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

SHARON A BORMANN	:	
	:	**HEARING NUMBER:** 11B-UI-15399
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
COMPREHENSIVE SYSTEMS INC	:	
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, 871 IAC 24

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:

The claimant, Sharon A. Bormann, worked for Comprehensive Systems, Inc. beginning May 5, 2004 full-time hours as direct support staff from "…5:30 to 9:00 a.m. on Thursdays and Fridays; and then 6:30 to 2:30…every other weekend…also picking up a floater position on Thursdays and Fridays, which went until 9:00 to 3:30 p.m. …" (Tr. 2, 18, 19) On July 5, 2010, the claimant worked a ten-hour shift and was caught sleeping at the end of her shift, which resulted in her immediate dismissal. (Tr. 2, 19, 24-25) However, because the employer believed her to be a valuable employee, she was rehired on July 7, 2010. (Tr. 2)

Ms. Bormann was diagnosed with sleep apnea and narcolepsy approximately 1 ½ years ago (Tr. 3, 5, 19, 24) (mid-summer of 2009). When the claimant was terminated, she lost her seniority, which she tried to regain through the Union. (Tr. 20) The Union advised her to inform the employer of her medical condition, which she did by explaining to the employer in September (Tr. 19) that her medical condition caused her to fall asleep prior to her July 5th termination. (Tr. 3, 20) Outside of that incident, the claimant's condition had never hindered her ability to fulfill her job responsibilities. The employer took this information under advisement and in light of a subsequent note from her doctor determined that Ms. Bormann "…wouldn't be able to drive for the company anymore… [and] not be able to work alone with the consumers…" (Tr. 3, 13, 20, 25, Exhibit 1-unnumbered p.4-5) The claimant was allowed to remain as a floater with accommodation, which entailed another employee driving her to appointments. (Tr. 4, 20) At no time did her doctor (Dr. Doumanian) advise her to quit her job. (Tr. 21, 23)

The claimant believed the employer had other work she could perform within her restrictions. (Tr. 22) The employer, however, had a policy which provided that, "…Light duty work will not be offered to employees when the employer's injury or illness did not arise out of and in the course of employment…" (Tr. 17) On September 28th, the employer spoke with the claimant informing her they had no work available within her restrictions. (Tr. 8-9, 12, 15, 20) Of the jobs, the claimant may have been able to perform (cook and dietary aide positions), there were none open at that time. (Tr. 8, 13)

The employer placed Ms. Bormann on medical leave pending the outcome of Dr. Doumanian's recommendation that she see a specialist at Mayo Clinic. (Tr. 3, 5, 10, 25, Exhibit A, Exhibit 1-unnumbered p. 2) Ms. Bormann was given FMLA papers to complete (Tr. 7) that she didn't return. (Tr. 21) The claimant was ***not*** allowed to return to work after September 28th, 2010 until she got her restrictions lifted. (Tr. 3, 8, 16) The employer is still awaiting the outcome of her follow-up visit to Mayo Clinic. (Tr. 8)

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.1(113) provides:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
> b. Quits. A quit is 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.
> c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. **Other separations**. **Terminations of employment for** military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and **failure to meet the physical standards required**. (Emphasis added.)

It is clear from this record that Ms. Bormann did not quit her employment. "[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), accord Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992). Once she was rehired, the claimant attempted to regain her seniority, which any reasonable person would do to secure their employment in the long-term. Her action in this regard was indicative of a person intending to maintain her employment. Thus, there can be no disqualification as a result of a voluntary quit.

The record supports that the claimant was essentially forced to take a medical leave of absence for which she has not yet received a full release to return to work. According to the employer's testimony, Ms. Bormann was ***not*** terminated, as the employer testified that she would be allowed to return once her doctor lifted her restrictions. (Tr. 3, 8, 16) In light of the employer's allusion to possible jobs she could do that wouldn't require her to work alone (cook and dietary aide), the claimant was precluded from following up with these positions because they were presumably already filled by other personnel. (Tr. 8, 13) The parties are in a 'wait and see' status. Since the claimant has not been discharged for misconduct, she cannot be disqualified on that basis either.

There is no dispute that Ms. Bormann could not work alone with patients. (Tr. 3, 13, 20, 25, Exhibit 1-unnumbered p.4-5) The claimant, however, provided credible testimony that there was other work she could perform, which the employer denied citing their policy regarding 'light duty.' (Tr. 17) Since the claimant's medical condition was not work-related, 'light duty' was not available to her, which essentially forced her into an involuntarily separation on September 28th, 2010.

We acknowledge that Ms. Bormann's unemployment is not attributable to the employer; nor is it her fault that she was born with such a condition. The record establishes that she has worked for this employer for nearly six years and her condition had never been a problem. How then is it that she should be penalized now when she clearly wants to continue working, and is capable to some degree, but disallowed? If we look to the purpose for which unemployment compensation was created in the first place, i.e., "to protect from financial hardship workers who become unemployed through no fault of their own…" it would follow that we "are to construe the provisions of that law liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Employment Appeal Board*, 570 N.W.2d 85 (Iowa 1997) Just because Ms. Bormann could no longer meet the physical demands of the jobs she has held thus far with this employer, does not mean she is unable to satisfy the physical requirements of any other job. The burden is hers to establish that she able and available for work within the meaning of the law.

DECISION:

The administrative law judge's decision dated December 22, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant was separated from employment for reasons that do *not* disqualify her from benefits. Accordingly, the claimant is allowed benefits provided she is otherwise eligible, i.e., able and available for work. For that issue, we are sending this matter to the Iowa

Workforce Development Center, Claims Section, for a determination of whether she is able and available.

The Employment Appeal Board would also comment that the claimant needn't obtain an unconditional release to return to work in order to qualify for unemployment benefits.

Iowa Code section 96.4.3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:
>
> The individual is able to work, is available for work, and is earnestly and actively seeking work.…

In addition, the law also provides that a person "…must be physically able and available for work, not necessarily in the individual's customary occupation, but in some *reasonably suitable, comparable, gainful, full-time endeavor*... that is generally available in the labor market…" (Emphasis added.) See, 871 IAC 24.22(1)"b."

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John A. Peno

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Monique F. Kuester

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Elizabeth L. Seiser

AMG/kjo