

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

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JAMES W BREITKREUTZ	:	
	:	
Claimant,	:	HEARING NUMBER: 09B-UI-09632
	:	
and	:	
	:	EMPLOYMENT APPEAL BOARD
ACC ENTERPRISES LLC	:	DECISION
	:	
Employer.	:	

**NOTICE**

**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**

**DECISION**

**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. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The Board makes no finding regarding the timeliness of the Employer's appeal as, in any event, the Board finds for the Claimant. The Board in reaching its findings and conclusions today does not consider any new and additional evidence which the Claimant submitted and/or had proposed to submit.

James Breitkreutz (Claimant) was employed by Cedar Health (Employer) as a full-time maintenance director from May 7, 2007 until his quit on May 1, 2009. (Tran at p. 13-14; p. 20; Ex. 1). The Employer is a licensed care facility of some sort although the record does not show the level of care. The licensed administrator of the facility is Dennis Sanvig. (Tran at p. 2). On April 7, 2009, the Claimant gave a verbal resignation and 30-day notice to Administrator Dennis Sanvig stating he was

looking for another job. (Tran at p. 16-17; p. 19-20; Ex. 1). The Claimant left earlier than expected and his last day was May 1. (Tran at p. 14; p. 21; Ex. 1).

On March 22, 2009, a contractor was taking up tile in the kitchen. (Tran at p. 24-25). This generated a lot of dust. (Tran at p. 24). The Claimant had been told by the contractor in a phone call that there was some asbestos in the tile. (Tran at p. 25-26; p. 55). The Claimant then told administrator Sanvig of the call. (Tran at p. 26). He gave Mr. Sanvig the person's phone number. (Tran at p. 26). The Claimant did not hear back about the asbestos and the removal continued. (Tran at p. 27-28). He challenged the workers, and while two of them left not all removal stopped. (Tran at p. 28). The Claimant was later himself asked to help with the removal. (Tran at p. 37). Prior to this the Claimant had been pressured to do work for which he was not licensed. (Tran at p. 31; p. 32). For example, he was expected to do work which required a licensed plumber. (Tran at p. 31). The Claimant objected but was required to do the work anyway. (Tran at p. 31-32). A similar issue had arisen because the Claimant is not a licensed electrician. (Tran at p. 33; p. 36). The precipitating cause of the Claimant's decision to resign, and but for which he would not have resigned, was the March 22 incident. (Tran at p. 24-26; p. 32; p. 41).

## REASONING AND CONCLUSIONS OF LAW:

A. Background: This case involves a voluntary quit. Iowa Code Section 96.5(1) states:

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.

Under Iowa Administrative Code 871-24.26:

The following are reasons for a claimant leaving employment with good cause attributable to the employer:

...

24.26(4) The claimant left due to intolerable or detrimental working conditions.

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.* Where multiple reasons for the quit, which are attributable to the employment, are presented the agency must "consider that all the reasons combined may constitute good cause for an employee to quit, if the reasons are attributable to the employer". *McCunn v. EAB*, 451 N.W.2d 510 (Iowa App. 1989)(citing *Taylor v. Iowa Department of Job Service*, 362 N.W.2d 534 (Iowa 1985)).

Where an employee quits because of allegedly illegal working conditions the reasonable belief standard applies. "Under the reasonable belief standard, it is not necessary to prove the employer violated the law, only that it was reasonable for the employee to believe so." *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993). Good faith under this standard is not determined by the Claimant's subjective understanding. The question of good faith must be measured by an objective standard. Otherwise benefits might be paid to someone whose "behavior is in fact grounded upon some sincere but irrational belief." *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988). The "key question is what a reasonable person would have believed under the circumstances" and thus "the proper inquiry is whether a person of reasonable prudence would believe, under the circumstances faced by [Claimant], that improper or illegal activities were occurring at [Employer] that necessitated his quitting." *O'Brien* at 662; accord *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988)(misconduct case).

B: Good Cause: As we have found, the Claimant reasonably believed he was working under unsafe or unlawful conditions. In so finding our emphasis is on the Claimant's belief. For example, we certainly do not find that in fact there was exposure to asbestos in the kitchen. But we have found that the Claimant was told there was asbestos, that he appropriately referred the concern, and the Claimant was never told any differently about the asbestos. We conclude that he reasonably concluded that his concerns were founded. We conclude that based on the safety risks a person of reasonable prudence would believe that "improper or illegal activities were occurring at [Employer] that necessitated his quitting." *O'Brien* at 662.

C. Notice of Intent To Quit: "[A] notice of intent to quit is not required when the employee quits due to intolerable or detrimental working conditions." *Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 5 (Iowa 2005). The ruling in *Hy Vee* thus dispenses with the requirement that the Claimant tell the Employer he would quit if the safety problems were not addressed.

D. Notice of Intolerable Conditions: It is not clear how far the ruling in *Hy Vee* sweeps. Clearly, the Claimant need not give notice of an intent to quit. Left unanswered, however, is whether the Claimant needs to give notice of the intolerable conditions themselves. In other words, is a Claimant still required to inform the employer that something is wrong even though the Claimant need not threaten to quit over it?

On this record, even if we were to conclude the Claimant had an obligation to place the Employer on notice of the illegal conditions, we find that the Claimant has satisfied any reasonable requirement of notice. The Claimant did challenge the electrical and plumbing work, although not in the strongest possible terms. He also notified the highest authority at the Employer about the asbestos, which is an obvious point of concern. More than this he was not required to do even if there is some remaining notice requirement. The Claimant has proven he is not disqualified from benefits.

**DECISION:**

The administrative law judge's decision dated July 23, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv

**DISSENTING OPINION OF MONIQUE KEUSTER :**

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.

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Monique F. Kuester

RRA/fnv