

pressroom and the employer immediately took immediate action to rectify the matter by installing an air purifying system. (Tr. 4, 9)

The owner of the company, Jody Koopman was a heavy smoker and frequently walked through the claimant's work area (pressroom), which was a restricted area as it contained fumes and lots of loose paper. (Tr. 5, 8-9) Although the State of Iowa previously passed a law banning smoking in all businesses, Jody regularly walked through the premises with a lighted cigarette. (Tr. 3, 4, 5, 14) Nearly three months after the smoking ban passed, the claimant complained to Mr. Koopman that he was having problems with Jody's smoking. (Tr. 3) Nothing was done; the claimant warned the employer that if he saw Ms. Koopman smoking, again, he would "... automatically walk out..." even though Mr. Winders did not take action at the time. (Tr. 6) The employer also received a customer complaint about Jody Koopman's smoking. (Tr. 10, 14) Yet, nothing was ever done about her habit.

Finally, on September 26, 2005, Mr. Winders gave his two-week resignation in which time the employer did nothing to alleviate Jody Koopman's smoking in or around the pressroom. (Tr. 4)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1) (2007) provides:

An individual shall be disqualified for benefits: *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 provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employer 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...

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code §96.6(2) (amended 1998).

871 IAC 24.26(5) provides a quit is with good cause attributable to the employer when, "The claimant left due to intolerable or detrimental working conditions."

The record reflects that the employer, Jody Koopman, continued to smoke in the employer's facility after the state-wide smoking ban was passed into law. Ms. Koopman walked through the claimant's work area with a lighted cigarette. The record establishes that Ms. Koopman periodically, but not often, left her office and went into the work area while smoking. A reasonable person would believe that the employer's actions would continue.

Although the employer denies having any knowledge of the claimant's chronic breathing condition, he acknowledges that the claimant missed a lot of work due to having "a bunch of tests done in Iowa City..." (Tr. 6) The fact that he installed an air purifying system is corroborative of the claimant's testimony that the employer did, in fact, have knowledge of his breathing concerns and the air quality in the pressroom. Furthermore, the employer's allusion to the claimant's condition being caused by "...smoking all the time in barroom, bars and everything," (Tr. 9) during his previous years makes it more probable than not that the employer was fully aware of Mr. Winders' sensitivity to smoke in the environment.

The employer should have also been on sufficient enough notice that Jody's smoking habits were a detrimental concern for the claimant based on his complaint shortly after the smoking ban and Winders' final alleged 'threat' to quit should she ever light up again. (Tr. 6) The court in Hy-Vee v. Employment Appeal Board, 710 N.W.2d 1 (Iowa 2005) where the court held that the notice of intention to quit set forth in Cobb v. Employment Appeal Board, 506 N.W.2d 445 (Iowa 1993) does not apply to quits involving detrimental and intolerable working conditions.

Additionally, Jody Koopman's smoking in the pressroom (an unauthorized smoking area) created a safety issue due to the fumes of paper in this area. (Tr. 3, 15) thus, we note that the court in the Hy-Vee case also overturned Swanson v. Employment Appeal Board, 554 N.W.2d 294 (Iowa App. 1996) involving quits due to unsafe working conditions.

Lastly, based on a customer's complaint regarding Jody Koopman's smoking (which the employer admitted, but denied the timeframe), we can reasonably assume her smoking was visible and clearly not in compliance with Iowa law. The court in O'Brien v. Employment Appeal Board, 494 N.W.2d 660 (Iowa 1993) held that the claimant need not prove that the employer's actions that triggered the quit were, in fact, illegal. Rather, the court used the reasonable person standard, which indicates if a reasonable person would believe the employer's actions were illegal, then there is good cause to quit.

Based on this record, we conclude that substantial evidence supports that the claimant worked under detrimental and intolerable working conditions for which he also believed to be not only unsafe, but illegal as well. Consequently, his quit was a nondisqualifying event.

DECISION:

The administrative law judge's decision dated January 5, 2009 is **REVERSED**. The claimant voluntarily quit his employment with good cause attributable to the employer. Accordingly, he is allowed benefits provided he is otherwise eligible.

John A. Peno

AMG/fnv

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/fnv

The claimant submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. A portion of the argument consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the argument and additional evidence (documents) were considered, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

A portion of the employer's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

Lastly, the claimant has requested this matter be remanded for a new hearing. The Employment Appeal Board finds the applicant did not provide good cause to remand this matter. Therefore, the remand request is **DENIED**.

John A. Peno

Elizabeth L. Seiser

Monique F. Kuester

AMG/fnv