IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GLORYANN MEJIAS-SARCENO
Claimant

WELLS ENTERPRISES INC
Employer

APPEAL NO. 11A-UI-13552-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/18/11
Claimant: Appellant (2)

Iowa Code § 96.5(1) – Voluntary Leaving

STATEMENT OF THE CASE:

The claimant filed an appeal from the October 7, 2011 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on December 6, 2011. Claimant participated and was represented by Todd Deck, attorney at law. Employer did not offer testimony but was represented by Jason Gann, attorney at law. Employer's Exhibits 1-01 and 1-02 were admitted to the record. Claimant's Exhibit A was admitted to the record.

ISSUE:

The issue is whether claimant voluntarily left the 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: Claimant was employed full-time as a sanitation set-up manager. She was hired in January 2009 and was separated from employment on September 22, 2011. She interviewed for the promotion to the management job in July 2010, got the job on August 17, and started in September 2010. Claimant supervised three direct supervisors and 35 employees under them. Thereafter, immediate supervisor and plant manager John Sample made ethnic comments about and to claimant regularly in one-on-one meetings, at management lunches, and at the front office. He referred to her "too passionate" emotions because of being Hispanic, Latin, or from the Caribbean. Sample made fun of her accent in front of others saying she "talked gibberish" at interviews and management lunch meetings two to three times per month from summer 2010 through the separation date. He also said, "You've gotta love the Puerto Rican accent." Sample accused her of not having strong leadership or management skills after she asked for training or help, which was not provided. In mid-March, she hired subordinate sanitation set up supervisor Mark Capash to work with a team 9 to 12 employees for the structural changes and asked Sample to help Capash to do that; but, when she followed up with him in June, she learned it was not accomplished. Capash was fired in early August 2011. Sample made comments after she returned from vacation in June and when the management team went to a monthly lunch and she ordered her favorite dish, he made fun of how she pronounced

"fettuccini." After claimant told him she did not like how he made fun of her, Sample cancelled management meetings with her. Claimant did not report her concerns about Sample to Vice President of Operations David Lyons or CEO Mike Wells or call the ethics hotline. Her former supervisor and a human resources representative were present when Sample made some of these comments but did nothing about it.

She was prompted to quit because most recently on September 13 there was a disagreement about her work performance with subordinate sanitation department supervisor Ryan Vander Schel. He got favorable treatment from human resources and management, including Sample. Claimant was not able to get support for work performance issues Vander Schel had and he and Sample discussed claimant's cultural differences. Sometime in 2012 the employer anticipated changing her supervisor from Sample to Clarissa Vaughn, with whom she had concerns because of "body language" and "dirty looks." Her workload was also anticipated to change, but not necessarily increase

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 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 24.26(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.

A notice of an intent to quit had been 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). 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 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 use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. EAB*, 462 N.W.2d 734 (Iowa App. 1990). Inasmuch as an employer can

expect professional conduct and language from its employees, claimant is entitled to a working environment without being the target of ethnic name-calling and should not have to endure this in order to retain employment any more than an employer would tolerate it from an employee. Claimant is not required to tolerate Sample's behavior until sometime in 2012, when she would be assigned a new supervisor, in order to retain eligibility for unemployment insurance benefits. Sample's ethnic comments about claimant and his failure to support her in the enforcement of her supervisory authority with Vander Schel created an intolerable work environment for claimant that gave rise to a good-cause reason for leaving the employment. Benefits are allowed.

DECISION:

The October 7, 2011 (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. The benefits withheld shall be paid to claimant.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw