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

SHIRLEY MITCHELL Claimant, and MASON CITY CLINIC PC Employer.	:	HEARING NUMBER: 08B-UI-05685 EMPLOYMENT APPEAL BOARD DECISION

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

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. 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:

Shirley Mitchell (Claimant) worked for Mason City Clinic, P.C. (Employer) as a medical record clerk from September 7, 1999 until the date of her quit on May 21, 2008. (Tran at p. 2-3; p. 5). The Claimant has asthma. (Tran at p. 6; Ex. A; Ex. B). The Claimant went on leave on February 28, 2008. (Tran at p. 3). Her leave was approved under the Family and Medical Leave Act. (Tran at p. 3). The Claimant's physician stated on February 27, 2008 that "I believe Shirley's work environment is responsible for much of her difficulty." (Ex. A). On March 27, 2008 Dr. Levinson reported a marked improvement after the Claimant was off work. (Ex. A). He signed a release on that date restricting the Claimant so she "cannot work in MCC basement. Could work on the second floor as a trial." (Ex. A; Tran at p. 3; p. 7). Dr. Levinson is a pulmonary specialist. (Tran at p. 9). The Employer received the

restrictions and asked for clarification. (Tran at p. 3). The Claimant asked for clarification from Dr. Levinson who replied that the Employer had enough information. (Tran at p. 3; p. 8).

On April 10 the Claimant was informed by the Employer that the Employer could not accommodate the Claimant by isolating her from work in the basement. (Tran at p. 8).

The Claimant's FMLA leave was set to expire on May 21, 2008. (Tran at p. 3). The Employer called the Claimant on May 14, 2008 to discuss her plans to return. (Tran at p. 3). The Claimant informed the Employer that she intended to comply with her physician's restrictions. (Tran at p. 3). As a result when the Claimant's leave expired on May 21, 2008 she was separated from the Employer. (Tran at p. 3; p. 5). The Claimant has proved by a greater weight of the evidence that working at the Employer aggravated her asthma. (Tran at p. 6; p. 9; p. 11; p. 12; Ex. A).

REASONING AND CONCLUSIONS OF LAW:

Standards Governing Quits For Work Related Health Problems: 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:
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> ....
> *(6) b. Employment related separation*. The claimant was compelled to leave employment because of an illness injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with the employment, which caused or aggravated the illness, injury, allergy or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of the employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

In White v. Employment Appeal Board, 487 N.W.2d 342 (Iowa 1992) the Supreme Court explained:

> [W]hen the illness is either caused or aggravated by circumstances associated with the employment, regardless of the employee's predisposition to succumb to the illness, the separation will be deemed to be with good cause attributable to the individual's employer. . . .An illness or disability may correctly be said to be attributable to the employer even though the employer is free from all negligence or wrongdoing in connection therewith.

Even a pre-existing health condition that is aggravated by the job is attributed to the Employer under White. See Rooney v. Employment Appeal Bd., 448 N.W.2d 313, 315-16 (Iowa 1989)(noting that a recovering alcoholic who terminates employment with bar and liquor store may do so without disqualifying himself for unemployment benefits to the extent that the employment is found to have "aggravated" his condition); Ellis v. Iowa Dep't of Job Serv., 285 N.W.2d 153, 156-57 (Iowa 1979) (claimant's showing that recently installed Christmas tree would aggravate her pre-existing allergies was sufficient to constitute a "quit" that was attributable to her employer). There is no question that the Claimant has asthma. There is no question the Claimant's own physician noted that her condition was aggravated by her employment. While the worker's compensation physician expressed that the condition was not caused by the work this is not the standard in our cases. Unlike worker's compensation, where even a repeated impact injury must arise out of and be in the course of employment, the Employment Security Law is not concerned only with the ultimate cause of the condition. Under White, and Ellis, and the binding regulations it is enough that there be "[f]actors and circumstances directly connected with the employment, which caused **or aggravated** the illness." 871 IAC 24.26(6)(b). The Claimant has carried her burden of proving that her asthma was aggravated by her job environment.

Notice Of Intent To Quit: In cases of work-related health problems the employee is still required to satisfy the notice requirements of 871 IAC 24.26(6) in order to be eligible for benefits. The case of Hy Vee v. Employment Appeal Board, 710 N.W.2d 1 (Iowa 2005) specifically disapproved the rule of Swanson v. Employment Appeal Board, 554 N.W.2d 294, 297 (Iowa Ct.App.1996), which imposed a notice of intent to quit rule in non-health related setting. The holding of Hy Vee was that "a notice of intent to quit is not required under rule 871-24.26(**4**)." Hy Vee at 5(emphasis added). Health related quits involve 871-24.26(6). The Hy Vee opinion recognized that the Workforce rules have been amended with respect to health related quits and that this amendment means that a notice of intent to quit was required in such situations. Hy Vee at 5. The opinion quoted from and cited to Suluki v. Employment Appeal Board, 503 N.W.2d 402, 404 (Iowa 1993), and Cobb v. Employment Appeal Board, 506 N.W.2d 445, 446-47 (Iowa 1993). These cases were both subsequently codified in 871-24.26(6). In contrast to the specific voiding of the Swanson rule the Hy Vee holding cast no doubt on these cases or on 871-24.26(6).

Even after Hy Vee, therefore, the requirements of 871-24.26(6) remain in effect. An employee who quits based on a work related health condition must still satisfy the notice requirements. Specifically:

before quitting, an employee must give an employer notice of work-related health problems and that the

employee intends to quit unless those problems are corrected or the employee is otherwise reasonably accommodated. Absent such notice, the employee has left work voluntarily without good cause attributable to the employer and is not entitled to unemployment compensation benefits.

Suluki, 503 N.W.2d at 405; accord Cobb v. Employment Appeal Board, 506 N.W.2d 445, 446-47 (Iowa 1993); 871 IAC 24.26(6)"b".

Here the Claimant was told she could not be accommodated. She was given specific work restrictions by Dr. Levinson. The Employer thinks these restrictions do not make sense. That is as may be but the question here isn't whether Dr. Levinson was right. The question is whether the Claimant was reasonable in relying on the opinion of her personal physician, a specialist, in asking that the Employer accommodate her restrictions. We think, of course, that she was perfectly reasonable.

There remains only whether the Claimant gave adequate notice of her intent to quit if not accommodated. Claimant had informed the Employer of the restrictions. The Employer told her they could not be accommodated. On May 14 the Claimant then informed the Employer that she intended to comply with the restrictions and would otherwise quit. The Employer never indicated that the Claimant could be isolated from basement work and a week later when the Claimant's leave expired she quit by not returning to work. The Claimant has satisfied any reasonable requirement of notice as the Employer had ample time to comply with the Claimant's request for accommodation if it were possible.

DECISION:

The administrative law judge's decision dated July 9, 2008 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was quit for good cause attributable to the Employer. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. The overpayment entered against Claimant in the amount of $1,165 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 KUESTER:

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

The claimant has requested this matter be remanded for a new hearing. The Employment Appeal Board finds the applicant did not provide good cause to remand this matter. Therefore, the remand request is **DENIED.**

The Claimant submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. A portion of the argument consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the argument and additional evidence (medical information) were considered, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv