IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DORIS A SMITH
Claimant

ACKERMAN INVESTMENT CO
Employer

APPEAL NO. 13A-UI-04734-NT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/29/12
Claimant: Respondent (2-R)

Section 96.5-1 – Voluntary Quit

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated April 16, 2013, reference 04, that allowed benefits without disqualification. After due notice was provided, a telephone hearing was held on May 29, 2013. Ms. Smith participated personally. The employer participated by General Manager, Bryan Bocken and was represented by Stuart Cochrane, Attorney at Law.

ISSUE:

The issue is whether the claimant quit work with good cause attributable to the employer.

FINDINGS OF FACT:

Doris Smith was employed by Ackerman Investment Company d/b/a Quality Inns & Suites from May 22, 2012 until January 29, 2013 when she quit employment without advance notice. Ms. Smith was employed as a part-time cook and was paid by the hour. Her immediate supervisor was Scott Galyen.

Ms. Smith quit her employment based upon her belief that the facility's general manager, Mr. Bocken, had publicly used an inappropriate and disparaging word referring to Black individuals in the presence of one or more black employees during a large social event that had taken place at the employer's facility on January 15, 2013. Ms. Smith had not been present at the event, but Mr. Bocken's use of the word at the event had been reluctantly described to the claimant by another worker who was present that evening. The female worker, who was black, and another male worker indicated that something "bad" had occurred during Ms. Smith's absence from work, but both employees had been reluctant to provide further information. After a number of inquiries from Ms. Smith, the female worker stated that she overheard Mr. Bocken use the "N word" at the event. Ms. Smith finished her shift that day. The following day, January 29, 2013, Ms. Smith went to Mr. Bocken's office to speak with him about the incident. Ms. Smith asked the general manager if he had used the racially derogatory and derisive term. Mr. Bocken admitted that he had and began to explain the context that the term was used in. At that point Ms. Smith ended the conversation and quit employment stating: "If that's how you

feel about me, I can't work here." Ms. Smith believed that the use of the reference in any context was so derisive, disruptive and derogatory, that it required her to quit employment. Ms. Smith had not experienced any other incident of this nature while employed by the company but felt compelled to leave based upon Mr. Bocken's admission that the word had been used. Mr. Bocken had previously apologized to the black female worker who had been present during the incident. That individual had remained employed and had not quit her employment.

Although Mr. Bocken had no clear memory of using the "N word," he did not deny it when questioned by Ms. Smith because other individuals had brought Mr. Bocken's use of the word to his attention during or after the January 15, 2013 event.

At the time of Ms. Smith's quitting, Mr. Bocken was attempting to explain his belief that his use of the word at the event was to explain that the volatile nature of the word itself had almost started a large melee in Fort Dodge at one time. Mr. Bocken was discussing the matter when visiting with other individuals that were from the Fort Dodge area.

After the claimant had left her employment, Ms. Smith exercised her right to go up the chain of command to bring the matter to the attention of her former employer's corporate management. It appears that Ms. Smith was aware of her right to bring areas of concern up the chain of command but had not elected to do so before quitting her employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant voluntarily left employment without good cause attributable to the employer.

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 24.25(6), (21) 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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> (6) The claimant left as a result of an inability to work with other employees.
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> (21) The claimant left because of dissatisfaction with the work environment.

871 IAC 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 claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code section 96.6(2). An individual who voluntarily leaves their employment must first give notice to the employer of the reasons for quitting in order to give the employer an opportunity to address or resolve the complaint. Cobb v. Employment Appeal Board, 506 N.W.2d 445 (Iowa 1993). Claimants are not required to give notice of intention to quit due to intolerable, detrimental or unsafe working environments if the employer had or should have had reasonable knowledge of the condition. Hy-Vee, Inc. v. Employment Appeal Board, 710 N.W.2d 1 (Iowa 2005).

Ms. Smith quit her employment on January 29, 2013 based upon initially what was a hearsay statement from other female worker who was black, who reluctantly stated that the facility's general manager had used the "N word" in her presence at a social function approximately two weeks previously. Ms. Smith, who is black, understandably took great offense at the use of the word that is patently racially derisive and insensitive. To verify that the hearsay allegation was true, Ms. Smith went directly to the general manager to ask if he had used the word. Upon Mr. Bocken's admission that he had, Ms. Smith immediately quit, allowing no further explanation. Ms. Smith concluded that Mr. Bocken's use of the word itself in a public gathering, and especially in the presence of a black worker created an intolerable and detrimental working environment that was unacceptable and therefore quit her employment without allowing further explanation.

Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 24.26(4). Aside from quits based upon medical reasons, prior notification of the employer before a resignation for intolerable or detrimental working conditions is not required. See Hy-Vee v. Employment Appeal Board, 710 N.W.2d 1(Iowa 2005). The test as to whether a person has been subjected to intolerable, detrimental working conditions is whether a reasonable person would have quit under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 33(Iowa 1988) and O'Brien v. Employment Appeal Board, 494 N.W.2d 660 (Iowa 1993).

The administrative law judge is fully cognizant of the inflammatory and patently derisive nature of the use of the word "Nigger" and its effect upon individuals of color. The administrative law judge neither condones nor sanctions the use of this term or any other similar derogatory, or derisive term in an employment, or any other setting when the intent is to cause embarrassment, humiliation or any of the other negative consequences of the inappropriate use of that word. "Good cause" for leaving employment within the meaning of the Employment Security Law must be that which is reasonable to the average person, not to a person whose sensitivity is enhanced, or the claimant in particular. Uniweld Products v. Industrial Relations Commission, 277 So.2d 827 (Fla. App. 1973). In the case herein, it is evident that the claimant is very sensitive to the issue. Mr. Bocken's comment to the individuals that he was speaking

with on January 15, 2013 may have been inappropriate, and especially inappropriate to individuals who are not aware of the context in which it was made. In this matter, however, the administrative law judge finds that comment alone was insufficient to create an intolerable work environment.

When questioned about the matter by the claimant Mr. Bocken admitted that he had used the word but was not given the opportunity to provide any explanation. Ms. Smith knew that no incident of that nature had ever occurred before and that if necessary she could go up the chain of command to complain directly to Upper management. It is also notable that the black female worker who heard the comment had received a direct apology from Mr. Bocken and had elected not to leave her employment.

It is the claimant's burden to prove that the voluntary quit was for good cause that would not disqualify her. Iowa Code section 96.6-2. For the reasons stated herein, she has not satisfied that burden and benefits are denied. While Ms. Smith's reasons for leaving were undoubtedly good cause reasons from her personal viewpoint, for the above stated reason, they were not good cause reasons that were sufficiently attributable to her employer.

Iowa Code section 96.3-7, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
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> a. 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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> b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.
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> (2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for a determination as to whether there has been an overpayment, the amount of the overpayment and whether the claimant will have to repay the benefits.

DECISION:

The representative's decision dated April 16, 2013, reference 04, is reversed. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until 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 matter is remanded to the Claims Section for an investigation and determination of the overpayment issue.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

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