimant did not express any concerns to anyone about Mr. Anderson nor did she indicate or announce an intention to quit if her concerns were not addressed prior to her quit.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

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.

871 IAC 24.26(2)(3)(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:

- (2) The claimant left due to unsafe working conditions.
- (3) The claimant left due to unlawful working conditions.
- (4) The claimant left due to intolerable or detrimental working conditions.

The parties agree, and the administrative law judge concludes, that the claimant left her employment voluntarily on March 18, 2005. The issue then becomes whether the claimant left her employment without good cause attributable to the employer. The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. Although it is a close question, the administrative law judge concludes that the claimant has met her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer.

The claimant credibly testified that she was accosted by the Store Director, Ric Anderson, while he was angry and pointed an electric drill with a pistol grip directly at her about shoulder high and turned the drill on and then lowered it and then raised it again waist high and again pointed the electric drill at the claimant and turned it on a second time. The claimant credibly testified that she felt terrible during this incident and that she was scared and did not believe that Mr. Anderson was joking. The drill was a cordless drill with a pistol grip used by Mr. Anderson to drive screws. The claimant credibly testified further that Mr. Anderson was mad and loud and upset because he thought the claimant had not delivered the message he had left with the

claimant to give to the claimant's manager, Bruce Brown. However, the claimant had delivered the message. Mr. Anderson told the claimant that he needed to see Mr. Brown as soon as possible and the claimant turned and went back and informed Mr. Brown. Mr. Anderson then returned to the coat rack that he was working on with the electric drill or screwdriver before accosting the claimant.

The testimony of Mr. Anderson to the contrary is not credible. Mr. Anderson first testified that he pointed the drill at the claimant and pulled the trigger or turned the drill on because he was "just messing around." However, later Mr. Anderson testified that he did so because he was "impatient." These are contradictory. The administrative law judge is constrained to conclude that Mr. Anderson was impatient and, therefore, angry and this supports the claimant's version. The claimant's testimony is also supported by the very vague testimony of a person standing nearby, Phil Diggins, Assistant Manager. Although Mr. Diggins was only four or five feet away, he heard nothing and only saw the claimant and Mr. Anderson talking. However, Mr. Diggins conceded that the claimant had spoken to him prior to the incident with Mr. Anderson. This confirms and supports the claimant's testimony. The claimant testified that the drill was between three and four inches from her body. Mr. Anderson testified that the drill was between four and five feet from the claimant's body. The administrative law judge is constrained to conclude that the drill was actually somewhere in between those two distances but was close enough to justifiably cause the claimant intimidation and fear. Even Mr. Anderson conceded that the behavior to which he admits was inappropriate. The administrative law judge most heartily agrees. Based upon the record here, the administrative law judge concludes that the actions by Mr. Anderson in pointing the drill at the claimant very close to the claimant and turning it on twice made the claimant's working conditions unsafe, intolerable, and detrimental and perhaps even unlawful. The administrative law judge concludes that the claimant was justified in quitting and that her quit was with good cause attributable to the employer.

This conclusion is bolstered by the conversation the claimant had with Mr. Anderson later on the day she resigned, March 18, 2005. Mr. Anderson called the claimant and apologized and confirmed that she was a good worker and hated to have her quit over a misunderstanding and asked the claimant to think about it. The claimant said that she would. Mr. Anderson then told the claimant that she had until Saturday, March 19, 2005 to decide whether she was coming back. The administrative law judge does not believe that Mr. Anderson should have put such a short deadline to the claimant's decision to return to work. The administrative law judge does not believe that it is necessary for such a quick decision in order to properly staff the pizza department. Other employees could have been enlisted to give the claimant several more days to consider her actions. It is true that this happened after the quit and is not particularly relevant towards the quit but does indicate the attitude of the parties.

The claimant did not give the employer a reasonable opportunity to address any of her concerns about Mr. Anderson before she quit. The claimant did inform Mr. Brown of the incident but did not indicate that she was considering quitting because at that point the claimant had not considered what she was going to do. The claimant went home and thought about the incident and then resigned without expressing any further concerns to anyone at the employer or without indicating or announcing an intention to quit if her concerns were not addressed. The claimant did not afford the employer an opportunity to address her concerns. Ordinarily, this failure would be fatal to the claimant's claim. However, under these unusual circumstances, the administrative law judge is constrained to conclude that the claimant was so intimidated by the inappropriate behavior of Mr. Anderson that she was justified in not expressing concerns about Mr. Anderson before she quit. The administrative law judge notes that Mr. Anderson, after all, was the Store Director and the claimant was intimidated and scared

by him. This is a close question but the administrative law judge concludes that the claimant was justified in failing to express concerns or failing to threaten to quit to anyone at the employer before her quit.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant left her employment voluntarily on March 18, 2005, with good cause attributable to the employer and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision of April 6, 2005, reference 01, is reversed. The claimant, Audrey A. Mitchell, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she left her employment voluntarily with good cause attributable to the employer.

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