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

ANA M GUDINO Claimant, and SWIFT & COMPANY Employer.	:	HEARING NUMBER: 09B-UI-05551 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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Ana Gudino (Claimant) worked as a full-time laborer for Swift & Co. (Employer) from June 5, 2006 until her separation. (Tran at p. 5; p. 13). The Claimant requested and was granted Family Medical Leave (FMLA) from December 4, 2008 due to her high risk pregnancy. (Tran at p. 5; p. 6; p. 7; p. 13-14). Following delivery on New Year's Day the Claimant needed more time to recover from the Caesarian. (Tran at p. 7). The Claimant requested leave through February 26th, 2009 based on her physician's opinion that she be off until then. (Tran at p. 7; p. 9 [Eight weeks from January 1]). The Employer approved leave through February 16. (Tran at p. 14; p. 20). The Employer did not tell the Claimant that she was only approved to be on leave through the 16th. (Tran at p. 8). The Claimant was not aware that her leave had only been approved through the 16th. (Tran at p. 7-8; p. 16; p. 17). The

Claimant did not appear for work on February 16, 2009, and the Employer assumed she voluntarily quit work as of

February 19th. (Tran at p. 14; p. 16). On February 25th the Claimant was told by the physician that she needed to care for her ill daughter and the Claimant was given a physician's note to be absent from work through March 2nd. (Tran at p. 10; p. 12). The Claimant sent this note with a co-worker to the Employer. (Tran at p. 10; p. 12). The Employer, thinking the Claimant already separated, did not respond. (Tran at p. 19). The Claimant, thinking herself on approved leave, stayed at home with her sick child through March 2. (Tran at p. 9-10). When the Claimant returned to work on March 3 she found her locker locked and learned for the first time that she was no longer considered an employee. (Tran at p. 8). The Employer did not terminate the Claimant. (Tran at p. 13; p. 17).

REASONING AND CONCLUSIONS OF LAW:

Layoff On the 3rd: Treating the separation as occurring on March 3, the Claimant was laid off rather than quit. The key to this conclusion is our finding that the Claimant was given until the 26th by her physician and that she was never told that she had to be back to work any sooner than that.

Iowa Administrative Code 871–24.25(96) 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.

"[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). Although the Claimant did not come to work in February she certainly did not intend to quit. She had a note giving her until the 26th to recover from delivery of her child in a high risk pregnancy. She credibly testified that she was never told she was expected to return by the 16th. The Claimant did not return prior to the 26th because she did not think she had to – not because she wanted to quit.

Iowa Administrative Code 871–24.22(2) provides:

> 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.
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> (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.

At the end of her initial leave the Claimant provided a note that she needed an extra five days to care for her sick child. The Employer, having been under the impression that the Claimant was separated as of

the 19th, did nothing with this information and so the Claimant was under the impression she had until

March 3 to return. Again the Claimant had no intent to quit by not returning until the 3rd. Under these circumstances we conclude that the Claimant returned at the end of her leave period (on March 3) and therefore the Claimant "is considered laid off and eligible for benefits." 871 IAC 24-22(2).

Quit On the 26th: Even treating the Claimant as having quit by not returning on the 26th still we would find the Claimant not disqualified. In this analysis we again apply our finding that the Employer has failed to prove that the Claimant knew she was actually due back on the 16th. Looking at it this way the Claimant had until the 26th to return. This she failed to do. If we were to find that the Employer did not extend her leave until March 3 then we could find that the Claimant quit by not returning at the end of her leave on the 26th. 871–24.22(2)(j)(2). Yet even if we were to find this we would not disqualify the Claimant.

Iowa Code §96.5(1)"c" states:

> Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:
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> The individual left employment for the necessary and sole purpose of taking care of a member of the individual's immediate family who was then injured or ill, and if after said member of the family sufficiently recovered, the individual immediately returned to and offered the individual's services to the individual's employer, provided, however, that during such period the individual did not accept any other employment.

When the separation is treated as a quit occurring on the 26th the question in this case is whether the Claimant left her employment for the necessary and sole purpose of taking care of her child. All agree that this was the sole purpose of the absence. The issue then is whether the Claimant's absence was necessary. Her child was born after a high risk pregnancy, her child was but weeks old, and the Claimant was told by a physician that she was needed to care for her child. No person of good faith can question the necessity of the Claimant to care for her child. She returned immediately after the physician said she could. On the facts of this case, we find that the Claimant was necessary to care for her child and thus any quit occurring on February 26th would fall under the protection of Iowa Code §96.5(1)"c". Since the Claimant promptly offered to return to work once her daughter's illness was resolved but was turned down she should not be disqualified from benefits.

Separation Occurring on February 19th: Finally, we consider the possibility that the Claimant was actually separated sometime between February 16th and February 26th. This is the theory of the case most in line with the Employer's understanding. The Employer testified that the Claimant was due back the 16th but did not come. The Employer therefore *assumed* that the Claimant had quit as of the 19th. (Tran at p. 16). The Employer was quite clear that it had not terminated the Claimant. (Tran at p. 13; p. 14; p. 17, ll. 23 ["she was not fired."]). Meanwhile the Claimant is quite clear that she did not return on the 16th because she never knew she had to. As we found above there is simply no intent to

quit on the part of the Claimant and the Employer is unable to prove that the Claimant quit at any time prior to the 26th of February.

Looking to the Employer's asserted separation date of February 19 there is no termination and no quit. Thus the situation we face, which is surprisingly not that rare, would be separation by mutual mistake. The Claimant thought she was on approved leave. The Employer thought the Claimant had quit, and considered her separated when she did not show by the 19th. One might wonder, then, whether this would be a quit or a discharge? Casting the issue in these terms, however, is a false dichotomy. Under the rules separations include "**all** terminations of employment" and these in turn are **"generally** classifiable as layoffs, quits, discharges, or other separations." 871 IAC 24.1 (emphasis added). Therefore a separation by mutual mistake is a "termination of employment" and falls within the definition of a "separation." It is also clear that a separation by mistake does not fall within the definition of a quit or a discharge. We conclude, therefore, that the Claimant is not disqualified by the separation even treating the separation as occurring on February 19th. Again this conclusion is based on the finding that the Claimant did not know she was expected back on the 16th. Therefore this conclusion holds even though we found that the Claimant was not approved to be off after the 16th – the key is that she didn't know she had to be back. This is the Claimant's part of the mutual mistake.

This treatment of separation by mutual mistake is compelled by logic. We know that the only disqualifying separations are discharges and quits. On the 19th the Claimant was neither discharged nor did she quit nor can she be deemed to have quit. We are required to conclude, therefore, that the Claimant was not disqualified by the nature of the separation. This result is, we think, inescapable once it has been determined that the separation was caused by a mutual mistake of the parties. Of course, the Claimant must otherwise be eligible and not have been disqualified by something other than the nature of the separation. In this appeal, however, we address only the allegation that the Claimant was disqualified by her separation and we find that she was not.

As a final note we agree with the Administrative Law Judge that the Claimant would not be able and available until March 3. Yet since she filed for benefits that same week, and remained available for the rest of that week we cannot see how this ruling would affect her benefit rights. 871 IAC 24.22(2)(h)("Generally, if the individual is available for the major portion of the workweek, the individual is considered to be available for work.").

DECISION:

The administrative law judge's decision dated May 6, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv

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.

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Monique F. Kuester

RRA/fnv

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 (physician notes) 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.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv