

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

RICHARD E MUSUMHI

Claimant,

and

ADVANCE SERVICES INC

Employer.

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HEARING NUMBER: 11B-UI-06328

**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-J

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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Richard E. Musumhi, worked for Advance Services, Inc., which is a temporary employment agency. At the start of his employment, the Claimant signed a notification form dated May 14, 2010 to acknowledge that he was required to contact the employer within three days after the end of an assignment. (Rec. @ 6:53-7:05; 11:53-12:08; Employer's Exhibit 1-unnumbered p. 3) Because the Claimant did not have access to a phone, the Employer allowed e-mail communication for assigning him jobs (Rec. @ 13:43-13:55; 15:05-15:09), as well as he made himself available through e-mails. (Rec. @ 14:46-14:58)

On May 24, 2010, the Claimant was assigned to work for PDM as a full-time pallet cleaner for the 3:30 p.m. through 11:30 p.m. shift. (Rec. @ 6:12-6:28; 7:08-7:17; 7:34-7:43; 7:58-8:19; 9:23-9:55; Employer's Exhibit-unnumbered p. 2) The Claimant's supervisor (Jeff) at PDM informed him that the

assignment had ended on November 19th, 2010. (Rec. @ 10:49-11:11; 12:15) The Claimant did not immediately ask for

an additional assignment because the Employer always sent e-mails with very explicit dates for next assignments. (Rec. @ 11:22; 11:34-11:54) There had been other assignments, i.e., June 11th and June 24th, 2010, wherein the Claimant received them by e-mail and he didn't, specifically, call in. (Tr. 13:58-14:29) Sometimes the Employer didn't send him an assignment for two weeks. (Rec. @ 15:39-15:48) The Employer did not consider him a voluntary quit during those times. (Rec. @ 15:50)

Mr. Musumhi contacted the Employer on November 22nd to inquire about the pay period for that month. (Rec. @ 11:29; 12:17-12:37) The Employer knew his assignment had concluded and sent an e-mail for another assignment at the end of November for which Mr. Musumhi could not accept because his car broke down. (Rec. @ 5:35-6:06; 12:44-12:56; 16:39-16:49) Most of the Employer's assignments were outside of Ames wherein the Claimant had previously accepted, as he had his own transportation. (Rec. @ 13:17-13:22) Because he now had to rely on transportation through friends, he focused on jobs he could obtain in the Ames area. (Rec. @ 13:12-13:28)

When Mr. Musumhi did not accept a November 24th assignment sent to him via e-mail, the Employer considered him a voluntary quit. (Rec. @ 16:15; 16:20-16:30)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1) (2009) provides:

An individual shall be disqualified for benefits: *Voluntary Quitting*. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25 provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5...

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code §96.6(2) (amended 1998).

Mr. Musumhi provided unrefuted testimony that he made himself available through e-mail, as was agreed to by the Employer based on the fact that the Claimant had no phone access and the Employer contacted him regularly via e-mailed assignments. (Rec. @ 11:22; 11:34-11:54; 14:46-14:58) This practice went on throughout the duration of his employment.

The Claimant testified that he contacted the Employer on November 22nd, 2010 (Rec. @ 12:26) as he had done in the past. (Rec. @ 15:00) There were no phone call-ins, per se, based on their agreement, which had been a common and acceptable mode of communication. The employer was aware that the Claimant's assignment ended. Although the administrative law judge focused on the notification form that the

Claimant signed in acknowledgement and agreement, we find that Mr. Musumhi substantially complied with the notification requirement. The fact that he didn't call by phone does not detract from the employer's receiving notice of the assignment's end on November 19th with the three-day timeframe. The purpose of the notification law is to notify the employer of an assignment end. We disagree with the administrative law judge that the Claimant did not contact the employer within the three-day timeframe.

The Claimant raised a legitimate argument, i.e., how can the Employer consider him a voluntary quit after his November 19th assignment concluded when the Employer hadn't considered him a quit in the past when he was didn't specifically call in for much longer duration? The Employer failed to appear at the hearing to refute any of the Claimant's testimony. The Claimant's sworn testimony (Rec. @ 12:26; 15:00) that he contacted the employer by e-mail as he had done in the past is more credible. Based on this record, we conclude that the Claimant did not voluntarily quit his employment, but was essentially discharged for which the employer bears the burden of proof.

871 IAC 24.32(4) provides:

Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

This record contains no evidence to support that the Claimant committed any job-related misconduct.

DECISION:

The administrative law judge's decision dated June 29, 2011 is **REVERSED**. The Claimant did not voluntarily quit, but was separated for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided he is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. 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

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

John A. Peno

Monique F. Kuester

Elizabeth L. Seiser

RRA/fnv