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

DOREEN CRAIG Claimant, and GRANDVIEW HEIGHTS INC Employer.	:	HEARING NUMBER: 09B-UI-04925 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

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:

Doreen Craig (Claimant) started working at Grandview Heights, Inc.'s (Employer) long-term care nursing facility on September 4, 2003. (Tran at p. 3; p. 17). She originally worked as a certified nursing aide (CNA). (Tran at p. 18; p. 24; p. 33). Since obtaining her medication certification in 2005 she worked primarily as a certified medications aide (CMA) on the second shift. (Tran at p. 3; p. 8; p. 19; p. 24; p. 33). Her last day on the job site was February 9, 2009. (Tran at p. 4; p. 13; p. 23; p. 24).

The Claimant was off work between January 26 and January 30; she had admitted herself to the hospital for detoxification for substance abuse issues relating to the use of alcohol and prescription drugs (her own). (Tran at p. 5-6; p. 12; p. 15-16; p. 25). She voluntarily informed the Employer of her treatment.

(Tran at p. 5; p. 12; p. 15-16). However, as a result, the administrator, Mr. Hoskins, advised the

Claimant that he was not comfortable with her passing medications to residents, at least for a period of time. (Tran at p. 5; p. 6). Therefore, until the Employer's confidence in the Claimant's medication issues was restored, the Employer was only going to allow the Claimant to work as a CNA. (Tran at p. 5; p. 6; p. 8-9). The Claimant had worked performing just CNA duties only on an intermittent basis since 2005. (Tran at p. 30; p. 31; p. 33-34). The CNA job is physically demanding. (Tran at p. 18).

The Claimant has degenerative arthritis in the spine, and also has problem with pain in her feet and hands. (Tran at p. 21; p. 28; p. 30; p. 39). After being hospitalized for detoxification, the Claimant returned to work with the Employer on February 2. (Tran at p. 13-14; p. 25). She was scheduled to work an 8-hour shift, and was assigned to work doing CNA duties. (Tran at p. 25-26). She was also scheduled to work 8-hour shifts on three other days that week, and she worked each shift as a CNA. (Tran at p. 25-26; p. 38). She experienced significant pain while working, and on all but one day she requested and was allowed to go home approximately an hour early. (Tran at p. 24; p. 25-26; p. 39). On one of these days, she asked the director of nursing (DON) how long it would be before she could go back to running the medications cart as a CMA; she was told that the Employer would review the matter in about two weeks. (Tran at p. 26; p. 29; p. 39).

On February 9 the Claimant was again scheduled for an 8-hour shift doing CNA duties. (Tran at p. 4; p. 23; p. 27). Approximately 45 minutes after arriving, the Claimant became despondent about the discomfort she was in and whether she would ultimately be able to continue in her employment if she was regularly going to have to perform CNA duties. (Tran at p. 4; p. 13-14; p. 24; p. 26-27; p. 39-40). She requested of the DON whether she could leave, and the DON agreed that she could. (Tran at p. 4; p. 26-27; p. 41-42).

On February 20 the Claimant's doctor gave her a note specifying, "Doreen can't [work] more than 4 hrs. daily as a CNA due to medical reasons." (Tran at p. 7; p. 28; Ex. 2). She provided this note to the Employer. (Tran at p. 7; p. 9; p. 10). Consequently, both in a letter dated February 24 and in phone conversation, Mr. Hoskins offered the Claimant the opportunity to take FMLA (Family Medical Leave) either alone or in conjunction with working part time as a CNA (four hours per day). (Tran at p. 7-8; Ex. 1). However, he reiterated that he was presently not comfortable allowing the Claimant to resume the medications duties. (Tran at p. 7; Ex. 1). The four-hour position was inadequate to provide sufficient income to make the commuting worthwhile. (Tran at p. 29; p. 32). The Claimant declined to take the part-time position or to go on a period of unpaid FMLA. (Tran at p. 7-8; p. 10; p. 29). The Claimant decided she could not return to employment with the Employer and she quit over the change in her employment. (Tran at p. 4; p. 7; p. 8; p. 11; p. 22).

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)).

Change in Contract of Hire:

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). 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.

The Iowa Court of Appeals has recognized that a contract of hire is not limited only to express written terms. In *Woods v. Iowa Dept. of Job Service* 315 N.W.2d 838 (Iowa App. 1981) an employee was asked to work a new shift. The employee objected because the employer did not assign the shift according to the company seniority system. The seniority system, however, was not encompassed in the governing collective bargaining agreement (CBA). The company argued that Mr. Woods was not justified in quitting because the seniority system was only a company practice, not part of the CBA, and therefore could not be part of the contract of hire. The Court rejected this contention. "We agree with claimant's assertion that the 'contract of hire' is not limited to the collective bargaining agreement but also encompasses implied terms as well." *Woods* at 841. In so finding the *Woods* court cited to the

section of the Employment Security Law that defines employment to mean "service, including service in interstate

commerce, performed for wages or under any contract of hire, written or oral, expressed or implied." Iowa Code §96.18(18)(a)(formerly 96.19(6) as cited in Woods). The Court went on to uphold the Board's decision denying benefits on the basis that the record supported the finding that the parties' course of conduct had created an "emergency exception" to the seniority rule. *Woods* at 841-42. As *Woods* recognized, then, a contract of hire can be altered by the parties' conduct and is not limited to what was expressly agreed to at the actual time of hire. *See also Olson v. Employment Appeal Board*, 460 N.W.2d 865 (Iowa Ct. App. 1990)(course of conduct can create acquiescence to a change in contract of hire).

The mere fact that the Claimant's job description theoretically required her to perform the more strenuous CNA duties is not controlling. The fact is the Claimant had not been performing such duties, except rarely, for several years. To then impose those duties is thus a change in the contract as contemplated by the Code. What remains, then, is whether the change is a substantial one.

The record shows that the duties of a CMA, as performed by the Claimant for several years, substantially differ from those of a CNA who, regularly had to engage in strenuous lifting and bending. The Claimant had not regularly performed these duties for three to four years on a regular basis. At the time of her quit she could only physically perform those duties, at best, on a half-time basis. Obviously a 50% cut in pay is a substantial change in the contract of hire. Further, a change in duties that causes such a significant increase in physical demands is a substantial change in the contract of hire. On this latter we emphasize that it is the impact on the Claimant that the Courts instruct us to examine. The fact that the Employer felt it had good reason for making the change – and maybe it did – is not the key. The fact that someone with a better health would have been able to handle the change is not the key. The key is that there was a change, and that to *this Claimant* that change was a substantial one. The resultant quit is a quit for good cause attributable to the Employer.

Again, we are not here faulting the Employer for its actions. We emphasize that "[g]ood cause attributable to the employer" does not require fault, negligence, wrongdoing or bad faith by the employer. *Dehmel v. Employment Appeal Board*, 433 N.W.2d 700, 702 (Iowa 1988)("[G]ood cause attributable to the employer can exist even though the employer is free from all negligence or wrongdoing in connection therewith"); *Shontz v. Iowa Employment Sec. Commission*, 248 N.W.2d 88, 91 (Iowa 1976)(benefits payable even though employer "free from fault"); *Raffety v. Iowa Employment Security Commission*, 76 N.W.2d 787, 788 (Iowa 1956)("The good cause attributable to the employer need not be based upon a fault or wrong of such employer."). But as the Claimant likewise is not faulted with committing misconduct, she was entitled to quit based on the substantial change in the contract and, regardless of the Employer's fault, to collect benefits.

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 she intends to quit employment unless the conditions are corrected. *Cobb v. Employment Appeal Board*, 506 N.W.2d 445 (Iowa 1993). Here the Claimant repeatedly had

to ask for time off due to her inability to perform the CNA duties for an entire day. Further she specifically provided to the Employer restrictions that she was unable to perform CNA duties for more than four hours a day. The Employer nevertheless effected the change of removing her from her CMA duties. The notice was adequate.

DECISION:

The administrative law judge's decision dated April 24, 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.

_____
John A. Peno

_____
Elizabeth L. Seiser

AMG/ss

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.

_____
Monique Kuester

AMG/ss