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

MYRNA LOY HOWARD	:	
	:	**HEARING NUMBER:** 21B-UI-12653
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
IMKO ENTERPRISES INC	:	
	:	
Employer	:	

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 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:

Myrna Loy Howard (Claimant) work for IMKO Enterprises Inc. (Employer), but rendered services to Western Iowa Tech Community College (WITCC). She generally reported to WITCC employees, and communicated with the Employer through WITCC. This situation lasted from April 9, 2013 until March 16, 2020.

In March of 2020, due to COVID, WITCC did not need the Claimant. This was initially thought to be a temporary situation. In April the Claimant did turn down consideration of going to another location because she wished to remain at WITCC if possible.

Around May 6, 2020 the Claimant learned that WITCC was going to be restructuring and that her services would not be needed at WITCC. The Claimant spoke with IMKO about this, and they discussed the possibility of her reassignment. IMKO would not discuss the details of any supposed new assignments unless the Claimant came into the office in person. Claimant did not do so, but rather looked for other work.

The procedure in the past at IMKO was for the Claimant to get details about job changes from IMKO, over the phone, and *then* she would come in.

IMKO has failed to prove by a preponderance of the evidence that it had specific jobs, or assignments, that met the Claimant's needs that it was planning on offering her in May of 2020.

REASONING AND CONCLUSIONS OF LAW:

As an initial matter, we note that the Claimant did not file for benefits until June 7, 2020. Thus the Claimant's decision to remain on furlough waiting for WITCC back in April does not come into play. This did **not** lead to the separation, although it might have rendered the Claimant ineligible while she waited for the WITCC job to restart. Since she wasn't on benefits at the time, this lack of availability is not relevant.

Legal Standards: Iowa Code section 96.5-1 provides:

> 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.

Iowa Code section 96.5(1)"j" provides:

> 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, But the individual shall not be disqualified if the department finds that:
>
> j. The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.
>
> To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.

> For the purposes of this paragraph:
>
> (1) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.
>
> (2) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

The Employer has the burden of proving disqualification under paragraph 96.5(1)(j) except that the compliance with the good cause exception is on the claimant. Since the employer has the burden of proving disqualification and the claimant only has the burden of proving the justification for a quit, the employer has the burden of proving that a particular separation is a quit. 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. Employment Appeal Bd.,* 883 NW 2d 179, 210 (Iowa 2016).

Not Temporary Employee:

Although the Administrative Law Judge relies on the paragraph J requirements to disqualify the Claimant the predicate issue is whether this is even a temporary employment situation. The Code defines a temporary employee as one who works for a temporary employment firm, and who is "employed…to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects." Iowa Code §96.5(1)(j). The Claimant worked for the same client for seven years. She didn't "supplement" the workforce she *was* a long-term part of that client's workforce. And certainly, she wasn't working seven years just for "temporary" labor market shortages, or for "special" assignments. In short, seven years is not "temporary." *See Irving v. EAB,* 883 N.W.2d 179, 192 (Iowa 2016)("the Iowa Employment Security Law is to be liberally construed to carry out its humane and beneficial purpose"). We find the Claimant has not been shown to be a temporary employee within the meaning of the Code.

The Employer has Not Shown Compliance With The Code:

Again, since the Employer must prove a quit has taken place the Employer must show that it had a policy that complies with the Code. The Code states that "[t]o show that the employee was advised in writing of the notification requirement ...the temporary employment firm shall" require the worker to read and sign *at the time of hire* a "document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify." Further the document must be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee. We find that the Employer has failed to prove by a greater weight of the evidence that the Claimant was required to sign a clear concise reassignment policy statement at the time of hire, or that she was provided a copy of such a policy. The special provisions of paragraph "J" thus cannot be relied upon to disqualify the Claimant *even if* we treat this as a temporary employment case.

Claimant Complied With Any Reasonable Requirement to Request Reassignment Even If A Temporary Employee:

Even if the Employer complied with the notification requirement, still we would not disqualify under paragraph "J."

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). 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 considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible the Claimant's description of her communication with the Employer after the loss of her assignment about her possible reassignment.

Even a temporary employee only has to request reassignment once. Here the Claimant did request reassignment over the phone, but the Employer decided this was not good enough. The Employer insisted she had to come in person to get reassignment details. But, the process of requesting reassignment is governed by a rule of reason. *Sladek v. Employment Appeal Bd.*, 939 NW 2d 632, 639 (Iowa 2020). The regulations further provide that "[t]he individual shall be eligible for benefits under this subrule if the individual had good cause for not contacting the employer within three days and did notify the employer at the first reasonable opportunity." 871 IAC 24.26(15)(b). In this case the Claimant did not fail to contact the employer, but just didn't do so in the manner the employer dictated. We thus ask whether the failure to come in person was "a substantial and justifiable reason, excuse or cause such that a reasonable and prudent person, who desired to remain in the ranks of the employed, would find to be adequate justification for not notifying the employer" in the prescribed manner. 871 IAC 24.26(15)(b). We think the fact that the Claimant already spoke to the employer by phone, was clearly seeking reassignment, and was of course wary because of the Pandemic, would excuse not appearing in person just to get the employer to give her the basics about a reassignment that may or may not be suitable. The fact is the Code gives a time of seeking reassignment, not a *manner*. And the fact that the Claimant requested reassignment by personal conversation over the telephone falls within the normal understanding of "request reassignment." In other words, we see nothing in the Code saying the employer can just decide that a phone call is not good enough to satisfy the *Code*. *C.f. Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007). Thus we would not find a quit under paragraph "J" even if we ruled that the Claimant was a temporary employee, and that the Employer had complied with the notice provisions.

Claimant Did Not Quit By Refusing Reassignment:

Since the Claimant was not a temporary employee, and since the employer did not comply with the notice requirement in any event, then she was not obliged to *ask* for reassignment. The question would remain, however, whether she quit by refusing a transfer to some other job site. In this analysis we apply the general law that applies to voluntarily leaving work, rather than the special temporary employee 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. 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).

Rule 24.1(113)(b) goes a long way in resolving this case. The Claimant would be working still except for the ending of the assignment. This is not a separation "initiated" by the Claimant, and is not a quit. Since the special quit provisions of paragraph J either do not apply, or have been satisfied by claimant, then the separation is not a disqualifying quit. Nor do we think simply not coming in person could be taken as an expression of an *intent to quit*, given that the Employer hadn't even told the Claimant what was available, and given that the process in the past had been that the Employer would contact her if a they had a job for her.

The Claimant is required to seek work as a condition of receiving benefits. And she is required not to turn down suitable work unless she has good cause. But once separated, she is not required to seek jobs through former employers in order to earnestly and actively seek work. Since this case is not governed by paragraph "j" the Claimant failure to look for work through IMKO is not a quit.

DECISION:

The administrative law judge's decision dated December 11, 2020 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was not separated from employment in a manner that would disqualify her from benefits. Accordingly, benefits are allowed if the Claimant is otherwise eligible.

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Ashley R. Koopmans

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James M. Strohman

DISSENTING OPINION OF MYRON R. LINN:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge. Although, I agree that there may be a question if a seven-year assignment is temporary employment, still it is clear the Claimant worked for IMKO Enterprises, not the college. This being the case, I look at the contract with IMKO. I would find that the Claimant knew that once an assignment ends she could expect to work another assignment with IMKO, and that by not seeking a reassignment in person she quit IMKO under the usual standards we use in voluntary quit cases.

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Myron R. Linn

RRA/fnv