IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHAEL CARBERRY
Claimant

IOWA RENEWABLE ENERGY ASSN
I-RENEW
Employer

APPEAL NO: 11A-UI-03931-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/31/10
Claimant: Respondent (2/R)

Iowa Code § 96.5-1 - Voluntary Quit
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

I-Renew (employer) appealed an unemployment insurance decision dated March 21, 2011, reference 01, which held that Michael Carberry (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 23, 2011. The claimant participated in the hearing with Attorney Paul Waterman. The employer participated through Board President Kimberly Dickey, Director Steve Fugate, and Attorney Ray Rinkol. Employer's Exhibits One through Seven and Claimant's Exhibits A through E were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant's voluntary separation from employment qualifies him to receive unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a temporary contractor with the employer for a couple months in 2007 and 2008. He was hired as a full-time employee on May 1, 2009 as the executive director but it soon became evident that he was a poor manager. The problems increased so much that the Board considered disincorporation and functioning without an executive director in their meeting on March 13, 2010. The employer determined there was an issue of workplace harassment due to neglect of administrative responsibilities and the work environment was referred to as a "borderline hostile work environment." The claimant repeatedly failed to meet deadlines, he falsified information in grants and expected the Board to answer to him as opposed to him answering to the Board. The Board determined that the claimant was good with the big idea but "drops the ball" on someone else to "run with it."

There were repeated problems with personnel as a result of the claimant. At one point, the claimant referred to someone's work effort as a "premature ejaculation." On August 12, 2009 he was involved in an altercation with co-employee Dawn Suter which required Board involvement. On January 16, 2010 his failure to oversee employee Rod Ness resulted in failing to process membership forms for three months before it was discovered. In March and April 2010, the claimant was involved in office disruptions which prompted the Board to discuss possible organization dissolution. A week or two prior to September 30, 2010, the claimant told co-worker Karen Perry, in front of other employees, to tell someone else that her "tricking days were over" and that she "could not work the pole as effectively" as she once did.

The work environment exploded on September 30, 2010. the claimant spoke with Ms. Perry about her previous boyfriend dating his previous girlfriend and how they were on Facebook. According to Ms. Perry, the claimant would not leave it alone and continued making comments all morning and wanting to show her pictures. She begged him to stop and said she did not want to hear it. Their conversation turned into a shouting match which culminated in Ms. Perry yelling that if he did not "shut the fuck up", she was going to vandalize his Prius, burn down his fucking house and kill him.

Consequently, the Board decided to eliminate the claimant's position of executive director. However, he was offered a part-time, temporary position as a project manager with no benefits and pay of no more than $15.00 per hour. The claimant instead chose to verbally resign on October 14, 2010 during a board meeting. He followed that verbal resignation with a written resignation on that same day.

The claimant filed a claim for unemployment insurance benefits effective October 31, 2010 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the reasons for the claimant's separation from employment qualify him to receive unemployment insurance benefits. The claimant contends he was forced to resign but the evidence does not support that contention. He had the option of continuing employment, albeit in a different position, but no one forced him to leave.

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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The claimant verbally resigned on October 14, 2010 during a board meeting and he followed that verbal resignation with a written resignation on that same day. When a claimant voluntarily quits, he bears the burden of proving that the voluntary quit was for a good reason that would not disqualify him. Iowa Code § 96.6-2.

871 IAC 24.26(1) 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:
>
> (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

A "change in the contract of hire" means a substantial change in the terms or conditions of employment. See *Wiese v. Iowa Dept. of Job Service*, 389 N.W.2d 676, 679 (Iowa 1986). Generally, a substantial reduction in hours or pay will give an employee good cause for quitting. See Dehmel v. Employment Appeal Board, 433 N.W.2d 700 (Iowa 1988). In analyzing such cases, the Iowa Courts look at the impact on the claimant, rather than the employer's motivation. Id. The claimant's position of executive director was being eliminated but he was offered part-time, temporary employment as a project manager. He would receive no benefits and would be paid between $10.00 to $15.00 per hour. These changes are considered to be a substantial change in the claimant's contract of hire. *Dehmel v. Employment Appeal Board, 433* N.W.2d 700 (Iowa 1988).

However, that is not the end of the analysis if the change in the contract of hire was due to a demotion. When an employer discharges an employee for misconduct, the employee is disqualified from receiving unemployment benefits. It is consistent with the statutory framework to extend that analysis to hold that in situations in which an employer demotes an employee for misconduct warranting discharge, an employee who leaves employment should be disqualified from receiving benefits. *Goodwin v. BPS Guard Services, Inc.*, 524 N.W.2d 28 (Minnesota App. 1994). The issue in this case then becomes whether the claimant was demoted for misconduct that was sufficient to warrant his discharge and the answer to that question is yes.

The claimant's demotion was due to his contribution to a hostile work environment. The problems went back as far as March 13, 2010 when the employer determined there was a harassment issue which directly fell under "neglect of administrative responsibilities" and the work environment was referred to as a "borderline hostile work environment" by one of the staff. Aside from his lack of leadership, the claimant made inappropriate comments like comparing a work effort to a premature ejaculation. A week or two prior to September 30, 2010, the claimant suggested co-worker Karen Perry say to someone else that her "tricking days were over" and that she "could not work the pole as effectively" as she once did. These comments were said in front of co-workers.

On September 30, 2010 the claimant spoke with Ms. Perry about her previous boyfriend dating his previous girlfriend and how they were on Facebook. According to Ms. Perry, the claimant would not leave it alone and continued making comments all morning. She begged him to stop and said she did not want to hear it but it turned into a shouting match which culminated in Ms. Perry yelling that if he did not "shut the fuck up", she was going to vandalize his Prius, burn down his fucking house and kill him. While granting that Ms. Perry's comments were inappropriate at best, she had never demonstrated that conduct prior to this date and it demonstrates how bad the work environment had deteriorated.

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). The claimant's comments to Karen Perry created a hostile or offensive working environment. Under these circumstances the administrative law judge cannot conclude that the claimant's separation was for good cause attributable to the employer as defined by Iowa law. Benefits are therefore denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

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 determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated March 21, 2011, reference 01, is reversed. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/css