BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
eab.iowa.gov

MICHAEL A KEIL	:	
	:	**HEARING NUMBER:** 22B-UI-22405
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
KRAFT HEINZ FOODS COMPANY LLC	:	
	:	
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: 96.5-2 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:

The Administrative Law Judge findings of fact are adopted by the Board as its own. We find further that the Claimant did not intend to quit the employment.

REASONING AND CONCLUSIONS OF LAW:

Disqualification Under The Employment Security Law: An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa Code §96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify

claimants until they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer", Iowa Code § 96.5(1), or (2) is discharged for work-connected misconduct, Iowa Code § 96.5(2)"a", or (3) fails to accept suitable work without good cause, Iowa Code § 96.5(3).

The first two disqualifications are premised on the occurrence of a separation of employment. To be disqualified based on the nature of the separation the Claimant must either have been fired for misconduct or have quit but not for good cause attributable to the employer. Generally, the employer bears the burden of proving disqualification of the claimant. Iowa Code §96.6(2). Where a claimant has quit, however, the claimant has "the burden of proving that a voluntary quit pursuant to Iowa Code section 96.5, subsection 1, was for good cause attributable to the employer." Iowa Code §96.6(2). 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).

We note the Employer did not appear. Even when a party with the burden of proof fails appear at hearing it is still possible for that party to carry its burden of proof through evidence introduced by the opposing party. *See Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 3 (Iowa 2005) (In finding that claimant, who did not appear, had proved good cause for her quit the Court holds that the "fact that the evidence was produced by [the employer]). It is, however, markedly difficult for a party who does not show at the hearing to carry a burden of proof.

Quit not shown: 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.

"[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), *see also Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992).

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 testimony of the Claimant, in particular his denial of an intent to quit, and his description of his communications with the Employer and his union steward.

It is true, the Employer may have interpreted the Claimant not returning as a quit, and had more work available for the Claimant if he had called. But in *Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992) the Court found no quit even though the employer in *Peck* construed the walk out as a quit. We find that the greater weight of evidence fails to establish that the Claimant intended to quit. Thus he cannot be found to have quit under 871 IAC 24.25.

Mutual Mistake In This Case Not Disqualifying: Even accepting that the Employer took the Claimant to be quitting this would not be disqualifying. If that were the case the situation we would face, which is surprisingly not that rare, is a separation by mutual mistake. The Employer thought the Claimant was quitting, and the Claimant thought he had been terminated. 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 under the circumstances of this case.

This treatment of separation by reasonable misunderstanding is compelled by logic. We know that the only disqualifying separations are discharges and quits. When there is a separation by reasonable mistake the Claimant was neither discharged nor did he quit. We are required to conclude, therefore, that the Claimant was not disqualified by the nature of his 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 his separation and we find that he was not. We caution that where a Claimant *unreasonably assumes* he has been fired, but has not been, this can be a disqualifying quit. *LaGrange v. IDJS*, No. 83-1081 (Iowa App. June 26, 1984). The case at bar does not fall into this category. Also if the evidence showed a discharge caused by misconduct we would disqualify. But the testimony shows absences for illness properly reported, and this is not misconduct. The Employer has failed to prove that the Claimant quit, and failed to prove that the Claimant was discharged for misconduct.

Note to Employer : The procedural aspects of this case are a little odd. The Employer did not attended the hearing. We do not know if the Employer had a legally sufficient excuse for not attending since it has filed no argument with the Board. We recognize, of course, that until today the Employer had prevailed and thus has no reason to try to explain the absence at hearing. We point this out now so that the Employer is explicitly aware of the ability to apply for rehearing of today's decision within 20 days of issuance of today's decision. The Employer may make whatever argument for reopening that the Employer thinks appropriate, and this would include argument explaining why the Employer failed to attend the hearing. We are not saying the argument would necessarily prevail, only that we would consider it. We do caution that the 20-day deadline for applying for rehearing is not flexible and may not be extended.

DECISION:

The administrative law judge's decision dated January 6, 2022 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.

_____
James M. Strohman

_____
Ashley R. Koopmans

DISSENTING OPINION OF MYRON L. LINN:

After a complete review of this claim including audio testimony, I respectfully disagree with the majority and would affirm the decision of the Administrative Law Judge.

The Claimant had been away from work periodically and associated his absenteeism on workplace stress and overwhelming work requirements. The Claimant alleged that the workplace was hostile.

The Employer met with the Claimant, along with the union representative, and discussed his absenteeism. The Employer agreed to call the Claimant the following day to inform him if he still had a job.

However, the Claimant testified that his union representative called him approximately an hour prior to the work shift and was told that he was no longer employed by the Employer. The glaring missing piece is the failure of the Claimant to have the union representative testify on his behalf of why the union representative made that phone call. The Employer then did not call the Claimant. At no time did the Employer tell the Claimant that he was terminated.

The Claimant's opportunity to directly provide testimony in support of his claim was lost without the hearing participation of the union representative.

It is my opinion that the Claimant's explanation is empty of evidence that the Employer terminated his employment, and the decision issued by the Administrative Law Judge should be Affirmed.

_____

Myron R. Linn

RRA/fnv