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

KATHRYN M GISEL

Claimant,

and

SELECT MEDICAL CORPORATION

Employer.

HEARING NUMBER: 09B-UI-04345

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 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 Employment Appeal Board adopts and incorporates as its own the administrative law judge's Findings of Fact with the following addition:

The claimant's regular hours as a CNA were from 8:00 a.m. until 5:00 p.m. (Tr. 5) Beginning September 5, 2008 through December of 2008, she worked a temporary light duty assignment (filing in medical records at the same hours) that accommodated her work-related injury. (Tr. 4)

In December, the employer placed Ms. Gisel on medical leave without pay when she indicated that she didn't believe she could perform the duties of the unit secretary position, which involved a change to a

12-hour shift (7:00 a.m. through 7:00 p.m.). (Tr. 5, 21)

In early January of 2009, the employer hired a health information manager and no longer needed the claimant to do the filing. (Tr. 4) The employer offered the claimant a secretarial position, again. (Tr. 2, 5) Ms. Gisel found this change in shift hours unacceptable and preferred to wait on the second opinion from another doctor which wouldn't come until after her January 7th, 2009 appointment to which the employer agreed. (Tr. 10, 12) Her employment relationship ended on January 13, 2009. (Tr. 2, 6)

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 employer 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).

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. 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 record establishes that when the claimant was originally hired, she worked a regular 8-hour shift (8:00 a.m. – 5:00 p.m.) And even when she had to change duties, i.e., filing in the medical records department, she maintained those same hours. Ms. Gisel agreed to this change as it accommodated her medical restrictions. However, the employer's request that she work a totally different shift with yet different duties (secretary) was unacceptable to the claimant. Besides the fact that the longer hours with prolonged sitting may have been detrimental to her health, this change was "… substantial in nature…" as it "involve[d] changes in working hours, shifts… and [represented] a drastic modification in type of work…" 871 IAC 24.26(1), *supra*. The employer made it clear that there was no option of her working an 8-hour shift as secretary. (Tr. 5) Ms. Gisel's decision to refuse the secretarial position may reasonably be construed as a quit with good cause attributable to the employer since it was within the employer's control to modify the hours and duties to accommodate the claimant's restrictions.

On the other hand, an alternative analysis would be that the claimant was discharged while still negotiating the change job from being a CNA to a unit secretary. Ms. Gisel had a medical appointment on January 7, 2009 to which both parties agreed to wait until that doctor's (second) opinion to determine whether she could handle the job change. Her work-related injury necessitated the job change. Although she did not specifically tell the employer she would quit if she was forced to accept this new position, she indicated that she was unable to sit for long periods of time (Tr. 8, 11) and preferred to wait for her doctor's opinion that she didn't expect for 30 days. (Tr. 12) The claimant did not know that the report would be available so soon, much less that her job would be in jeopardy if she left town while on leave. Once the employer got the report, the employer initiated her separation one week after the doctor visit without meeting with the claimant to discuss other options as agreed upon.

871 IAC 24.1(113) provides:

> *Separations*. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> *Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

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.

In discharge cases, the burden is on the employer to establish that the claimant committed job-related misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Here, the employer failed to show that Ms. Gisel failure to return to work was due to any intentional malfeasance on her part. She did not return as she hadn't received her doctor's report prior to receiving the termination letter. Thus, her failure to contact the employer was a mistake committed in good faith in

light of their past discussions prior to her being placed on leave status. For this reason, we conclude that the employer failed to satisfy their burden of proving that her behavior was anything other than an isolated instance of poor judgment that didn't rise to the legal definition of misconduct.

DECISION:

The administrative law judge's decision dated April 15, 2009 is **REVERSED**. The claimant voluntarily quit without good cause attributable to the employer. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/ss

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.

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Monique F. Kuester

AMG/ss