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

KATHERINE S ANDERSON Claimant, and **THE BON-TON DEPARTMENT STORES INC** Employer.	:	**HEARING NUMBER:** 09B-UI-05392 **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 claimant, Katherine S. Anderson, worked for The Bon-Ton Department Stores, Inc. from August 13, 2008 through March 6, 2009 as a full-time counter manager. (Tr. 2, 15) The claimant suffered a work-related injury to her knee on January 27, 2009 (Tr. 5, 8, 10, 11, 13, 19, 20, 27) that required her to be restricted to light duty (sit-down job, no squatting or stairs) for several days beginning the following day until February 16, 2009. (Tr. 9, 12, 25) She contacted Human Resources and filed a claimant for workers compensation. (Tr. 17) The claimant missed several days of work due to her knee injury or doctor's appointments regarding her knee. She provided the employer with doctor's notes in keeping them abreast of her medical condition. (Tr. 9, 19, 20, 21, 24) Ms. Anderson also regularly

spoke with the employer via Cory Kahl (Store Manager) or either Connie Holst (Counter Supervisor) or Heather Van Auken (Human Resources Manager) about her status. (Tr. 20, 26)

Ms. Anderson had surgery on her knee and was released from work beginning February 23rd until 'recheck' on March 2nd, 2009. (Tr. 9, 11, 24, 25) She contacted Cory Kahl (Store Manager) about her surgery and subsequent absences for which she was granted permission. (Tr. 20) The claimant also had set up several post-surgery visits, i.e., physical therapy, doctor visits, etc., which would cause her additional absences. (Tr. 15-16, 17, 21)

Ms. Anderson returned to work on March 3rd, 2009. (Tr. 9) By this time, she had accumulated 27 unexcused absences. (Tr. 7) The employer did not allow her time. According to the employer's policy, excessive unexcused absences could result in termination. (Tr. 17) However, absences due to work-related injuries are considered excused. (Tr. 13)

On March 6th, Connie Holst met with the claimant met about her attendance. (Tr. 5, 15, 20, 22, 23, 27-28) Ms. Holst noted that Ms. Anderson had a "…total of 27 medical issues (Tr. 5, 7) that based off [their] handbook…ten absences…" would result in the claimant being issued a first corrective action. (Tr. 5-6, 11) Four of those absences were due to illness; "…seven leave earlies, two absences due to inclement weather…" that were considered excused. (Tr. 7-8) Ms. Holst told the claimant that if she missed another day before February of 2010, she would be terminated. (Tr. 15, 20, 22, 28) The claimant became upset with this information because she knew she would be taking more time off for her knee in just four days. (Tr. 19, 21) She told the employer that she quit and left the store without returning. (Tr. 3, 6, 15)

REASONING AND CONCLUSIONS OF LAW:

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(5) provides a quit is with good cause attributable to the employer when, "The claimant left due to intolerable or detrimental working conditions."

The record establishes that Ms. Anderson suffered a work-related injury that took her off work periodically after January 27th. Although she provided a doctor's note for many of her absences attributed to her knee injury, the employer considered these absences as unexcused (contrary to company policy) purportedly since she was such a short-term employee. (Tr. 13-14) However, the court in Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982) held that absences due to illness, which are properly reported, are excused and not misconduct.

There is no dispute that the employer had knowledge that Ms. Anderson's absences were due to her work-related injury; yet the employer continued to assess points against her for unexcused absences (Tr. 11) triggering the March 6th warning. Although the employer argues that this was just a first step disciplinary

measure (Tr. 5), the claimant refutes this argument stating that Ms. Holst, specifically, warned her that "…[she] couldn't have any unexcused absences… until February 2010 (Tr. 15, 20, 22, 28); this warning came on the heels of Ms. Anderson's informing Holst of her upcoming doctor's appointments. (Tr. 16) While the parties' testimonies conflict as to whether the claimant understood this to be essentially a final warning, we attribute more weight to Ms. Anderson's account of that March 6th meeting as the employer failed to provide Ms. Holst as a firsthand witness to refute the claimant's testimony.

Understandably, the claimant felt caught between the proverbial rock and hard plate. Any reasonable person would feel anguish knowing that her job was in jeopardy should she incur an absence (albeit legitimately excusable) in the near future. The employer's hard-line attendance stance in light of her recent surgery and incumbent medical follow-up created a detrimental and intolerable working condition. Ms. Anderson's decision to quit was justifiable and directly attributed to the employer.

Although the employer inferentially argues that she quit without notice (Tr. 3-4), the court in Hy-Vee v. Employment Appeal Board, 710 N.W.2d 1 (Iowa 2005) held that the notice of intention to quit set forth in Cobb v. Employment Appeal Board, 506 N.W.2d 445 (Iowa 1993) does not apply to quits involving detrimental and intolerable working conditions. The Hy-Vee case also overturned Swanson v. Employment Appeal Board, 554 N.W.2d 294 (Iowa App. 1996) involving quits due to unsafe working conditions. For all the foregoing, we conclude that the claimant has satisfied her burden of proof.

DECISION:

The administrative law judge's decision dated May 5, 2009 is **REVERSED**. The claimant voluntarily quit with 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

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