

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

MISTY D LUND

Claimant

and

AMMESA INC

Employer

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HEARING NUMBER: 17BUI-03702

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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, 96.3-7

DECISION

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:

The Claimant, Misty Lund, worked for AMMESA, Inc. from August 18, 2016 through November 29, 2017 as a part-time commercial cleaner working approximately 26 hours weekly. The Claimant made numerous mistakes on the job throughout her employment for which she received additional training and several write-ups. (38:30-38:48; Exhibits 3-6) On November 22, 2017, the Claimant received a write-up for several performance issues. (Exhibit A)

On November 23, 2017, while cleaning at a commercial business, Ms. Lund locked herself out of the building where she worked after she took the trash out. She contacted the night manager, Annie Bailey, who subsequently came to the site to let her into the building. (41:10-41:17) The Claimant is expected to keep a key on her person at all times. (41:36-41:38)

When they entered the building, Ms. Lund had left the water running in the sink which caused flooding on the building floor. (43:10-43:14) Ms. Bailey had to return to the company office to retrieve the portable water extractor. (43:30-43:32) The Claimant indicated she was leaving to obtain her own extractor, but the Employer directed her to stay at the building and complete the cleaning. (43:38-44:02)

When Ms. Bailey returned, she noticed another car passing back and forth in the parking lot. She got out of the car and headed towards the building; at which time the driver from the other car (the Claimant's boyfriend) got out of his car. (44:18-44:45) Ms. Bailey went into the building and directed the Claimant to continue cleaning while she extracted the water. It became apparent that Ms. Bailey needed another part for the extractor. As she left the building, the Claimant came out into the parking lot where her boyfriend started angrily criticizing and insulting Ms. Bailey and the company she worked for. (45:36-46:10) Ms. Lund had already discussed the incident with her boyfriend and was upset. The boyfriend told Ms. Lund to get in the car, which prompted Ms. Bailey to ask her if she was leaving or if she intended to finish the job. The boyfriend ordered the Claimant to get into the car 'right now', which she obliged. (Exhibit 2) Before the Claimant was driven off, Ms. Bailey told her she needed to contact Mitzi Willis (General Manager) in the morning. (46:45-46:53; 48:00-48:09) Ms. Bailey forgot the following day was Thanksgiving and the office was closed. (56:30-56:39)

The Claimant was not terminated, as Ms. Bailey had no authority to make that decision or recommend termination; only Ms. Willis with the consent of Ms. McCool (President/CEO) has such authority. (48:35-48:37; 50:35-51:12; 59:45-1:00:02) Ms. Bailey did file an incident report that same evening. (48:43-48:51; Exhibits 1 & 2) On Friday, the day after Thanksgiving, the Claimant had not contacted Mitzi and did not report to work. (Exhibit 3-unnumbered p.1) The Employer tried to contact the Claimant to no avail. (22:04-22:23) Ms. Lund was a no call/no show the following Monday and Tuesday (November 28th & 29th, 2017) (Exhibit 3-unnumbered pp. 2-3)

REASONING AND CONCLUSIONS OF 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.

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 24.25 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...

(28) The claimant left after being reprimanded.

03702

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 attribute more weight to the Employer's version of events. Although Ms. Lund vehemently argued that the Employer directed her to call on what turned out to be Thanksgiving Day, we find her argument totally without merit that she believed she was terminated since the office was closed. Any reasonable person would have known that this was simply an error and interpreted the directive to call to be for the next business day. In addition, there is no evidence to support she attempted to call that day even if the office were open to accept her call.

It is clear the Claimant was upset by this most recent mistake (being locked out and leaving the water running) given her recent warning the night before. However, there is nothing in the record to substantiate that she was terminated for the November 23rd incident. Ms. Bailey provided credible testimony that she had no authority to terminate Ms. Lund, as was corroborated by Ms. Willis who had such authority, yet testified that she had no intention of severing this employment relationship.

When Ms. Lund failed to call in on the next business day, and essentially refused to respond to any calls made to her that day from the Employer, we have to consider what the Claimant's intentions were as to her continued employment with AMMESA. "[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). If Ms. Lund had contacted the Employer, we can reasonably infer that she intended to maintain her employment at that juncture regardless of what action she believed the Employer would take. However, the record establishes that Ms. Lund failed to contact the Employer the next two business days, which the Employer reasonably interpreted as the Claimant's intention to quit her employment. Ms. Lund's walking off the job was the overt act; the fact that she never contacted the Employer, nor returned clearly establishes her intent to sever their employment relationship. Taken together, we conclude that it was the Claimant who initiated her own separation through no fault of the Employer. Lastly, even if the Claimant thought she was terminated, she still does not win. The court in *LaGrange v. Iowa Department Job Service*, June 26, 1984, Iowa Court of Appeals Unpublished Case No. 4-209/83-1081 held that an employee who quits based on his mistaken belief that he will be terminated is deemed a voluntary quit without good cause attributable to the employer when the employer has taken no action to sever his employment.

In *LaGrange*, the employee was sent to an alcohol abuse counselor and ordered to take antabuse, a drug which makes it impossible to drink alcohol. The employee told his counselor that he planned on not taking the medication during the weekends so that he could drink. The counselor spoke to the employer about this and then relayed to the employee that his plan was unacceptable to the employer. After this the employee was at a bar where his boss was present. He bought himself a beer and one for his boss and then drank his beer.

The employer did not tell the employee that he was terminated but the employee assumed that he was. The Court of Appeals ruled that the fact that the employee was mistaken about whether he would be terminated did not negate the fact that he had voluntarily quit. *LaGrange* slip op. at 5.

DECISION:

The administrative law judge's decision dated May 17, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant voluntarily quit without good cause attributable to the Employer. Accordingly, she is denied benefits until such time she has worked in and was paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(1)"g".

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

AMG/fnv