IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CASSANDRA ACKERSON
Claimant

CDS GLOBAL INC
Employer

APPEAL NO. 09A-UI-16570-ET

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 10-11-09
Claimant: Appellant (2-R)

Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 28, 2009, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a telephone hearing was held before Administrative Law Judge Julie Elder on December 8, 2009. The claimant participated in the hearing. John Noll, Employee Relations Manager; Linda Burns, Employee Relations Specialist; and Cathy Hagist, Account Director; participated in the hearing on behalf of the employer. Employer's Exhibits One, Two, and Three were admitted into evidence.

ISSUE:

The issue is whether the claimant voluntarily left her employment with good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time Manager I for CDS Global from September 23, 1996 to August 4, 2009. On July 13, 2009, the claimant was eating lunch on the patio with co-worker Jessica Hensley. Two of the account managers supervised by the claimant, Ramona Lewis and Jackie Ollie, came by the claimant's table, with Michelle Dunham. Ms. Hensley said she was going inside because she was hot and the claimant said she "surely couldn't be as hot as (Ms. Lewis and Ms. Ollie) because they were black." They asked her to repeat what she said and she did so. Ms. Lewis and Ms. Ollie were offended by her comment, as was Ms. Hensley, who told the claimant her comment was inappropriate as soon as the other women left. Ms. Lewis and Ms. Ollie reported the claimant's statement to the employer July 15, 2009, and the claimant told Employee Relations Specialist Linda Burns and Account Director Cathy Hagist what happened July 16, 2009, and said she commented to Ms. Hensley she "surely could not be as hot as Ms. Lewis and Ms. Ollie because they were wearing black." One of the women was wearing black pants with a floral shirt and the other was wearing a floral outfit. The employer said it was aware of the situation and was going to investigate the situation by talking to witnesses. The claimant commented that, "It was going to be three against two and they always win." The employer asked what she meant and she said, "In these situations they always win." The employer stated she did not agree and the claimant said, "Maybe not at CDS but outside they do." The claimant apologized to Ms. Lewis and Ms. Ollie for her remark on the patio

but insisted she was referring to their clothing and, as a result, neither woman accepted her apology because they felt she was not being sincere or honest.

The claimant was scheduled to go on medical leave from the afternoon of July 16, 2009 to August 3, 2009. While she was gone the employer spoke to Ms. Lewis and Ms. Ollie, who both insisted the claimant did not comment on their clothing but rather on their skin color. Ms. Hensley confirmed the claimant did not remark on their clothing and stated she felt so guilty about the claimant's statement she apologized to Ms. Lewis and Ms. Ollie and said the comment made her white "race look ignorant." Ms. Dunham agreed the claimant made the statement and did not comment about their clothes, as did Amanda McCurdy, who worked outside the claimant's department but was eating lunch nearby on the patio. All of the witnesses indicated how uncomfortable the claimant's remark made them. The employer asked Ms. Lewis and Ms. Ollie if there had been any other incidents of a racial nature involving the claimant and they stated that quite some time ago they told the claimant she was speaking "ghetto" to them but not the Caucasian employees and after that she stopped.

When the claimant returned from her medical leave, the employer notified her she was being demoted to an account specialist position and her pay would be decreased from $17.80 per hour to $17.28 per hour. The claimant indicated she was disappointed with how the employer was handling this "misunderstanding" and did not know if she could work for her new manager. The claimant ask for a couple of days off to decide whether to accept the new position, because it would be difficult for her to go from a manager position to a peer of those she managed and the employer granted her request. She submitted her resignation letter effective August 4, 2009.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left her 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(27) and (28) provide:

> 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:
>
> (27) The claimant left rather than perform the assigned work as instructed.
>
> (28) The claimant left after being reprimanded.

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. 871 IAC 24.25. Leaving because of unlawful, intolerable, or detrimental working conditions would be good cause. 871 IAC 24.26(3),(4). Leaving because of dissatisfaction with the

work environment is not good cause. 871 IAC 24.25(1). 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. While the claimant testified she did not say Ms. Lewis and Ms. Ollie would be hotter in the sun because they were black but that they would be hotter in the sun because they were wearing black, the four witnesses to the incident, including Ms. Hensley, who was eating lunch with the claimant, all stated the claimant said they would be hotter because they were black. Although the circumstances might be considered a change in the contract of hire, the employer proposed to demote her rather than terminating her employment due to disciplinary reasons. Since the claimant's statement would be considered misconduct due to harassment by making an inappropriate, unprofessional, and offensive statement, the employer's decision to demote the claimant from her Manager I position to an account specialist position, at a decrease in wages of $0.52 per hour, and retain her rather than terminate her employment, did not give claimant a good cause reason attributable to the employer for her leaving the employment. Consequently, the administrative law judge concludes benefits must be denied.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The October 28, 2009, reference 01, decision is reversed. The claimant voluntarily left her employment without good cause attributable to the employer. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/kjw