

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**CHERYL J TIMEUS
1910 RHOMBERG
DUBUQUE IA 52001**

**SEVENTH AVENUE INC
1112 – 7TH AVE
MONROE WI 53566**

**Appeal Number: 06A-UI-00885-RT
OC: 12-25-05 R: 04
Claimant: Appellant (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Cheryl J. Timeus, filed a timely appeal from an unemployment insurance decision dated January 17, 2006, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on February 8, 2006, with the claimant participating. Marcia L. Kafar testified for the claimant. John Indra, Human Resources Manager, and Jim McDevitt, Senior Operations Manager at the employer's location in Peosta, Iowa, where the claimant was employed, participated in the hearing for the employer, Seventh Avenue, Inc. Claimant's Exhibits A through C and Employer's Exhibit One were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. At 2:46 p.m. on February 3, 2006, the claimant called the administrative law judge and spoke to the administrative law

judge. The claimant requested a continuation of the hearing because she was seeking help from Legal Aid, and they would not decide whether they would take her case until Monday, February 6, 2006. The administrative law judge denied the claimant's request for a continuance because the claimant did not have to have an attorney for the hearing, although she was welcome to have one if she could arrange for one, and because the claimant had had sufficient time to obtain an attorney, and because the claimant was not aware whether Legal Aid would take her case or not and whether they would be available at that time. When the administrative law judge called the claimant for the hearing, she informed the administrative law judge that she was not represented by Legal Aid, although they may have taken her case if the hearing had been rescheduled, but they did not participate in the hearing. No request for a continuance was made by Legal Aid.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibits A through C and Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full-time temporary forklift operator or order picker from December 27, 2004 until she voluntarily quit on December 30, 2005. Although the claimant's position was temporary, she had no end date and work remained for the claimant had she not quit. The claimant quit by way of a letter dated December 30, 2005, as shown at Claimant's Exhibit A, which was faxed to the employer's witnesses, Jim McDevitt, Senior Operations Manager, and John Indra, Human Resources Manager, and Kathy Clapham, the claimant's supervisor. The claimant quit because of conduct directed towards her by a male co-worker, Dave Lutgen.

No later than April 2005 the claimant had difficulties with Mr. Lutgen. When the claimant was working on the employer's dock, Mr. Lutgen just sat and laughed at the claimant for five or ten minutes and told the claimant that she would make a good wife someday. The claimant reported this behavior to the employer and eventually both were given written write-ups or warnings. Approximately one week after the write-up, on a Friday, Mr. Lutgen left work early and met the claimant on the freeway and cut her off and then Mr. Lutgen "flipped off" the claimant, honked his horn at the claimant, and then blocked the claimant's path. The claimant did not report this incident to the police, because there were no witnesses, but did do so to the employer. In August, Mr. Lutgen and another employee, Jim Powers, called the claimant a snitch. Mr. Lutgen also continued to bother the claimant by pulling in behind her with a forklift and not backing up. The claimant would ask Mr. Lutgen to honk his horn, but he would ignore her. Finally, on December 19, 2005, while the claimant was walking down a pedestrian walkway with a co-worker, Marcia L. Kafar, Mr. Lutgen was operating a forklift truck and swerved it at the claimant and Ms. Kafar. Ms. Kafar yelled at Mr. Lutgen to use his horn and Mr. Lutgen yelled back, "Fuck you." The claimant reported this behavior to the employer and Mr. Lutgen was given another write-up. This incident, as well as others, were observed by a co-worker, Jym Seitz, who wrote a statement as shown at Claimant's Exhibit C which also contains the written statement of Ms. Kafar.

On December 27, 2006, because of all the incidents with Mr. Lutgen, the claimant told her supervisor, Kathy Clapham, that she was uncomfortable in working in the "racks" alone because Mr. Lutgen also worked in the racks. Ms. Clapham told the claimant that there was nothing that she could do. The claimant then went to tell Mr. McDevitt, but he was not in the office. The claimant then left work. The claimant also had reported an incident with Jim Powers on or about December 20, 2005, when he drove by and called the claimant a "fucking puke." She reported this to Mr. McDevitt that day, but Mr. McDevitt told the claimant

there was nothing he could do since there were no witnesses. The claimant did not work on December 28, 2005, but sent an e-mail letter of that date to Mr. McDevitt, as shown at Claimant's Exhibit B. The claimant was then called by Mr. Indra on December 29, 2005. Mr. Indra told the claimant that he felt that the disciplines of Mr. Lutgen had been handled appropriately and if anything further happened again, that the claimant should immediately report it and Mr. Lutgen would face further discipline. Mr. Indra also told the claimant that he would perform an investigation. The claimant asked that Mr. Lutgen be moved to a different shift and Mr. Indra refused. The claimant then prepared her resignation letter dated Friday, December 30, 2005, as shown at Claimant's Exhibit A.

The employer performed an investigation and Mr. Indra wrote the claimant letters in that regard dated January 3, 2006 and January 9, 2006, which appear at Employer's Exhibit One. The letters indicate that the claimant decided to terminate her employment before the full investigation was completed and then further indicates in the second letter that the investigation had been completed and that the employer had taken the necessary and reasonable actions to prevent recurrence, but Mr. Indra did not say what actions were taken or what was the result of the investigation.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

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(2), (3), (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:

- (2) The claimant left due to unsafe working conditions.
- (3) The claimant left due to unlawful working conditions.
- (4) The claimant left due to intolerable or detrimental working conditions.

The parties agree, and the administrative law judge concludes, that claimant left her employment voluntarily on December 30, 2005. The issue then becomes whether the claimant left her employment without good cause attributable to the employer. The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has met her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The claimant and her witness, Marcia L. Kafar, credibly testified as to continuing incidents by co-workers Dave Lutgen and

Jim Powers. All of these incidents are set out in the Findings of Fact. The incidents with Mr. Lutgen began no later than April 2005. The claimant properly reported those incidents in April 2005. Although the employer gave both the claimant and Mr. Lutgen a warning, the behavior of Mr. Lutgen continued, and apparently Mr. Lutgen was joined in his behaviors by another co-worker, Jim Powers. The claimant testified that these behaviors continued and, although the claimant did not meticulously report each and every occurrence, the claimant continued to report these behaviors to the employer to the extent that it was more than sufficient to alert the employer as to the problems. The employer did not seem to be able to stop the behaviors.

Matters culminated in an incident on December 19, 2005, which was observed not only by the claimant but by two co-workers, Marcia L. Kafar, who credibly testified about the incident, and another co-worker, Jym Seitz, who prepared a statement in that regard. The statement of Mr. Seitz even confirms other testimony of the claimant in regards to behaviors by Mr. Lutgen and Mr. Powers. The claimant reported this incident on December 22, 2005, to the employer. Nothing was done immediately and the claimant became uncomfortable in working alone near Mr. Lutgen. After telling her supervisor, Kathy Clapham, that she was uncomfortable and Ms. Clapham informed the claimant that there was nothing she could do, the claimant quit coming to work and then outlined her complaints in a letter dated December 28, 2005, as shown at Claimant's Exhibit B, and then quit by a letter December 30, 2005, as shown at Claimant's Exhibit A. The administrative law judge concludes that Mr. Lutgen and Mr. Powers did commit most, if not all, of the offenses and behaviors outlined by the claimant and Ms. Kafar. Even the employer seems to concede that Mr. Lutgen told the claimant and Ms. Kafar on December 19, 2005, "Fuck you." This should have been more than sufficient for the employer to have taken immediate action to prevent further occurrences and, further, to have informed the claimant of the immediate actions. The employer did not do so. Accordingly, the administrative law judge concludes that the offenses and behavior of Mr. Lutgen and Mr. Powers made the claimant's working conditions unsafe, unlawful, intolerable and detrimental, and were good cause attributable to the employer for the claimant's quit. The employer, no later than April 2005, was aware of the problem but did not appropriately address the problem to stop the offenses and behavior, at least before the claimant quit. It does appear that once the claimant quit, the employer investigated the matter and perhaps dealt with the matter, but even that is uncertain, as shown at Employer's Exhibit One by the letter sent to the claimant, because all that the employer says is that they had taken the necessary and reasonable actions to prevent recurrences and considered the investigation completed. This is like closing the gate after the horse has escaped.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant's working conditions were unsafe, unlawful, intolerable and detrimental, and that her voluntary quit on December 30, 2005, was with good cause attributable to the employer. Therefore, the administrative law judge concludes that the claimant is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision of January 17, 2006, reference 01, is reversed. The claimant, Cheryl J. Timeus, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she left her employment voluntarily with good cause attributable to the employer.

pjs/kjw