

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

DAVID W DAVIS

Claimant,

and

A K C LLC

Employer.

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HEARING NUMBER: 11B-UI-10767

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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

DECISION

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:

David Davis (Claimant) worked for AKC LLC/Culver's (Employer) as a full-time kitchen worker from April 17, 2008 until he quit to take employment with The Flying Horse on June 9, 2011. (Tran at p. 2; p. 3 ["not working any hours here"]; p. 4). Initially the Claimant had moved to part-time when he worked at the Victory Café, who then closed their doors. (Tran at p. 4). The Claimant then got a job with The Flying Horse (a restaurant) which conflicted with his part-time work and required him to quit the Employer. (Tran at p. 4). He worked for The Flying Horse in Galena, Illinois, full-time until they laid him off due to lack of work at the end of June. (Tran at p. 3; p. 4-5). The Claimant applied for benefits and looked for full-time work in July. (Tran at p. 5). Then in August, the Claimant returned to the Employer who then hired him back part-time. (Tran at p. 3; p. 5).

REASONING AND CONCLUSIONS OF LAW:

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.

Even where a claimant quits but without good cause attributable to the employer the claimant may nevertheless collect benefits under certain circumstances. One of this is where the quit is for the purpose of accepting other employment. On this issue the Code provides:

a. The individual left employment in good faith for the sole purpose of accepting **other** or better **employment**, which the individual did accept, and the individual performed services in the new employment. Benefits relating to wage credits earned with the employer that the individual has left shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Iowa Code §96.5(1)(a). The rules of Workforce further explain:

The claimant shall be eligible for benefits even though the claimant voluntarily quit if the claimant left for the sole purpose of accepting an offer of other or better employment, which the claimant did accept, and from which the claimant is separated, before or after having started the new employment. The employment does not have to be covered employment and does not include self employment.

871 IAC 24.28(5).

We note, as an initial matter, a discrepancy between these two provisions. The statute requires that “the individual performed services in the new employment.” Iowa Code §96.5(1)(a). The rule states that benefits are allowed if the claimant accepts the second employment but is separated “before or after having started the new employment.” Naturally, the Code governs the rules and we conclude that in order for the other employment provision to apply, the Claimant must prove that he actually did render services in the new employment. The parties agree that he did work for The Flying Horse, and was laid off.

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the Claimant’s testimony that he actually quit the Employer to go to work in Galena. The Employer, who has no motive to lie in this matter, testified that the Claimant was on a “leave.” The Claimant testified he quit to work at The Flying Horse, he then lost that job and looked for something else before coming back to the Employer. The Employer then rehired him when he came back. The Employer would not ordinarily know why the Claimant was gone for such a short time, and it does look a lot like a simple leave from the Employer’s perspective. Thus, the conflict in the evidence is easily resolved: the Claimant quit and then quickly returned, and this looked like a leave to the Employer witness.

The Claimant quit his job with the Employer in good faith for the sole purpose of taking other employment with The Flying Horse. He did perform services for the Flying Horse shortly after his quit with the Employer. The Claimant therefore has proven that he falls within the exception of Iowa Code §96.5(1)(a) and is not disqualified for having quit his job at the Employer.

Finally, since A K C LLC (Culver's) was the employer whom the Claimant quit in order to take another job, under the law **A K C LLC's account may not be charged** with benefits paid to the Claimant. Iowa Code §96.5(1)(a); 871 IAC 23.43(5)(no charge to prior employer when quit for other or better job).

DECISION:

The administrative law judge's decision dated September 29, 2011 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. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside. Benefits relating to wage credits earned with the Employer shall be charged to the unemployment compensation fund under the authority of Iowa Code §96.5(1)(a).

John A. Peno

Elizabeth L. Seiser

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 F. Kuester