

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JEAN A WILSON
Claimant

HY-VEE INC
Employer

APPEAL 17A-UI-12777-JCT
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/19/17
Claimant: Appellant (1)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Admin. Code r. 871-24.26(1) – Voluntary Quitting – Change in Contract of Hire

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 8, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 5, 2018. The claimant participated personally and was represented by Daniel R. Rockhold, attorney at law. The employer participated through hearing representative, Barbara Buss. Employer witnesses included Casey Higgins, store director, and Taylor Pennington, produce clerk. 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.

ISSUE:

Did the claimant voluntarily quit 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: The claimant was employed full-time as a pharmacy clerk and was separated from employment on November 12, 2017, when she quit the employment. Continuing work was available.

Prior to beginning employment with Hy-Vee Inc., as a pharmacy clerk, the claimant worked for Niessen Pharmacy for many years. When Hy-Vee Inc., bought the pharmacy in 2014, the claimant joined employment under the new ownership. The undisputed evidence is she was well-liked, and recognized in her local community, and the employer viewed her as an asset to the company.

The claimant's primary job duties involved interacting with guests, retrieving medications for guests, and ringing in transactions. Occasionally, she would be responsible for also placing orders. While the claimant was never formally disciplined, the employer noted it became concerned after a pattern of repeated mistakes being made by the claimant. These included inaccuracies to records, mislabeling of medication and sending guests home without the correct medication or an incomplete order. Given the serious nature of medication distribution and

implications for errors, the employer decided to make a business decision to transfer the claimant from a pharmacy clerk to a front end clerk.

On November 10, 2017, the claimant was called into a meeting with Mr. Higgins. Ms. Pennington served as a witness to the meeting. At that time, Mr. Higgins explained to the claimant that moving forward, he wanted her to move to a full-time, front-end clerk position, and would no longer work in the pharmacy as a clerk. The move was a lateral move from pharmacy clerk to front-end clerk, and not a demotion in status. Mr. Higgins explained to the claimant that she would keep the same hours and wages as a clerk. The employer intended to offer the claimant the option to do some additional duties that were consistent with her prior experience at Niessen Pharmacy, including placing orders, but would primarily ring up guests, similarly to as she had done in the pharmacy, but without prescription medications as part of the items rung up.

The claimant assumed based upon her observation of part-time clerks, that she would be required to stock shelves and bag groceries. The employer did not intend to have the claimant stock shelves and stated bagging groceries would be minimal. The claimant became upset by the conversation and the exact duties were not explained or questioned before she left the meeting. The claimant stated she was offended by Mr. Higgins' comment about her being well liked and respected in the community and would be a good fit up front in the store. The claimant interpreted the comment to mean Mr. Higgins was using her and her reputation to make money for the store.

Upon consideration of the lateral transfer, the claimant sent Mr. Higgins a text message on November 12, 2017, stating "you fired me and I am done". She referenced not wanting to see his or her manager's face again as well. Separation thereby ensued.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not fired, but quit, without good cause attributable to the employer.

An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa Code § 96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer" Iowa Code § 96.5(1) or (2) is discharged for work –connected misconduct, Iowa Code § 96.5(2) a, or (3) fails to accept suitable work without good cause, Iowa Code § 96.5(3).

The first two disqualifications are premised on the occurrence of a separation of employment. To be disqualified based on the nature of the separation, the claimant must either have been fired for misconduct or have quit but not for good cause attributable to the employer. Generally, the employer bears the burden of proving disqualification of the claimant. Iowa Code § 96.6(2). Where a claimant has quit, however, the claimant has "the burden of proving that a voluntary quit was for good cause attributable to the employer pursuant to Iowa Code section § 96.5(1). Since the employer has the burden of proving disqualification, and the claimant only has the burden of proving the justification for a quit, the employer also has the burden of providing that a particular separation was a quit. The Iowa Supreme Court has thus been explicitly, "the

employer has the burden of proving that a claimant's department from employment was voluntary." *Irving v. Employment Appeal Board*, 883, NW 2d 179, 210 (Iowa 2016).

Quit not shown: 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.

A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). Generally, a quit is defined to be a "termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." Furthermore, 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 employer has the burden of providing that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5.

The credible evidence presented does not support the claimant was fired from this employer, in light of her text message to the employer in which she declared she was fired. Rather, the credible evidence presented is that the employer made a business decision to move the claimant from a clerk in the pharmacy to a front end clerk. The claimant was upset by it and left the meeting. Instead of accepting the position, she sent a text message to the employer stating she had been fired. The administrative law judge recognizes the claimant's perception that her being transferred from one department to another may have felt involuntary, but is not persuaded the employer intended to fire the claimant based on the fact she was offered a full-time position at the same hours and wages she worked at the same time she was told she was not going to be working in the pharmacy moving forward. The administrative law judge is also not persuaded the claimant's move was intended to capitalize on the claimant's reputation in the community, and make money for the store. For these reasons, the administrative law judge concludes the separation is a quit and not a discharge.

The next issue is whether the claimant quit for good cause reasons attributable to the employer according to Iowa law.

The claimant has the burden of proof to establish she quit with good cause attributable to the employer, according to Iowa law. Ordinarily, "good cause" is derived from the facts of each case keeping in mind the public policy stated in Iowa Code section 96.2. *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993)(citing *Wiese v. Iowa Dep't of Job Serv.*, 389 N.W.2d 676, 680 (Iowa 1986)). "The term encompasses real circumstances, adequate excuses that will bear the test of reason, just grounds for the action, and always the element of good faith." *Wiese v. Iowa Dep't of Job Serv.*, 389 N.W.2d 676, 680 (Iowa 1986) "[C]ommon sense and prudence must be exercised in evaluating all of the circumstances that lead to an employee's quit in order to attribute the cause for the termination." *Id.* "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).

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 claimant and employer 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 claimant has met her burden of proof to establish she quit for good cause reasons within Iowa law.

Iowa Code § 96.5-1 provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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. 871-24.25(22) provides:

Voluntary quit without good cause. 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 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. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(22) The claimant left because of a personality conflict with the supervisor.

Iowa Admin. Code r. 871-24.25(27) provides:

Voluntary quit without good cause. 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 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. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(27) The claimant left rather than perform the assigned work as instructed.

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:

24.26(1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

An employer has the right to allocate personnel in accordance with the needs and available resources. *Brandl v. Iowa Dep't of Job Serv.*, (No. ___-___/___-___, Iowa Ct. App. filed ___, 1986). Iowa law distinguishes between changes in contract of hire that result in demotion. The credible evidence presented is the claimant was not demoted, but rather offered a lateral transfer from pharmacy clerk to front end clerk. The store location was the same, the hours were the same, and the schedule was the same. The claimant's title changed from pharmacy clerk to front end clerk, and did not strip her of any leadership or managerial title or duties. The claimant did not ask or allow the employer to explain the extent of her job duties as a front end clerk, which the employer intended to keep the same as pharmacy clerk, minus the access to prescription medications. However, the claimant did not inquire or allow the employer to explain the extent of the front end clerk before quitting.

When a claimant quits due to an alleged change to the agreement of hire, she must prove the change to the terms of hire is substantial in order to allow benefits. In this case, claimant was not aware of the impending job duties when she quit and she has not established that the change would be substantial, or that it would jeopardize her health, safety or morals. The administrative law judge is sympathetic to the claimant and recognizes her preference to work in the pharmacy department. However, based on the evidence presented, the administrative law judge concludes the claimant has not met the burden of proof to show she quit with good cause attributable to the employer. Accordingly, benefits are denied.

DECISION:

The December 8, 2017, (reference 01) decision is affirmed. The claimant voluntarily quit the employment without good cause attributable to the employer. 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.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn