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

JUDY A WINKEL	:	
	:	**HEARING NUMBER:** 15B-UI-06306
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
QWEST CORPORATION	:	
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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

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 the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

In addition to the analysis of the Administrative Law Judge, we write to address the FMLA. Firstly, we do not think that this unemployment law question is governed by other laws. *E.g. Crane v. Iowa Dept. of Job Service*, 412 N.W.2d 194 (Iowa App. 1987); *Central Foam Corp. v. Barrett,* 266 N.W.2d 33, 35 (Iowa 1978). The issue is a change in contract of hire, and we concur that none is shown, that is, that the contractual process was followed. Second, even applying the FMLA we find that the record supports that there was no violation. The decision on which queue to enter is one which has to be communicated to the customer at a certain time before services were rendered. Here that meant that the Employer had to make the decision whom to put on a queue at a time when it did not know if the Claimant would be back the following month. Naturally FMLA does not require putting a person on a job which the person will not be available to do.

Thus an employer is not required to pay a monthly production bonus for production that did not take place. 29 CFR 825.15(b)(2). Similarly if a worker becomes disqualified from a position for failure to attend necessary training, or fly a minimum number of hours, while on leave all that is required is an opportunity to attend that training, or make up those hours. 29 CFR 825.215(b). Thus conditions precedent to receiving certain pay, or holding certain positions, which conditions depend upon presence on the job site can be applied to those who are not able to attend due to FMLA leave, so long as this is done for all those absent from the job. Here placement on the queue is in the nature of a production bonus. The Claimant was not available to work the queue at the time it came open, and the FMLA does not require any more than what was provided, namely, that she be allowed to get back into the queue on the same basis as anyone else. Instead the Claimant retired. This leads us to our third point. Even if we found a technical violation of the FMLA, all this might do is allow the Claimant to sue under that statute. It does not mean that a quit was reasonable under the circumstances. "[T]he 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 [her] quitting**." *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993)(emphasis added). When applying the standard of good cause to the situation here, there is at most a technical violation causing a temporary reduction of pay and this the Claimant reacted to by permanently reducing pay from this Employer. There was no reason to think that the situation would recur and the action of the Employer was not discriminatory or malicious. Under the circumstances, even if there were a violation, we are of the opinion that it is not one that "necessitated [her] quitting." *O'Brien* at 662.

Finally, for the edification of the parties we note that "[a] finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States." Iowa Code §96.6(4). Thus our opinion regarding the FMLA is not binding except in this unemployment matter.

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Kim D. Schmett

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Ashley R. Koopmans

_____
James M. Strohman

RRA/fnv
DATED AND MAILED:_____

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