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

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| BETTY J CHRISTIANSON | : | |
| | : | HEARING NUMBER: 09B-UI-10581 |
| Claimant, | : | |
| | : | |
| and | : | EMPLOYMENT APPEAL BOARD |
| | : | DECISION |
| GOOD SAMARITAN SOCIETY INC | : | |
| 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

## 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:**

Betty Christianson (Claimant) was employed by Good Samaritan Society, Inc. (Employer) from November of 1997 until August 30, 2008. (Tran at p. 2; p. 7). She was last employed as an LPN working as special care unit coordinator. (Tran at p. 2; p. 7). She worked three 12-hour shifts each week. (Tran at p. 2; p. 6; p. 13). She quit the employment because she did not feel she was able to safely perform the physical requirements of the job after the Employer made a staffing change. (Tran at p. 2-3; p. 5; p. 17).

On December 18, 2007 the Claimant injured her shoulder at work when a resident grabbed her from behind. (Tran at p. 3; p. 5; p. 8; New & Additional p. 1). The Claimant reached maximum medical

improvement on August 7, 2008. (New & Additional). At this time her physician informed the Claimant

she would be at risk for injury unless she restricted her activities to avoid rapid movement of the shoulder, to work in the forward position below shoulder height, and to avoid any further altercations. (Tran at p. 3; p. 4; New And Additional, p. 2).

After her injury the Claimant was placed on modified duty until August 7 when she reached maximum medical improvement. (Tran at p. 5-6). While on modified duty, she was not required to perform duties such as dressing, feeding, bathing, toileting, or transferring residents. (Tran at p. 11). Prior to August there were three individuals assigned to the unit where the Claimant worked. (Tran at p. 14; p. 18). In August, the Employer decided that one of those individuals would be assigned to work elsewhere in the building, leaving only two to work with the residents on the Claimant's unit. (Tran at p. 4; p. 6; p. 10; p. 13; p. 14; p. 19). This decision was made based on the resident population at that time. (Tran at p. 14). This change would have required the Claimant to be more actively involved in providing daily cares to residents. (Tran at p. 10; p. 14-15; p. 17-18). The Claimant feared that her more active involvement might lead to another injury. (Tran at p. 3; p. 5; p. 12; p. 17). Therefore, the Claimant tendered her resignation on August 21 to be effective August 31, 2008. (Ex. 2).

## REASONING AND CONCLUSIONS OF LAW:

Standards Governing Quits For Work Related Health Problems: 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)).

Quitting over health concerns is addressed by Iowa Administrative Code 871 IAC 24.26(6):

> The following are reasons for a claimant leaving employment with good cause attributable to the employer:

> *(6) b. Employment related separation*. The claimant was compelled to leave employment because of an illness injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with the employment, which caused or aggravated the illness, injury, allergy or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of the employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

In White v. Employment Appeal Board, 487 N.W.2d 342, 345 (Iowa 1992) the Supreme Court explained:

> We have held that an illness-induced quit is attributable to one's employer only under two circumstances. First, when the illness is either "caused or aggravated by circumstances associated with the employment," regardless of the employee's predisposition to succumb to the illness, ... Second, when the employer effects a change in the employee's work environment such that the employee would suffer aggravation of an existing condition if she were to continue working.... An illness or disability may correctly be said to be attributable to the employer even though the employer is free from all negligence or wrongdoing in connection therewith.

Even a pre-existing health condition that is aggravated by the job is attributed to the Employer under White. See Rooney v. Employment Appeal Bd., 448 N.W.2d 313, 315-16 (Iowa 1989)(noting that a recovering alcoholic who terminates employment with bar and liquor store may do so without disqualifying himself for unemployment benefits to the extent that the employment is found to have "aggravated" his condition).

Aggravation: The record does reveal that the Claimant was injured and that this resulted in permanent rating on her shoulder. (Ex. 1; New & Additional p. 3). The physician did release the Claimant to work but only with the proviso that she be willing to take the risk of further injury. (New & Additional p. 2). The Claimant was injured, her existing condition was aggravated. (Tran at p. 5). The Claimant has proven "[f]actors and circumstances directly connected with the employment, which caused or aggravated the illness, injury, allergy or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health." 871 IAC

24.26(6). Based on the first prong of White, aggravation of a pre-existing condition, we find that the Claimant had good cause attributable to the Employer for quitting.

Change in Conditions: In the alternative we also find that the Claimant has shown a change in condition that, based on her pre-existing condition, is attributable to the Employer under the second prong of White.

The Claimant had been working under conditions that would minimize her exposure to further injury, specifically, the presence of three people on the unit. The risk of further injury did not go away just because the Claimant reached maximum medical improvement. The Employer nevertheless reassigned staff and as a result the risk to the Claimant increased significantly. It was this change, and the risk it posed, that caused the Claimant to quit. The Claimant has proven that "the employer effect[ed] a change in the [Claimant]'s work environment such that the [Claimant] would suffer aggravation of an existing condition if she were to continue working." White at 345.

Notice: When quitting for health concerns an employee is required to take the reasonable step of informing the employer about the change that the employee believes are substantial and that he intends to quit employment unless the conditions are corrected. Cobb v. Employment Appeal Board, 506 N.W.2d 445 (Iowa 1993). The fact that the Claimant's quit was technically completed on August 21 and just not actually implemented until August 31 is of no importance in this fact setting. Clearly, if she had worded her notice to say "I will quit on August 31 unless you do something about the risk of further injury" she would be eligible for benefits. There is a technical difference between a conditional intent to resign on a certain day unless a risk of injury is remedied and a completed intent to quit effective that same day because of the risk. But in this context it would serve no purpose to treat the difference as legally significant. Either way the employer has an equal amount of time to address the situation before the employee leaves and an equal chance that the quit will not result. Any other view would be contrary to the directive that we must "interpret strictly the law's disqualification provisions, again with a view to further the purpose of the law". Bridgestone/Firestone, Inc. v. Employment Appeal Bd., 570 N.W.2d 85, 96 (Iowa 1997).

Note that we are not here presented with an employee who quits and then seeks to rescind it. Of course, once someone gives notice of resignation that person cannot convert the separation into a termination by changing their mind. Langley v. Employment Appeal Board, 490 N.W.2d 300 (Iowa App. 1992). Had the Employer moved to minimize the risk soon after August 21, and the Claimant still left on the 31st we would likely find the quit not attributable to the Employer. Had the Employer changed back the duties and the Claimant expressed a desire to stay on and been rebuffed we would, under Langley, still not treat the case as a discharge. Instead it would be a quit but with good cause attributable to the employer since the separation would be the result of actions taken prior to the retraction of the Employer. C.f. Iowa Code §96.5(1)"f" (employee not disqualified if quit is for "compelling personal reasons" but within ten days of actually leaving the employee returns but is not rehired). But we face neither of these situations. Instead the Claimant made the Employer fully aware of the reasons for the quit. (Tran at p. 17; p. 18, ll. 24-25). The Employer had ten days to remedy the situation but did not do so. Of course, that the Employer may have good business reasons for not assigning the third person back is not controlling. White v. Employment Appeal Board, 487 N.W.2d 342, 345 (Iowa 1992) (still attributable even if employer free from fault). The Claimant has proved that quit for good cause attributable to the Employer.

## DECISION:

The administrative law judge's decision dated December 3, 2008 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. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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John A. Peno

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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

**ORDER OF REMAND:** The Employment Appeal Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a determination of the issue of whether or not the Claimant is able and available for work for any week in which she claimed for benefits, if such issue has not been otherwise addressed. The Employment Appeal Board would also comment that the claimant needn't obtain an unconditional release to return to work in order to qualify for unemployment benefits.

Iowa Code section 96.4.3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds:
>
> The individual is able to work, is available for work, and is earnestly and actively seeking work. . . .

In addition, the law also provides that a person "… must be physically able and available for work, not necessarily in the individual's customary occupation, but in some *reasonably suitable, comparable, gainful, full-time endeavor…* that is generally available in the labor market…" (Emphasis added.) See, 871 IAC 24.22(1)"b."

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv