

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CIERRA M FRENCH
Claimant

APPEAL NO. 11A-UI-11146-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PARLOR CITY ICE CREAM LLC
Employer

**OC: 07-24-11
Claimant: Respondent (2-R)**

Iowa Code § 96.5(1) – Voluntary Leaving
Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 17, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 6, 2011. The claimant did participate. The employer did participate through Angela Hoyt, owner; Hannah Vanourney, team member; and Brittany Conwell, assistant manager. Claimant's Exhibit A was entered and received into the record.

ISSUES:

Did the claimant voluntarily quit her employment without good cause attributable to the employer or was she discharged due to job related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as an assistant manager, part-time, beginning in July 2001 through July 27, 2011, when she was discharged due to job-connected misconduct. The claimant arrived at work on July 23 and began a conversation with her coworker Brittany Conway. Another coworker, Hannah Vanourney, was present and heard the conversation between the claimant and Ms. Conwell. The claimant was complaining that she was not being allowed to interview new job candidates. In the past, the claimant had been allowed to interview job candidates. On July 21 the employer, Ms. Hoyt, had instructed the claimant and Ms. Conway to call prospective employees to set up interview times. When neither employee called the prospective employees, Ms. Hoyt called them herself and set up interview times that would work for her. The interview times would not have allowed the claimant to be present for the interview. As the owner of the business, Ms. Hoyt was well within her rights to schedule interviews for and interview prospective employees. While complaining to Ms. Conway, the claimant alleged that the reason she was not being allowed to participate in the interview was because Ms. Hoyt was a racist, as the claimant is of African-American descent. Ms. Conway specifically heard the claimant make the allegation of racism and immediately challenged the claimant's assertion.

The conversation was overheard by Ms. Vanourney, who at hearing, along with Ms. Conway, confirmed that the claimant did assert that Ms. Hoyt was treating her differently because it was a "black and white issue" and because Ms. Hoyt was a racist. Later, Ms. Conway reported the claimant's allegations to Ms. Hoyt, who subsequently confronted the claimant. The claimant initially denied the allegation and then admitted that her mother may have gotten her all wound up and that's why she made the claim.

Ms. Hoyt had dealt with the claimant's prior emotional outbursts at work, including crying and claims of disparate treatment. The claimant had been an employee of Ms. Hoyt's since she was 15 or 16 years old and Ms. Hoyt considered her part of her family. For the claimant to allege that Ms. Hoyt was treating her differently because she was a racist was considered slanderous by Ms. Hoyt. The allegations were made in the workplace where customers could hear, as well as other employees. Ms. Hoyt depends upon the goodwill of the public to patronize her business. Members of the public would not patronize her business if they believed she was a racist.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment due to job-related misconduct.

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(21) 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:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

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 only quit because she was told if she did not she would be discharged. Under such circumstances her separation is appropriately analyzed as a discharge.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The claimant knew or should have known that she should not make false accusations about her employer, particularly to other employees or in front of customers. The administrative law judge is persuaded that the claimant called Ms. Hoyt a racist because she was put out that she was not going to be allowed to participate in new employee interviews. There is absolutely no credible evidence to establish that Ms. Hoyt was or is a racist or that she treated the claimant any differently because of the color of her skin. In fact, the record established that Ms. Hoyt went out of her way to insure that the claimant was treated no differently than any other employee and the employer even sought to insure the claimant's fair treatment in another work place. Under such circumstances, the claimant's false, malicious accusation of racism in front of other employees amounts to sufficient misconduct to disqualify her from receipt of unemployment insurance benefits. Benefits are denied.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits

were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. 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 § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The August 17, 2011 (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. 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.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw