IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

ERIKA G SCHUMAN Claimant **GLEBRY INCORPORATED** Employer	**APPEAL 16A-UI-12896-JCT** **AMENDED** **ADMINISTRATIVE LAW JUDGE** **DECISION** **OC: 11/06/16** **Claimant: Respondent (1)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the November 29, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 21, 2016. The claimant participated personally and was represented by her fiancé, Amanda Tyler. The employer participated through Glenn Johnson, attorney at law and president of the employer business. Sherry Kososkie, store manager, and Bryan Johnson, vice president, participated on behalf of the employer. Employer Exhibits A through F, and Claimant Exhibits 1 through 5 were admitted into evidence. The administrative law judge also took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:
Did the claimant voluntarily quit the employment with good cause attributable to the employer?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:
Having reviewed all of the evidence in the record, the administrative law judge finds: The employer operates a Firehouse Subs restaurant. The claimant was employed part-time as a crew member and was separated from employment on October 25, 2016, when she quit without notice. Continuing work was available.

The claimant stated she quit the employment based on continued text messages she received from her manager, Sherry Kososkie, discussing other employees' work status, and because Ms. Kososkie repeatedly asked the claimant to share her prescribed Xanax pills. The evidence is disputed as to when the claimant disclosed to Ms. Kososkie, that she took prescribed Xanax, for anxiety; according to the claimant, it was immediately at the beginning of her employment, but

according to Ms. Kososkie, it was not until October 8, 2016. An undated text message reflects the claimant telling Ms. Kososkie that she would be carrying her Xanax on her daily at work (Claimant Exhibit 1). The claimant indicated that she estimated between four to five times Ms. Kososkie asked her verbally to share her prescription pills and in two to three text messages as well.

On October 4, 2016, via text message, the claimant and Ms. Kososkie exchanged the following text messages: (Claimant Exhibit 5)

Ms. Kososkie: Can I get some skittles from you just a few
Claimant: They are at home today. I have bedtime ones though.
Ms. Kososkie: Whenever you bring them is fine thank you

Ms. Kososkie denied knowing the claimant was taking Xanax before the October 4, 2016 message. The claimant denied sharing any of her prescribed medication with Ms. Kososkie, and that her reference to "skittles" referred to street drugs, not candy, and the term was used in the workplace amongst employees. The claimant stated she would simply tell Ms. Kososkie "no" when asked, but that she continued asking for pills. The claimant also acknowledged that she had personally observed Ms. Kososkie smoke marijuana, both outside of the employer's premises, while the claimant smoked a cigarette, and one time at Ms. Kososkie's home, in her bedroom, when the claimant was there between shifts. Ms. Kososkie denied engaging in drug use, marijuana or other. She further stated that the reference to "skittles" was for a "few bags of the candy", skittles, not drugs. She had no explanation for why she would ask for a "few" or not reference bags. The claimant denied ever being asked to purchase candy for Ms. Kososkie.

In addition, the claimant stated Ms. Kososkie would routinely share information about other employees via text message such as "I hated Erin from the day I met her. I can't stand her. (Claimant exhibit 2, page 20), stating she could make an employee cry in 3 seconds (Claimant Exhibit B, pages 4 and 5) and showing the claimant an email where Mr. Johnson referred to Ms. Kososkie as "not exactly competent" (Claimant Exhibit 3, page 2). Ms. Kososkie defended her text messages as being in response to those which were initiated by the claimant, and because the claimant had ambitions to be in management, that she could or should know the information.

The claimant acknowledged she did not notify the employer of any concerns with Ms. Kososkie's emails or requests for Xanax but that they caused her stress and she did visit a doctor for related stress prior to quitting. The claimant never told Ms. Kososkie to stop sending her messages or inquire why she would share other employee information with her. The claimant also referenced that Ms. Kososkie had requested Xanax for her manager, Bryan Johnson, as well, also which Ms. Kososkie denied.

While on vacation during the week of October 16 through 23, the claimant and her spouse discussed the stress associated with the continued requests for Xanax and the text messages and determined it was best for her to quit the employment. Upon return from vacation, she tendered her resignation effective immediately. The employer disputed the claimant's reason for quitting, stating the claimant had informed Ms. Kososkie that she was quitting to accept employment at a nursery for $10.00 per hour. The claimant acknowledged she had told Ms. Kososkie about a potential job offer under those terms but was never offered the position and denied referencing it as the reason for quitting.

The administrative record reflects that claimant has received unemployment benefits in the amount of $1128.00, since filing a claim with an effective date of November 6, 2016. The

administrative record also establishes that the employer did participate in the November 28, 2016 fact-finding interview by way of attorney and president, Glenn Johnson.

REASONINGS AND CONCLUSIONS OF LAW:
For the reasons that follow, the administrative law judge concludes the claimant quit the employment for good cause reasons attributable to the employer. Benefits are allowed.

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.

Iowa Admin. Code r. 871-24.26(3) 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:
>
> (3) The claimant left due to unlawful working conditions.

Iowa Admin. Code r. 871-24.26(2) 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:
>
> (2) The claimant left due to unsafe working conditions.

Iowa Admin. Code r. 871-24.26(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.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. 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. See 871 IAC 24.25. The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Industrial Relations Commission,* 277 So.2d 827 (Fla. App. 1973). 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). The test is whether a reasonable person would have quit under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.,* 494 N.W.2d 660 (1993).

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 weight of the evidence in the record establishes intolerable and/or detrimental working conditions that would have prompted a reasonable person to quit the employment without notice.

The credible evidence does not support that the claimant quit to accept other employment, as the claimant was never offered the position and had only told her manager about the possibility of the job. Rather, the evidence presented is that the claimant quit due to the ongoing conduct of Ms. Kososkie. A claimant with work issues or grievances must make some effort to provide notice to the employer to give the employer an opportunity to work out whatever issues led to the dissatisfaction. Failure to do so precludes the employer from an opportunity to make adjustments which would alleviate the need to quit. *Denvy v. Board of Review,* 567 Pacific 2d 626 (Utah 1977). Generally, when an employee does not notify the employer of a work condition or concern, and continues to work over a period of time, they are seen as to acquiesce to the condition. If at issue were only text messages in which Ms. Kososkie referenced other employees' job status or other frustrations with the workplace, (Claimant Exhibits 1 and 2) the administrative law judge would be persuaded that the claimant would be obligated to notify the employer for resolution and to preserve employment as the messages, although unprofessional, would not prompt a reasonable person to quit without notice.

However, the claimant quit in part due to her manager requesting her to provide access to Xanax prescribed to the claimant. The sharing of prescribed medications is well-known as being prohibited and illegal. Ms. Kososkie, as a manager, was held to a higher standard, and her requests of her subordinate employee, placed the claimant in the uncomfortable position of complying with requests of her boss, or quitting to avoid engaging in illegal behavior. Quitting for detrimental work conditions does not require notice to the employer or attempt for resolution to preserve employment. In the case of a resignation because of suspected illegal or unethical corporate behavior, the proper inquiry is whether a person of reasonable prudence would, in like circumstances, believe that improper or illegal activities were occurring at the place of work and that these activities necessitated the individual's quitting. *O'Brien v. Employment Appeal Board*, 494 N.W.2d 660 (Iowa 1993).

In the case at hand, the claimant provided specific, persuasive evidence, including a text message in which Ms. Kososkie, asked the claimant to get "some skittles from you just a few" (Claimant Exhibit 5). "Skittles" is a popular slang term for street drugs, and in light of the lack of history of Ms. Kososkie ever asking the claimant for candy before, and the lack of reference to a package but rather "few", the administrative law judge found the employer's testimony that she was requesting a "few bags of skittles" to be less credible than the claimant. The administrative law judge is persuaded Ms. Kososkie was aware of the claimant's use of Xanax based on the claimant's disclosure at the time of hire and in her text messages (Claimant Exhibit 1). Further, given the specificity offered by the claimant, including her personally observing Ms. Kososkie

engage in marijuana usage, the administrative law judge is persuaded that the claimant's concerns of Ms. Kososkie requesting she engage in illegal behavior by sharing her Xanax prescription were credible and valid. There can be no acquiescence to illegal conduct occurring in the workplace. Based on the evidence presented, the administrative law judge concludes that Ms. Kososkie's repeated requests for the claimant to share her prescription, Xanax, with her created an intolerable work environment for claimant that gave rise to a good cause reason for leaving the employment. Benefits are allowed.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

DECISION:

The November 29, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant voluntarily left the employment with good cause attributable to the employer. Benefits are allowed, provided she is otherwise eligible. The claimant has not been overpaid benefits. The employer is not relieved of charges associated with this claim.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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