BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

TRACY D EDWARDS	:	
	:	**HEARING NUMBER:** 17BUI-00268
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
CEDAR RAPIDS LODGE NO 251	:	
Employer		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1, 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Tracy Edwards (Claimant) worked for Cedar Rapids Lodge No. 251 (Employer) as a part-time cook from September 13, 2007 until he was separated from employment on December 16, 2016. The Claimant worked from the afternoon through the evening. He generally called every day to find out if he was to come into work that afternoon and evening.

On Thursday December 15, 2016 the Claimant got into an argument with a co-worker. The Claimant said that he was “done,” but he worked the rest of the shift. At the end of his shift the Claimant confirmed to his supervisor that he would be available to work the next day. They had not discussed the time he would report. On Friday the 16th the Claimant called, as usual, around 1 p.m. to see about when to report to work.

The Employer informed the Claimant that it had already replaced the Claimant for the next two shifts on Friday and Saturday. During this conversation the Employer told the Claimant that the Board did not want the Claimant to come in, and when the Claimant asked about the following day he was again told not to come in. At no point did the Claimant tell the Employer he quit.

REASONING AND CONCLUSIONS OF LAW:

Disqualification Under The Employment Security Law: 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 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 pursuant to Iowa Code section 96.5, subsection 1, was for good cause attributable to the employer." Iowa Code §96.6(2). 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 has the burden of proving that a particular separation is a quit. The Iowa Supreme Court has thus been explicit: "the employer has the burden of proving that a claimant's departure from employment was voluntary." *Irving v. Employment Appeal Bd.,* 883 NW 2d 179, 210 (Iowa 2016).

Quit not shown: Iowa Code section 96.5(1) 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.

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." 871 IAC 24.1(113)(b). Furthermore, Iowa Administrative Code 871—24.25 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.

"[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." *FDL Foods, Inc. v. Employment Appeal Board,* 460 N.W.2d 885, 887 (Iowa App. 1990), *see also Peck v. Employment Appeal Board,* 492 N.W.2d 438 (Iowa App. 1992).

It is the duty of the Board as the ultimate 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 Board, as the finder of fact, 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, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible the testimony of the Claimant, in particular his denial of an intent to quit, and his description of his communications with the Employer.

The Claimant has denied that he quit, and we have found this credible. Further the fact that the Claimant worked out his shift, promised to return, and then called in the next day tends to undermine the thought that he intended to permanently sever the employment relationship. In this the case is similar to *Peck v. Employment Appeal Board,* 492 N.W.2d 438 (Iowa App. 1992).

In *Peck* the claimant had concerns over his work assignment, and "told [his supervisor] to mark him down as sick or on leave of absence because he was leaving and would take up his concerns later with the front office. [The supervisor] asked Peck to stay and complete other tasks, but Peck declined and left the plant." *Peck* at 439. Mr. Peck insisted on coming in on the next working day but was told he was considered to have quit. The Court found no intent to quit. "Although Peck left work without the employer's permission, he stated he wanted a meeting with management the next day. The evidence shows Peck intended to express a complaint about work conditions." *Peck* at 440. The Court concluded that the Employer had not shown an intent to quit.

Here, just as in *Peck*, the Claimant had a beef over his work. But *unlike* in *Peck* the Claimant actually worked out his shift. Similar to *Peck* the Claimant stated he would be in to work the next day. While the Claimant did not call in the next *morning* he did call in the next day. The Claimant works nights and we do not take his failure to call before early afternoon as expressing an intent to quit. The fact that the Claimant called in at all is similar to the actions of the claimant in *Peck* in that it is not something we'd expect to see from someone who had decided to quit. Since the Claimant was removed from the next two shifts, and told the Board did not want him he reasonably concluded that he no longer had a job. The Employer for its part assumed the Claimant quit.

It is true, the Employer interpreted the failure to call sooner as a quit, and had more work available for the Claimant if he had called. But in *Peck* the Court found no quit even though the employer in *Peck* construed the walk out as a quit. Further, the parties discussed some sort of investigation that was to take place on Friday, but the evidence was far from clear on the point and we are unable to find that the Claimant intended to quit merely because the Friday meeting did not take place. We find that the greater weight of evidence fails to establish that the Claimant intended to quit. Thus he cannot be found to have quit under 871 IAC 24.25.

Mutual Mistake In This Case Not Disqualifying: Even accepting the Employer's contention that it took the Claimant to be quitting this would not be disqualifying. If that were the case the situation we would face, which is surprisingly not that rare, is a separation by mutual mistake. The Employer thought the Claimant was quitting, and the Claimant thought he had been terminated. One might wonder, then, whether this would be a quit or a discharge. Casting the issue in these terms, however, is a false dichotomy. Under the rules a separations include "**all** terminations of employment" and these in turn are **"generally** classifiable as layoffs, quits, discharges, or other separations." 871 IAC 24.1 (emphasis added). Therefore a separation by mutual mistake is a "termination of employment" and falls within the definition of a "separation." It is also clear that a separation by mistake does not fall within the definition of a quit or a discharge. We conclude, therefore, that the Claimant is not disqualified by the separation under the circumstances of this case.

This treatment of separation by reasonable misunderstanding is compelled by logic. We know that the only disqualifying separations are discharges and quits. When there is a separation by reasonable mistake the Claimant was neither discharged nor did he quit. We are required to conclude, therefore, that the Claimant was not disqualified by the nature of his separation. This result is, we think, inescapable once it has been determined that the separation was caused by a mutual mistake of the parties. Of course, the Claimant must otherwise be eligible and not have been disqualified by something other than the nature of the separation. In this appeal, however, we address only the allegation that the Claimant was disqualified by his separation and we find that he was not. We caution that where a Claimant *unreasonably assumes* he has been fired, but has not been, this can be a disqualifying quit. *LaGrange v. IDJS*, No. 83-1081 (Iowa App. June 26, 1984). The case at bar does not fall into this category, so we allow benefits. The Employer has failed to prove that the Claimant quit, and failed to prove that the Claimant was discharged for misconduct.

DECISION:

The administrative law judge's decision dated January 31, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

_____
Kim D. Schmett

_____
Ashley R. Koopmans

_____

James M. Strohman

RRA/fnv