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

LEON S BANKS Claimant and **CARISCH INC** Employer	:	**HEARING NUMBER:** 18BUI-01015 **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: 96.5-2-A, 24.32-7

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:

Claimant last worked for employer on December 12, 2017.

Leon Banks began working for Carisch Inc (Employer), an Arby's, as a full-time crew member on April 14, 2016. He was rehired by the Employer on that date. Under the Employer's rehire policy, a rehired employee is not allowed to leave scheduled work without advance notice given to Employer, and the Employer has to expressly approve the time off.

Claimant was engaged in a physical relationship with the assistant manager at the Employer starting in 2017. The relationship was consensual. Around December 12, 2017 the assistant manager contacted the Claimant's girlfriend and confronted her about the relationship with the Claimant. This, naturally, created problems away from work for the Claimant. On December 13 the Claimant left work saying it might be his last day. The Claimant called work later in the day and disclosed the relationship with the assistant manager and related that

this had caused problems with his girlfriend. The Employer offered to move the Claimant to a new shift but he declined saying he was going to look for a new job. The next day the Employer met with the Claimant and the assistant manager. At this meeting the Claimant declined the offer to work a new shift and refused to return to work. On December 19 the Claimant called the employer and left a message. The Employer called back twice but could not leave a message because the voice mailbox was full. The Claimant did not return the calls. On January 2, 2018 the Employer sent the Claimant a letter informing him that he was removed from payroll. The Employer informed the Claimant in that letter that he should contact it by January 10 or his voluntary termination would be finalized as of that date. The certified letter was delivered on January 8. The Claimant did not again contact the Employer.

REASONING AND CONCLUSIONS OF LAW:

Quit: 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 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 evidence from the Employer, including its exhibits. The credible evidence establishes that the Claimant left work with the threat to quit. He then refused to return despite offers to put him on a different schedule that avoid the assistant manager if he wished. The Claimant was sent a letter which stated that he would be treated as quitting if he did not return by a specified date. He got the letter in time but still neither returned nor contacted the Employer. We find this to be a separation initiated by the Claimant. We find that the Claimant intended to quit, and that he took the over act of not coming to work anymore in furtherance of that intent. *See Bunger v. EAB,* N0. 17-0560 (Iowa App. 11-22-2017). In short, the Claimant quit by abandoning his job.

Good Cause: Under Iowa Administrative Code 871-24.26:

> The following are reasons for a claimant leaving employment with good cause attributable to the employer:
> …
> 24.26(4) The claimant left due to intolerable or detrimental working conditions.

Ordinarily, "good cause" is derived from the facts of each case keeping in mind the public policy stated in Iowa Code section 96.2. *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993)(citing *Wiese v. Iowa Dep't of Job Serv.*, 389 N.W.2d 676, 680 (Iowa 1986)). "The term encompasses real circumstances, adequate excuses that will bear the test of reason, just grounds for the action, and always the element of good faith." *Wiese v. Iowa Dep't of Job Serv.,* 389 N.W.2d 676, 680 (Iowa 1986) "[C]ommon sense and prudence must be exercised in evaluating all of the circumstances that lead to an employee's quit in order to attribute the cause for the termination." *Id.* Where multiple reasons for the quit, which are attributable to the employment, are presented the agency must "consider that all the reasons combined may constitute good cause for an employee to quit, if the reasons are attributable to the employer". *McCunn v. EAB*, 451 N.W.2d 510 (Iowa App. 1989)(citing *Taylor v. Iowa Department of Job Service*, 362 N.W.2d 534 (Iowa 1985)). "Good cause attributable to the employer" does not require fault, negligence, wrongdoing or bad faith by the employer. *Dehmel v. Employment Appeal Board*, 433 N.W.2d 700, 702 (Iowa 1988)("[G]ood cause attributable to the employer can exist even though the employer is free from all negligence or wrongdoing in connection therewith"); *Shontz v. Iowa Employment Sec. Commission*, 248 N.W.2d 88, 91 (Iowa 1976)(benefits payable even though employer "free from fault"); *Raffety v. Iowa Employment Security Commission*, 76 N.W.2d 787, 788 (Iowa 1956)("The good cause attributable to the employer need not be based upon a fault or wrong of such employer.").

Here the Claimant had a consensual relationship with a manager. Things became difficult because the Claimant apparently at the same time had a girlfriend, and the manager confronted the girlfriend over this triangle. The mere fact that one of the Claimant's two paramours worked for the Employer does not make this situation attributable to the Employer. The Claimant's voluntary choices are the fundamental source of his predicament and not the Employer nor the employment. In particular there is no evidence that the manager used or was aided by her position of authority in initiating the relationship. Indeed, the Claimant did not prove that the manager was the one who initiated the relationship. Nor does the record contain evidence of *unwanted* words or conduct of a sexual conduct from the manager towards the Claimant. There is no record evidence of even *welcome* words or conduct of a sexual nature occurring at work. The smiling sometimes described by the Claimant is not objectively an act of harassment. *O'Brien v. EAB*, 494 N.W.2d 660 (Iowa 1993); *c.f. Haskenhoff v. Homeland Energy Solutions*, 897 N.W.2d 553, 592 (Iowa 2017) ("The test for constructive discharge is objective…"). Thus the Claimant has not shown any level of detrimental work environment that is attributable to the Employer. The offer to move the Claimant to a different shift/schedule was a reasonable solution under these circumstances, and the Claimant has not proven that he quit for good cause *attributable to the Employer*.

DECISION:

The administrative law judge's decision dated February 20, 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.

_____
Kim D. Schmett

_____
Ashley R. Koopmans

_____
James M. Strohman

RRA/fnv