

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMANDA C PAYNE

Claimant

APPEAL NO. 09A-UI-14704-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA MAINTENANCE &
MANAGEMENT LLC**

Employer

OC: 08/23/09

Claimant: Respondent (1)

Iowa Code § 96.5(1) – Voluntary Leaving
871 IAC 24.26(4) – Intolerable Working Conditions
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 22, 2009 (reference 02) decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on October 29, 2009. Claimant participated. Employer participated through Gary Pitts.

ISSUE:

The issue is whether claimant quit the employment without good cause attributable to the employer or if she was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked part-time (Monday and Tuesday nights) as a maintenance worker since November 3, 2008 and was separated on January 5, 2009. She was working in a work release program out of a Des Moines women's correctional facility cleaning empty rental units. The job was indefinite in duration. Employer obtained permission from the facility to give employees on work release a cell phone while working alone at night. She was supposed to return the phone after work each day but often gave it to her father to hold for her until the next scheduled workday since cell phones were not allowed at the facility. She was not aware employer had permission for her to use one while working. A couple of days before she quit she returned the work phone since she had acquired her own phone. Facility policy did not allow her to quit or be fired or she would get a disciplinary report and violations of facility policies may have ultimately resulted in her reincarceration. Employees were allowed to leave the work site for lunch and on one occasion her friend Ashley went to her work location to pick her up for lunch when Pitts was present. Pitts talked to Ashley and referred to pornographic magazines, talked about oral sex with her, and suggested he take Ashley and claimant to Victoria's Secret where they could try on clothing items for him. Earlier he had talked about oral sex with claimant after he had found out she is a lesbian. He admitted at hearing he told claimant he

was on Viagra and talked about oral sex with her. Correctional officers Ashley and Marquita wrote notes about events she had told them about with Pitts. Most recently on January 5, 2009 he put his hands down her pants when she was bent over to pick something up while cleaning. Electrician Troy also witnessed the incident. Troy was not called as a witness. She called her counselor Alma about what happened and Alma gave her permission to quit.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left the 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:

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

Generally notice of an intent to quit is required by *Cobb v. Employment Appeal Board*, 506 N.W.2d 445, 447-78 (Iowa 1993), *Suluki v. Employment Appeal Board*, 503 N.W.2d 402, 405 (Iowa 1993), and *Swanson v. Employment Appeal Board*, 554 N.W.2d 294, 296 (Iowa Ct. App. 1996). These cases require an employee to give an employer notice of intent to quit, thus giving the employer an opportunity to cure working conditions. Accordingly, in 1995, the Iowa Administrative Code was amended to include an intent-to-quit requirement. The requirement was only added, however, to rule 871 IAC 24.26(6)(b), the provision addressing work-related health problems. No intent-to-quit requirement was added to rule 871 IAC 24.26(4), the intolerable working conditions provision. Our Supreme Court recently concluded that, because the intent-to-quit requirement was added to 871 IAC 24.26(6)(b) but not 871 IAC 24.26(4), notice of intent to quit is not required for intolerable working conditions. *Hy-Vee, Inc. v. Employment Appeal Bd.*, 710 N.W.2d 1 (Iowa 2005). The U.S. Supreme Court has held that a cause of action for sexual harassment may be predicated on two types of harassment: (1) harassment that involves the conditioning of concrete employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 62 (1986).

Employer argues claimant was fired for poor performance, inability to complete the job, cell phone abuse, and failure to return the cell phone when asked each Monday that she worked but never put the request in writing or threatened to discipline her for it or notify the facility. Because of the failure to warn or otherwise document performance, that employer also indicated on the protest notice that she was still employed part time as of September 2, 2009, did not mention an involuntary separation until after the claimant had given her fact-finding interview statement, employer failed to provide an exculpatory witness who claimant claimed to have been present, and claimant has presented written documentation of her complaints to facility staff, which has been provided to the Iowa Civil Rights Commission, claimant's recollection of

the events and her claim of quitting are credible. Accordingly, employer created an intolerable work environment for claimant by verbal, visual, and physical sexual harassment that gave rise to a good cause reason for leaving the employment. Benefits are allowed.

DECISION:

The September 22, 2009, reference 02, decision is affirmed. The claimant was not discharged but voluntarily left her employment with good cause attributable to the employer. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css