

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

SAM R SMITH

Claimant,

and

PHOENIX MARKETING SERVICE

Employer.

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HEARING NUMBER: 11B-UI-05809

**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, 96.3-7

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, one member dissenting, 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**.

The Employment Appeal Board would comment that we do not find the Claimant's testimony credible that he quit because of misrepresentation regarding the accommodations; thus, we do not have to determine whether he quit for good cause attributable to the Employer on those grounds. Rather, we find that the Claimant quit solely because, as testified, "... I was homesick... [and] also missed my family..." (Tr. 2, line 34; Tr. 3, line 1 & 22) and

“...he missed his girlfriend.” (Tr. 20, line 9; Tr. 24, lines 1-6) When questioned as to whether he gave the Employer any other reason for quitting he testified ‘no,’ (Tr. 3, lines 23-28) which is corroborated by the Employer’s testimony that he never complained. (Tr. 8, lines 22-24; Tr. 9, lines 18-21; Tr. 10, lines 25-28; Tr. 19, lines 30-32; Tr. 20, lines 8-17) We also conclude that the Claimant accepted the terms of conditions of his new employment and that his acceptance was unconditional. (Tr. 18)

John A. Peno

Monique F. Kuester

DISSENTING OPINION OF ELIZABETH L. SEISER:

I respectfully dissent from the majority decision of the Employment Appeal Board. I especially note that its presentation of quoted testimony omits key testimony and context. In viewing the record as a whole the evidence clearly establishes that the Claimant's agreement to work for the Employer in its new St. Joseph, Missouri location was on a trial basis only and that he quit within one and a half weeks of starting because Employer-provided living/working conditions were misrepresented and intolerable.

The Claimant originally worked for the Employer, a telemarketing business called Heartland Marketing in 2006, which later changed its name to PCCS in Des Moines, Iowa before it closed in June of 2010. (Tr. 5, 11, 17) The reasons for the business closure are many. In fact, the record is full of evidence regarding the Employer's disreputable conduct culminating in sanctions from the Iowa Attorney General. Although, there was some confusion at hearing as to Claimant’s start date with the employer (Tr. 3, lines 6-12) this is largely due to the fact that the higher-ups of three entities remained the same while shifting assets from one business entity to another. (Claimant’s Ex. A; Tr. 11, lines 16-18) Apparently, after gaining knowledge of complaints to the Attorney General about Heartland, Inc.’s business practices, the higher-ups changed their business name to PCCS. (Tr. 14, lines 29-34) The Attorney General had concerns about fraudulent business practices of Heartland, Inc. and PCCS under the Iowa Consumer Fraud Act. (Tr. 21, lines 2-9) The Attorney General asked Heartland, Inc. and PCCS to leave Iowa and no longer practice business here. (Tr. 21, lines 6-9) The Employer entered into an Assurance of Voluntary Compliance Agreement with the Iowa Attorney General’s office to close its Iowa operations, which was signed by both parties on August 26th, 27th and September 9, 2010. (Tr. 17, Exhibit A)

Once the business closed in Iowa its owners decided to relocate to Missouri under the name Phoenix Marketing. Several Iowa employees including the Claimant were offered jobs in the new location. The Employer promised to purchase a dual purpose house which would serve both as the Employer's place of business and as a residence for the employees; the employees would live there at no cost and food would also be provided the first month. Because this was a very different living and working arrangement than before and because St. Joseph, Missouri was a considerable distance from Des Moines the Claimant agreed only to "give it a try." (Tr. 3) No contract was executed. This was strictly a verbal agreement between the parties. (Tr. 4)

The Employer disputes that the Claimant agreed to the new employment on a trial basis. In weighing the credibility of the parties on this and other points the Employer's very checkered history significantly undercuts their credibility. I find the Claimant more credible than the Employer.

The Claimant's employment in Missouri with Phoenix Marketing Services began in June 2009 when he and nine other employees (a total of 10 adults) as well as three dogs that were pets, moved into a single family home purchased by the Employer. (Tr. 2) Claimant's bedroom was in the attic. This house became something of a '24/7' environment as it served both as home and workplace for its residents. It soon became clear that the three dogs were not house trained and often made messes on the floor. For this reason, combined with the crowding commensurate with 10 adults living and working in one house, as well as the Employer scaling back on promised food provisions, the Claimant decided to quit. His last day of work was August 9, 2010, which was several weeks after starting. (Tr. 2-3,)

The Claimant's decision to quit was justified and reasonable. The Claimant's agreement to work was on a trial basis only and, in addition to the Employer's misrepresentation of the terms and conditions of employment, the working/living conditions were intolerable. After all, what reasonable person wouldn't find living and working in a single family home with ten adults and three unhousebroken dogs intolerable? The fact that the Claimant expressed feelings of homesickness does not diminish or offset the intolerable conditions in which he worked or the Employer's misrepresentation.

Evidence in this record supports that the Claimant's quit can be analyzed on two grounds: 1) based on a change in his contract of hire; and 2) due to detrimental and intolerable working conditions.

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. Id. 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). An employee acquiesces in a change in the conditions of employment if he or she **does not resign in a timely manner**. (emphasis added.)

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.

Although the court in Olson, specifically, opined that there is no trial period exemption in the voluntary quit provisions of the law, this case is distinguishable. In Olson, the Claimant accepted a new position for seven months before he decided the 40-50% reduction in his pay was not acceptable. They found he acquiesced in the change because the day he quit was too remote from the day he accepted the change in his contract that later triggered his quit. Here, the Claimant did not accept the new terms of his employment; rather he and the Employer openly agreed that “...he would give it a try...no time was given...” (Tr. 3-4) His period of employment was far less than seven months (only a few weeks) and it cannot reasonably be construed that the Claimant acquiesced to the new terms as the court concluded in Olson.

In the alternative, 871 IAC 24.26(5) provides a quit is with good cause attributable to the employer when, "The claimant left due to intolerable or detrimental working conditions" for which this record is replete with examples as previously described in this dissent. See, Hy-Vee v. Employment Appeal Board, 710 N.W.2d 1 (Iowa 2005) where the court held that the notice of intention to quit set forth in Cobb v. Employment Appeal Board, 506 N.W.2d 445 (Iowa 1993) does not apply to quits involving detrimental and intolerable working conditions. The Hy-Vee case also overturned Swanson v. Employment Appeal Board, 554 N.W.2d 294 (Iowa App. 1996) involving quits due to unsafe working conditions. See also, Barber v. Employment Appeal Board, 791 N.W.2d 712 (Table) WL 4885339 (Iowa App. 2010)

Finally, I take official notice of recent related decisions involving this Employer and former employees who quit their jobs because the terms and conditions of employment were misrepresented or intolerable have been issued:

Justin Triplett/PMS, 10A-UI-15584-S2T

Brandy Bright/Phoenix Marketing Services, 11B-UI-16818

Brandy Bright/Phoenix Marketing Services, 10A-UI-16818-LT

Christopher Bright/Phoenix Marketing Services, 11B-UI-16819

Christopher Bright/Phoenix Marketing Services, 10A-UI-16819-LT

In these decisions the former employees were all awarded unemployment benefits based on determinations that they quit with good cause attributable to the Employer. I find that in this matter the Claimant should also be awarded benefits because he quit his job with good cause attributable to the Employer.

Elizabeth L. Seiser

AMG/fnv