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

JESSE COADY Claimant, and DES STAFFING SERVICES INC Employer.	:	HEARING NUMBER: 08B-UI-05225 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:

Jesse Coady (Claimant) registered to work for clients of Des Moines Staffing Services, Inc (Employer) on June 24, 2003. (Tran at p. 3). The Claimant began his most recent assignment at Mid-American Recycling on October 7, 2007. (Tran at p. 3). In April 2008, employees at the job site started joking or making negative comments about the Claimant's work performance. (Tran at p. 3). On April 18, the Claimant and a co-worker at Mid-American Recycling engaged in an altercation. (Tran at p. 3; p. 6). The supervisor on duty initially told both the Claimant and the other employee to go home. (Tran at p. 6). Before the Claimant left work, the supervisor changed his mind and told the Claimant to stay. (Tran at p. 6). The Claimant, however, left work early on April 18. (Tran at p. 3; p.6).

When the Claimant left work on April 18, he called the Employer's office and left a message to let the Employer know what had happened and what the Claimant had done. (Tran at p. 3 [date]; p. 6). When the Claimant talked to Sorenson on April 19, the Claimant asked about another job assignment. (Tran at p. 6-7). The Employer did not have another job for the Claimant. (Tran at p. 4; p. 7). The Employer did not terminate the Claimant and considered the Claimant available for reassignment. (Tran at p. 4).

REASONING AND CONCLUSIONS OF LAW:

Quit Analysis: An unemployed person who meets the eligibility requirements of Iowa Code §98.4 receives benefits. Only if they fall within an exception to this general rule, as set out in Iowa Code §96.5, are they disqualified. The Code provides that people who are "totally unemployed" may, assuming all conditions are satisfied, receive a level of benefits equal to their, somewhat cryptically calculated, "weekly benefit amount." Iowa Code §96.3(2). "An individual shall be deemed 'totally unemployed' in any week with respect to which no wages are payable to the individual and during which the individual performs no services." Iowa Code §96.19(38(a). What this means, of course, is that an individual need not be separated from employment to be eligible for benefits as totally unemployed.

Meanwhile, if a person is separated from employment then the nature of the separation may disqualify them for benefits under Iowa Code §96.5(1) or §95.5(2). These subsections provide for disqualification for certain kinds of quits and discharges from employment. By law a discharge is form of "termination of employment initiated by the employer". 871 IAC 24.1(113)(c). On the other hand, a quit is a type of "termination of employment initiated by the employee." 871 IAC 24.1(113)(b); see also FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990)("quitting requires an intention to terminate employment…"); Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992)(same). This is but a long way of stating the obvious: both discharges and quits require a termination of the employment relationship. If an employee remains employed then the employee has neither quit nor been discharged. If an employee is not discharged the employee cannot be disqualified under §96.5(2) for being discharged for misconduct. If an employee has not quit the employee cannot be disqualified under §96.5(1) for having quit without good cause attributable to the employment. Thus where the employment relationship continues, that is, where no separation of employment has occurred, then ordinarily disqualification under subsections (1) or (2) of §96.5 cannot be imposed.

The testimony in the case at bar established that the Claimant intended to remain employed by DES Staffing but had requested reassignment to another position. The Claimant did satisfy the requirement that he seek reassignment and so the evidence shows that the Claimant cannot be deemed to have quit under the provisions of Iowa Code §96.5(1)(j). Had the DES Staffing terminated the Claimant for his actions while on assignment we would then need to resolve the issue of disqualification for misconduct. But the Claimant remained employed by the Employer. He was neither fired, nor did he quit, nor can he be deemed to have quit his employment with DES. The Claimant is therefore not disqualified based on the nature of the separation.

Refusal of Suitable Work:

Iowa Code section 96.5(3)(a) provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

(1) One hundred percent, if the work is offered during the first five weeks of unemployment.

(2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.

(3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.

(4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

Suitability of an offer is a fact issue that must be resolved "in light of those facts peculiar to each given case." Norland v. IDJS, 412 N.W.2d 904, 912 (Iowa 1987). Where the claimant actually refuses work, as opposed to not applying for work, the refusal of suitable work question involves whether the work was "suitable" and, if so, whether the refusal was for "good cause". In Pohlman v. Ertl Co., 374 N.W.2d 253 (Iowa 1985) the Supreme Court placed the burden of proof on good cause on the claimant. Subsequently in Norland v. Iowa Department of Job Service, 412 N.W.2d 904, 910 (Iowa 1987) the

Court ruled that the employer had the burden of proving suitability of the offer.

The Department of Workforce Development has set out a particular method for offering work before a disqualification for refusal of suitable work can be imposed:

24.24(1) Bona fide offer of work.

a. In deciding whether or not a claimant failed to accept suitable work, or failed to apply for suitable work, it must first be established that a bona fide offer of work was made to the individual by personal contact or that a referral was offered to the claimant by personal contact to an actual job opening and a definite refusal was made by the individual. For purposes of a recall to work, a registered letter shall be deemed to be sufficient as a personal contact.

871 IAC 24.24(a).

Clearly, the issue of refusal of suitable work is a disqualification issue that is distinct from the nature of the separation. Thus notice of possible disqualification based on the nature of the separation is usually not notice of a pending adjudication of the question of refusal of suitable work. Now generally, "[i]f new issues appear, different from those which are noticed in the appeal, the board ... in the interest of prompt administration of justice and without prejudicing the substantive rights of any party, may hear and decide any issue material to the appeal, even if not specifically indicated as a ground for appeal or not noticed for the administrative hearing." 486 IAC 3.1(6). Thus the fact that an issue is not raised does not necessarily preclude consideration of that issue at a later stage of the proceedings so long as due process is satisfied. Id.; Swanson v. Employment Appeal Board, 554 N.W.2d 294, 297 (Iowa App. 1996); Kehde v. Iowa Dept. of Job Service, 318 N.W.2d 202, 206 (Iowa 1982); Flesher v. Iowa Dept. of Job Service, 372 N.W.2d 230, 233 (Iowa 1985). Despite this, however, due process does require some notice to the parties of what issues are to be decided. For example, notice of a disqualification based on a discharge is not adequate notice that the issue of disqualification based on a quit will be adjudicated. Silva v. Employment Appeal Bd. 547 N.W.2d 232 (Iowa App. 1996); Iowa Code § 17A.12(2)(c) and (d). But quits and discharges are at least both concerned with the separation. The question of refusal of suitable work, which is usually following a separation, is even less clearly related and so we feel this case falls under the rule of Silva. This is particularly the case where the Employer, who has a portion of the burden of proof on a §96.5-3-a disqualification, was not represented below. Baker v. Employment Appeal Board, 551 N.W. 2d 646 (Iowa App. 1996). A remand for an additional hearing is therefore necessary so that the parties can address the issue of disqualification based on a refusal of suitable work. We emphasize that we have already adjudicated the issue of the nature of the separation and thus the remand need not address that issue.

DECISION:

The administrative law judge's decision dated June 19, 2008 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 provide he is otherwise eligible and pending the outcome of the remand hearing. At this time the overpayment entered against Claimant in the amount of $1,568.00 is **VACATED** and set aside. Another overpayment may be assessed as a result of the outcome of the remand hearing. This matter is further **REMANDED** to an administrative law judge in the Workforce Development Center, Appeals Section. The administrative law judge shall conduct an additional hearing following due notice in order to address

the issue of whether the Claimant is disqualified based on a refusal of suitable work. After the hearing, the administrative law judge shall

issue a decision that provides the parties appeal rights. Our finding today that the Claimant is not disqualified based on the nature of the separation does not prevent the Administrative Law Judge from finding, after the remand hearing, that the Claimant is disqualified based on a refusal of suitable work.

_____
John A. Peno

_____
Elizabeth L. Seiser

RRA/ss

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.

_____
Monique F. Kuester

RRA/ss