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

DARBY D EIBEN-PROKOP Claimant and **SYSTEMS UNLIMITED INC** Employer	:	**HEARING NUMBER:** 18BUI-10074 **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, 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer 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:

Darby Eiben-Prokop (Claimant) worked for Systems Unlimited Inc. (Employer) as a full-time Direct Support Professional from 2010 until he failed to return at the end of medical leave in August 2018. Claimant's direct supervisor was Chris Osborne, Supported Living Supervisor.

The Employer has an attendance policy that states if an employee does not report to work for three consecutive shifts and does not notify the Employer, then that employee has abandoned his job and is considered to have voluntarily quit his employment. This policy is included in the employee handbook, which Claimant received a copy of and acknowledged receipt on October 10, 2017.

From May 10, 2018 until August 2, 2018, the Claimant was on an agreed-to medical leave from work due to a non-work-related injury or illness.

On July 28 the Claimant emailed the Employer that he had been cleared by his physician to return to work effective August 3, 2018, and expressed that he was aware that his leave expired August 2. The Claimant had also indicated that he wanted to change his work schedule. In connection with this request, when the Claimant came to the office on August 2 the Employer provided the Claimant with an availability form to complete and return. The expectation of both was that since August 3 was a Friday, he would return the form and be back to work on Monday, the 6th.

The Claimant did not fill out the form or otherwise contact the Employer for the next week.

As of August 10, 2018, the Employer considered the Claimant as a voluntary quit, because his medical leave expired August 2, 2018 and the Claimant had not yet reported for work or contacted the Employer. The Employer sent the Claimant a certified letter on August 13 explaining this, but the letter was returned to the Employer as undeliverable.

On August 28, 2018, the Claimant contacted the Employer to discuss changes to the Claimant's schedule. The Employer then informed the Claimant that he was considered to have quit because he had not returned his availability form or reported to work.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1) 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.

Generally a quit is defined to be "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." 871 IAC 24.1(113)(b). Furthermore, Iowa Administrative Code 871—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.

Since the Employer had the burden of proving disqualification the Employer had the burden of proving that a quit rather than a discharge has taken place. The Iowa Supreme Court has thus been explicit: "the employer has the burden of proving that a claimant's departure from employment was voluntary." *Irving v. EAB*, slip op at 57, No. 15-0104 (Iowa 6/3/2016)(amended 8/23/16); On the issue of whether a quit is for good cause attributable to the employer the Claimant had the burden of proof by statute. Iowa Code §96.6(2). "[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).

The rules of Iowa Workforce also address leave of absence:

> j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee–individual, and the individual is considered ineligible for benefits for the period.
>
> (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee–individual, the individual is considered laid off and eligible for benefits.
>
> (2) **If the employee–individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits**.
>
> (3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

Iowa Administrative Code 871 IAC 24.22(2).

Under the rules a failure to return following a leave of absence means the "individual is **considered** as having voluntarily quit." 871 IAC 24.22(2)(j)(emphasis added). The rule is clear: the Claimant must return. "Failure to return to the employer and offer his services upon recovery from an injury statutorily constitutes a voluntary quit and disqualifies an individual from unemployment benefits." *Brockway v. Employment Appeal Bd*., 469 N.W.2d 256, 258 (Iowa App. 1991)(*citing* Iowa Code §96.5(1)(d)). This duty is not met by promising to return, it is met by returning. *See Hedges v. Iowa Dept. of Job Service*, 368 N.W. 862 (Iowa 1985)(returning with limitations is not good enough). Here the evidence establishes that the Claimant was to return, he was given the form to fill out in connection with his return, and he neither returned either himself or the form. We conclude that the Claimant went on a leave of absence and then he "fail[ed] to return at the end of the leave of absence and subsequently be[came] unemployed." 871 IAC 24.22(2)(j). Under the rule, this is "considered" to be a quit. It is a quit by rule and by ordinary understanding. The regulation and common sense agree: if you want to come back, then come back. A worker cannot simply have medical issues, leave and expect to receive benefits once he stays gone past the time that his condition justifies being off work. *C.f. Spence v. Iowa Employment Sec. Commission,* 249 Iowa 154, 86 N.W.2d 154 (Iowa 1957)(claimant who left work after injuring his back and never returned was disqualified as voluntary quit).

This case is also a disqualifying quit under the precedent. *Brockway v. Employment Appeal Board*, 469 N.W.2d 256 (Iowa App. 1991), is very similar to the case at bar. Mr. Brockway was placed on leave, and received workers' compensation benefits. *Brockway* at 257. He was released to work with restrictions in November, but did not return to offer his services until about three weeks later. *Id.* at 257. Even though the injury in *Brockway* was work-related, even though the release was "with certain restrictions," still the Court concluded that this was a disqualifying quit since Brockway did not promptly inform his employer of his release, and did not return once released. The Court affirmed the finding of a quit because "[f]ailure to return to the employer and offer his services upon recovery from an injury statutorily constitutes a voluntary quit and disqualifies an individual from unemployment benefits." *Id.* at 258; *see also Avery v. Beverly Health & Rehabilitation Services, Inc.,* 902 So. 2d 704, 709-10 (Ala. Civ. App. 2004)("A worker's failure to request an extension of a leave of absence amounts to the worker's voluntarily quitting her job and disqualifies her from receiving unemployment compensation.")

The Court has more recently made clear that inaction can be a form of quitting. In *Bunger v. EAB*, No. 17-0560 (Iowa App. 11-22-2017) a lightly-scheduled claimant did not come to work when scheduled, and failed to contact the employer for several months. Mr. Bunger claimed confusion, in particular, that he understood the employer would contact him if he was scheduled. The Court of Appeals found substantial evidence that the Employer's policy required workers to check the schedule. The Court in *Bunger* found that inaction can be an "overt act" of quitting. "True, Bunger's non-appearance for his August shift and his lack of initiative in calling his employer could be deemed a failure to act. But, as the court stated in *Irving*, 'the volitional act of refusing to' do something may 'be considered a voluntary quit.'" *Bunger*, slip op. at 4. It is true that the "lack of initiative" in *Bunger* stretched out over more time than here. But *Bunger* was a case of a worker who was only placed on the schedule once a month, meaning that he did not miss that many total shifts. Here the Claimant, unlike Mr. Bunger, was expected to return once release, and still he ended up missing as many potential shifts as Mr. Bunger – and that is only if we count the shifts he would have worked between August 3 and 10. Notably Mr. Bunger was not <u>on the schedule</u> for any shift except one day, yet the Court still found that the lack of contact with the employer was sufficient to constitute a quit.

One twist in this case is the undelivered letter. The Employer considered the Claimant to have quit as of the 10th. But the Claimant never got the letter so he never knew this until the 28th. Thus the Claimant's failure to contact the Employer from the 10th until the 28th cannot be explained by the undelivered letter. This means that even if we considered that the one week delay as of the 10th was insufficient to constitute a quit, we could still consider the additional 18 days of no contact and find that the quit took place at some later date. First, we do find that the Claimant quit as of the 10th by his failure to return. Second, we do find in the alternative that even if this one week delay was too short to find a quit, the ensuing weeks of delay clearly do show a case of quit by job abandonment in not returning at the end of leave.

As an alternate basis for disqualification, the fact that the Claimant was not actually scheduled does not mean we cannot invoke rule 24.25(4). That rule states it is a quit if "[t]he claimant was absent for three days without giving notice to employer in violation of company rule." 871 IAC 24.25(4). That rule does not say "scheduled shift" and clearly anticipates the situation where a claimant is expected back even though the Employer may not have the claimant on the schedule yet. Thus in *Reelfs v. EAB*, 2007 WL 1828303 (Iowa App. 2007) a claimant was on a leave of absence and was due back on a date certain. She attempted to request an extension, but in an ineffective way. There was no evidence of anything about schedules, but only that Ms. Reelfs was expected back on a specified day. The Court nevertheless affirmed the disqualification reasoning "Evidence at the hearing indicated Reelfs was absent for more than three consecutive work days without proper notification and authorization. This is presumed to be a quit without good cause." Thus as an entirely independent basis of disqualification we rely on rule 24.25(4) to find a quit. That rule does not refer to being on the schedule, although we agree in general terms that missing work when you are not expected back is not really missing work. But a Claimant cannot refuse to take actions necessary to being placed on the schedule and then point to the lack of being scheduled in order to get benefits. Benefits are denied.

DECISION:

The administrative law judge's decision dated October 29, 2018 is **REVERSED**. The Employment Appeal Board concludes that the Claimant quit but not for good cause attributable to the employer. Accordingly, he is denied benefits until such time the Claimant has worked in and was paid wages

for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(1)"g".

The Board remands this matter to the Iowa Workforce Development Center, Benefits Bureau, for a calculation of the overpayment amount based on this decision.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv