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

DIANNA L STARR

Claimant,

and

REGIS CORP

Employer.

HEARING NUMBER: 09B-UI-06912

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 majority of the Employment Appeal Board REVERSES as set forth below.

FINDINGS OF FACT:

Dianna Starr (Claimant) worked for Regis Corp. (Employer) as a part-time stylist from August 18, 2006 through the date of her quit on April 13, 2009. (Tran at p. 5; p. 8; p. 13). It was important to the Claimant that she work some daytime hours because she needed to deal with family obligations. (Tran at p. 7).

On March 2, 2009 the Claimant requested and was granted unpaid leave covered by the Family And Medical Leave Act (FMLA). (Tran at p. 4; p. 6; Ex. 3, p. 4). She returned from leave on March 16, 2009. (Tran at p. 6). At that time all the Claimant's day shifts were switched to nights. (Tran at p. 7; p. 8). The Claimant switched from two nights a week to four nights a week. (Tran at p. 8; p. 12). The Claimant objected to the change and asked to be placed full time. (Tran at p. 8; p. 9; p. 16). In

addition, the Claimant co-workers were shunning her. (Tran at p. 7; Ex. A; Ex. B). On April 13, 2009 the Claimant quit primarily because of the change in her hours. (Tran at p. 8; p. 9; p. 10, ll. 8-10).

REASONING AND CONCLUSIONS OF LAW:

A. Legal Standards: This case involves a voluntary quit. Iowa Code Section 96.5(1) states:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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)).

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.

Where an employee quits because of allegedly illegal working conditions the reasonable belief standard applies. "Under the reasonable belief standard, it is not necessary to prove the employer violated the law, only that it was reasonable for the employee to believe so." *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993). Good faith under this standard is not determined by the Claimant's subjective understanding. The question of good faith must be measured by an objective standard. Otherwise benefits might be paid to someone whose "behavior is in fact grounded upon some sincere but irrational belief." *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988). The "key question is what a reasonable person would have believed under the circumstances" and thus "the proper inquiry is whether a person of reasonable prudence would believe, under the circumstances faced by [Claimant], that improper or illegal activities were occurring at [Employer] that necessitated his quitting." *O'Brien* at 662; *accord Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988)(misconduct case).

B. Detrimental Work Conditions Analysis: Here we agree with the Administrative Law Judge that the greater weight of evidence shows that the major cause of the Claimant's quit was the change in hours. (Decision of Administrative Law Judge , p. 2). We focus on this change.

First, under the FMLA "an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment." 29 CFR § 825.214(a). This is so "even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence." 29 CFR § 825.214(a). Ordinarily this obligation means that the employee must be restored to a job with "substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position." 29 CFR § 825.215(e). The Department of Labor regulations specify that "[t]he employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule." 29 CFR § 825.215(e)(2). In this case the Claimant had all her daytime hours moved to nights when she came back. We find that the Claimant has shown that the new hours were not, under FMLA, an "equivalent work schedule." This alone is sufficient to mean that the Claimant's quit was for good cause, namely, an illegal change in her hours.

Second, the Claimant's working conditions were exacerbated by the silent treatment she suffered upon her return. We probably wouldn't find good cause for quitting based on a few weeks of enhanced "drama" alone. But when combined with the change in hours, in violation of the FMLA, we are even more firm in our judgment that the Claimant has proven "improper or illegal activities were occurring at [Employer] that necessitated [her] quitting." *O'Brien* at 662.

C. Notice of Intent To Quit: "[A] notice of intent to quit is not required when the employee quits due to intolerable or detrimental working conditions." *Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 5 (Iowa 2005). The ruling in *Hy Vee* thus dispenses with the requirement that the Claimant tell the Employer she would quit over the hours change.

D. Notice of Detrimental Conditions: It is not clear how far the ruling in *Hy Vee* sweeps. Clearly, the Claimant need not give notice of an intent to quit. Left unanswered, however, is whether the Claimant needs to give notice of the intolerable conditions themselves. In other words, is a Claimant still required to inform the employer that something is wrong even though the Claimant need not threaten to quit over it?

On this record, even if we were to conclude the Claimant had an obligation to place the Employer on notice of the illegal conditions, we find that the Claimant has satisfied any reasonable requirement of notice. Here the Claimant made the Employer aware that she needed hours to accommodate her daughter's needs. The Employer was unable to accommodate the Claimant's request and kept her on nights. True, the Claimant asked for full time hours but what prompted this was the assignment to incompatible hours. (Tran at p. 8). The notice was adequate.

DECISION:

The administrative law judge's decision dated June 2, 2009 is **REVERSED**. The Employment Appeal Board concludes that the Claimant quit for good cause attributable to the employer. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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John A. Peno

_____
Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE 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

RRA/fnv