IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

AUDRIAUNA BAINTER Claimant **1ST CLASS STAFFING LLC** Employer	**APPEAL 15A-UI-11697-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/23/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 16, 2015, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on November 4, 2015. The claimant participated personally. The employer participated through Ann Origer, branch manager.

ISSUE:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was last employed full-time on assignment as a laborer/operator and was separated from employment on August 21, 2015, when she voluntarily quit her assignment.

The employer asserted the claimant was discharged for no-call/no-shows. The claimant had missed her shift on August 19, 2015 due to car problems, and notified the employer, and tried to call the site location but was unsuccessful to site phone issues. The claimant worked her final shift on August 21, 2015, and was in the transition to move from second to first shift, due to ongoing harassment from Tommy Moore, who was related to the claimant's site manager, Marquee Glenn. Prior to being informed of her reassignment, Mr. Moore in front of the claimant's on site manager, Mr. Glenn, both slapped the claimant's backside and put his hands around her throat saying, he bet she was the kind of girl that liked that kind of thing. The claimant reported her concerns to Mr. Glenn, who said he would handle it, and not to escalate the matter or her job was at risk, and that she was a liability.

On August 21, 2015, during her shift, the claimant was working with her soon-to-be new manager, and as she walked into the warehouse, he looked at her and said her "butt looks good in those pants." The claimant was certain the comment was directed at her, because she is the

only female on that shift, and no one else was within the vicinity. The claimant was off work August 22 and 23, 2015, and on August 24, called around 5:00 a.m. prior to her shift, and called off, leaving a message with the employer contact, Rhonda, at the Moline, Illinois location. In her message, she asked to be called back due to ongoing harassment issues. The following morning she left another message with Rhonda. The issues were not discussed with Rhonda but the claimant was informed she was discharged for reportedly being a no-call/no-show on August 19 and 24, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left her employment with 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.

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:
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> (4) The claimant left due to intolerable or detrimental working conditions.

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).Good cause need not be based upon full or wrongdoing on the part of the employer, but may be attributable to the employment itself. Raffety v. Iowa Employment Security Commission, 76 N.W.2d 787 (Iowa 1956).

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 the claimant voluntarily quit the employment with good cause attributable to the employer. Inasmuch as an employer can expect professional conduct and language from its employees, the claimant is entitled to a working environment without being the target of or subjected to ongoing harassment. The claimant had previously reported to the employer an ongoing issue, but was told when she reported to her client manager, Marquee Glenn, her concerns with regard to Tommy Moore (who was related to him), that she was a liability and her job was at risk. On the final day of employment, the claimant's soon-to-be new manager on first shift told her that her "butt looked good in those pants." An employee should not have to endure bullying or harassment in order to retain employment any more than an employer would tolerate it from an employee. The claimant credibly testified that she then left two voicemail messages for her employer manager, Rhonda, at the Moline, Illinois phone number, saying she needed to discuss the harassment on both August 24 and 25, 2015, and the call was not returned. The administrative law judge is therefore persuaded that the claimant has satisfied her burden to establish she voluntarily quit with good cause under Iowa law.

Alternately, if this separation was determined to be a discharge, the claimant would be eligible for benefits.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a

right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). The claimant timely called Rhonda at the employer location on the 19, 24 and 25 of August to report her absences. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The facts do not establish that she committed work-connected misconduct. Whether a discharge or voluntary quit, the claimant is qualified to receive unemployment insurance benefits based on the reason for her separation from employment.

DECISION:

The October 16, 2015 (reference 01) decision is reversed. The claimant voluntarily left her employment with good cause attributable to the employer. Benefits are allowed, provided the claimant is otherwise eligible.

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Jennifer L. Coe
Administrative Law Judge

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Decision Dated and Mailed

jlc/pjs