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

MICHAEL A KOMAREK

Claimant,

and

CSD INC

Employer.

HEARING NUMBER: 09B-UI-13013

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:

Michael Komarek (Claimant) worked full time for CSD (Employer) from February 7, 2005 until he quit on November 7, 2008. (Tran at p. 2-3; p. 5-6; p. 10). Production Manager Brian Nieheus was the Claimant's immediate supervisor. (Tran at p. 5). The Claimant had initially been hired in the packaging department but moved to the position of mixer in less than a year. (Tran at p. 7-8). His job performance in mixing was satisfactory at first but then began to decline. (Tran at p. 8; p. 9). Problems became more serious and in October 2008, Mr. Nieheus met with the Claimant about the problem. (Tran at p. 8). Mr. Nieheus was concerned because the work load was going to increase substantially in the near future, and he believed the Claimant was not going to be able to keep up. (Tran at p. 8-9). The Claimant argued that the problem was due to others, but he was told he was being moved to packaging. (Tran at p. 13; p. 14; p. 15). The Claimant was told that the change was not a demotion. (Tran at p.

12). The Claimant understood this to mean he would not receive a pay change. (Tran at p. 11-13). The Claimant did not resign over the change because he didn't understand he would be receiving less pay. (Tran at p. 11).

The Claimant was moved back to his original job in the packaging area. (Tran at p. 7-9). Under the Employer's policies this change meant that the Claimant would have a decrease hourly wage, and that the Claimant would no longer get a shift differential. (Tran at p. 9; p. 14).

On November 7, 2008, the Claimant received his first paycheck after returning to the packaging area. (Tran at p. 7). His pay had gone from $16 per hour to $12 per hour. (Tran at p. 11). He was not happy with the decrease in pay. (Tran at p. 7; p. 12). The Claimant quit over the change in pay. (Tran at p. 7; p. 12; p. 14).

REASONING AND CONCLUSIONS OF LAW:

Quitting in General: 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.

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)).

Substantial Change: 871 IAC 24.26(1) provides:

> The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifying 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 of the job would not constitute a change of contract of hire.

"Change in the contract of hire" means a substantial change in the terms or conditions of employment. *See Wiese v. Iowa Dept. of Job Service*, 389 N.W.2d 676, 679 (Iowa 1986). Generally, a substantial reduction in hours or pay will give an employee good cause for quitting. *See Dehmel v. Employment Appeal Board*, 433 N.W.2d 700 (Iowa 1988). In analyzing such cases, the Iowa Courts look at the impact on the claimant, rather than the employer's motivation. *Dehmel v. Employment Appeal Board*, 433 N.W.2d 700 (Iowa 1988). The test is whether a reasonable person would have quit under the circumstances. *See Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988); *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993).

The Claimant testified, and the Employer appears to agree, that his pay changed from $16 per hour to $12 per hour. Now, we understand, part of this change was base pay and part was for the shift worked. It matters not. The Claimant's pay was reduced because he was moved to another job. The question before us is whether the reduction was substantial. In *Dehmel v. Employment Appeal Board*, 433 N.W.2d 700 (Iowa 1988), the Iowa Supreme Court ruled that a 25 percent to 35 percent reduction in wage was, as a matter of law, a substantial change in the contract of hire. In *Dehmel* the Court noted that the determination of "substantial change" is subject to no "talismatic percentage figure" but must be judged in consideration of the individual case. *Dehmel* at 703. When we consider the circumstances of the Claimant, her inability to survive on 15 hours a week, and the fact that the percentage reduction is in line with that in *Dehmel* we find that the Employer effected a substantial change in the Claimant's contract of hire. Whether or not the change is substantial must be judged by the standards of a reasonable employee in the claimant's position. *See Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988); *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993). Here the reduction is exactly 25% (assuming hours to be comparable). Under *Dehmel*, and under a reasonable person standard, this is a substantial pay cut.

Delay in Resigning: An employee acquiesces in a change in the conditions of employment if he or she does not resign in a timely manner. See *Olson v. Employment Appeal Board*, 460 N.W.2d 865 (Iowa Ct. App. 1990). The touchstone in deciding whether a delay in resigning will disqualify the Claimant from benefits is whether his "conduct indicates he accepted the changed in his contract of hire." *Olson* at 868.

Here the Claimant's delay does not indicate that he accepted the pay cut. In fact, the testimony shows quite the opposite. The Claimant, while discussing the shift change, was told he was not being demoted. The Claimant understood any cut in pay to be a demotion. Yet, not all demotions result in pay cuts, nor are all cuts in pay the result of a disciplinary demotion. Still, this is not how the Claimant understood the term. Thus the Employer truthfully told to Claimant he was not being demoted and the Claimant honestly thought this meant that his pay was not being cut. As shown by the Claimant's swift actions on payday, it was a shock to the Claimant when he received a paycheck reflecting the pay cut. We are convinced that the Claimant at no time intended to accept the cut in pay, and that he delayed only because he misunderstood what the Employer meant by "not a demotion."

Notice Of Objection To Change: Under some circumstances, an employee must give prior notice to the employer before quitting due to a change in the contract of hire. *Cobb v. Employment Appeal Board*, 506 N.W.2d 445 (Iowa 1993). Although we are not convinced that *Cobb* applies to cases of changes in the contract of hire, *Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1 (Iowa 2005), we do not reach the issue since even if *Cobb* applies the Claimant is not disqualified. Where *Cobb* applies an employee is required to take the reasonable step of informing the employer about the change that the employee believes are substantial and that he intends to quit employment unless the conditions are corrected. *Cobb v. Employment Appeal Board*, 506 N.W.2d 445 (Iowa 1993). Here the Claimant discussed the shift change with the Employer prior to the change. There is no reason, based on this record, to suspect that the change in pay was negotiable separately from the job change. True, the Claimant misunderstood this, which is why he didn't quit right off the bat. The Employer, however, understood all along that the two were part and parcel. The job change, and the attendant pay reduction, occurred because the Employer felt the Claimant was not able to do the job. The alternative was that the Claimant "very well could have been let go." (Tran at p. 8). A reasonable person could believe that the Employer was not going to move the Claimant back to his old job, and that the Employer certainly was not going to increase the pay in packaging. Thus any objection over the pay change that the Employer knew about all along, would have been an exercise in futility. Any reasonable notice requirement has been satisfied.

DECISION:

The administrative law judge's decision dated September 30, 2009 is **REVERSED**. The Employment Appeal Board concludes that the Claimant quit for good cause attributable to the Employer. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. 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

_____
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