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

JUSTIN E DOWIE	:	
	:	**HEARING NUMBER:** 18BUI-06575
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
UNITED PARCEL SERVICE	:	
	:	
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, 96.3-7

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. 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:

Justin Dowie (Claimant) was hired by United Parcel Service (Employer) on November 28, 2017, as a part-time on-call pre-loader. The Employer would call the Claimant the night before if there was work for the Claimant the following day. The Employer did not issue the Claimant any warnings during his employment.

The Claimant rode to work with a full-time employee. On or about April 18, 2018, the Claimant was ill. When the full-time employee came to pick up the Claimant for work, the Claimant told him to tell the manager he was sick and not coming to work. The co-worker followed the Claimant's instructions. The co-worker also informed the Employer that the Claimant's phone was not working. The Claimant had not paid his phone bill and could not call the Employer himself. He was too sick to go to the cellphone business and pay his bill. After a couple days the Claimant did pay his phone and the phone was turned back on.

Approximately May 3, 2018 the Claimant contacted the Employer wondering why he had not received an assignment. The Employer assumed the Claimant quit work.

The Claimant returned to work on May 9, 2018.

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 four 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) or (4) "became separated from employment due to the individual's incarceration in a jail". Iowa Code §96.5(11).

The first two disqualifications are premised on the occurrence of a separation of employment. Given that there is no incarceration in this case, then 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).

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.

The Claimant has denied that he quit, and we have found this credible. It is true that being incommunicado can, depending on the circumstances, indicate an intent to quit even for an on-call employee. Here the Claimant did take steps to notify the Employer he was sick and that his phone was off temporarily. This is not the action of one who is quitting. He was briefly out of communication because his illness affected his ability to pay his phone bill. He then contacted the Employer within a couple weeks because he wanted to know why he hadn't been contacted for work. Again this is not the action of one who quit. Had he waited much longer we might have concluded otherwise. But based on the facts of this case 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.

Misconduct Not Shown. Treating this case as a discharge we find no misconduct. After the first absence in April the Claimant was simply waiting for a call from the Employer. Since the Employer thought he was no longer available it didn't call him This is not a history of absenteeism, and so we do not disqualify for a discharge either. *See Gimbel v. EAB*, 489 N.W.2d 36 (Iowa App. 1992) ("[w]e also cannot find Gimbel intentionally acted against the interest of his employer by failing to own a telephone.")

Mutual Mistake In This Case Not Disqualifying: Even accepting the Employer's contention that it 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 otherwise. 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 a 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 or by incarceration. When there is a separation by reasonable mistake the Claimant was neither discharged nor did he quit nor was he incarcerated. 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, so we allow benefits. The Employer has failed to prove that the Claimant quit, and failed to prove that the Claimant was discharged for misconduct.

Referral For Relief Of Charges: It does appear in this case that the Claimant lost work with another employer, and then started the part-time work with this employer. Thus he may be partially unemployed during this benefit year even though he continues to work for United Parcel Service on the same basis as he did during the base period. "However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer." Iowa Code §96.7(2)(a)(2)(a). From our review of the agency records it appears that this Employer is providing the Claimant the same employment as it provided him during the base period. This being the case the Employer would not be charged for benefits in this claim. We therefore refer this claim to Iowa Workforce to determine whether the Employer is chargeable on this claim. We emphasize that we are not referring the claim on whether the Claimant is partially unemployed. This is not a case where rule 871 IAC 24.23(26) on same hours and wages would apply to this Claimant. The issue on referral is chargeability only.

DECISION

The administrative law judge's decision dated July 3, 2018 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.

This matter is **REFERRED** to Iowa Workforce for a determination of whether the Employer is eligible for relief of charges under Iowa Code §96.7(2)(a) (2)(a).

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Kim D. Schmett

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James M. Strohman

RRA/fnv