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

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| **JENNIFER GUSTAFSON** | : | |
| | : | **HEARING NUMBER:** 11B-UI-12213 |
| Claimant, | : | |
| and | : | **EMPLOYMENT APPEAL BOARD DECISION** |
| **ABBE CENTER FOR COMMUNITY** | : | |
| 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. Two 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:**

Jennifer Gustafson (Claimant) was employed by Abbe Center (Employer) as a full-time clinical worker from December 11, 2000 until she was discharged on July 3, 2010. (Tran at p. 2-4; p. 12). On July 12, 2010 the Claimant *requested* that her mental health be accommodated by assigning her to a clerical rather than a clinical job. (Tran at p. 2-3; p. 5). This requested was accompanied by a letter from her physician. (Tran at p. 5-6; p. 7). The request was for a temporary assignment. (Tran at p. 13; p. 18). The Employer informed the Claimant that no such positions were available. (Tran at p. 6). On July 13, 2010 the Employer fired the Claimant by letter. (Tran at p. 8-9; p. 12; p. 15; p. 18; p. 19). The Claimant did not quit. (Tran at p. 13-14; p. 17-18; p. 19).

**REASONING AND CONCLUSIONS OF LAW:**

*Quit or Discharge:* The first issue in this case is whether the Claimant quit or was discharged.

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.

Since the Employer had the burden of proving disqualification the Employer had the burden of proving that a quit rather than a discharge has taken place. "[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).

Here there is little doubt that the Claimant did not actually quit. The Employer was asked "Fired, quit, laid off?" and responded "fired." (Tran at p. 2). Had the Employer not fired the Claimant the Employer was free to respond "quit", or if it was none of these to say "none of these." The Employer's initial choice of "terminated" is a general term encompassing many types of separation and it is perfectly appropriate for the Administrative Law Judge to seek clarification. 871 IAC 24.1(113)("terminations of employment [are] generally classifiable as layoffs, quits, discharges, or other separations"). In fact, as those charged with reviewing the record, we appreciate the clarification. The Claimant testified she did not quit, and the Employer testified she was fired. We conclude the Claimant did not quit. Since she did not quit, she cannot be disqualified for quitting without good cause attributable to the Employer.

*Other Separation*: The Iowa Workforce Development has defined the various types of separations from employment in 871 IAC 24.1 (emphasis added):

> 24.1(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.
> b. Quits. A quit is 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.
> c. Discharge. **A** discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.
> d. **Other separations**. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

Even if the Employer answered "fired" because it had no "none of the above" option, this does nothing to help the Employer. The basic rule of disqualification cases is that claimants who meet the eligibility requirements of Iowa Code §96.4 can receive benefits *unless* they are disqualified by Iowa Code §96.5. This seems obvious but it has a result worth mention: if an eligible Claimant is separated from employment in a way that cannot be characterized either as a termination or a voluntary quit then, absent some special provision, the Claimant will not be disqualified from benefits. In other words, if the Claimant does not quit she cannot be disqualified because of a voluntary quit, and if the Claimant is not terminated she cannot be disqualified because of a termination for misconduct. To be clear, we find the Claimant was fired. But even if it was something other than a quit or discharge, we would still allow benefits.

Under rule 871 IAC 24.1 the separation is, at the most, an "other separation" for an inability to do the job, and thus would not be a disqualifying quit nor a disqualifying termination. Similarly, even if we had found a miscommunication we would allow benefits. Such a separation occurs where the Claimant stops coming to work because she thought she was fired but the Employer did not fire her because it thought she quit. Even if we were to find such a separation by mutual mistake - and we find a discharge - such a separation is neither a quit, nor a discharge, and is not disqualifying.

*Termination Analysis:*

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(a):

> *Misconduct* is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in the carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*,

275 N.W.2d, 445, 448 (Iowa 1979).



The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

The Employer does not seriously argue that this Claimant committed misconduct. All she did was make a "request for accommodation to do clerical work instead of clinical work." (Tran at p. 2). This is a request for accommodation, and is not a willful and wanton disregard of the Employer's substantial interests.

*Requirement to Return Once Released:* Having found the Claimant to have been discharged, we now address the requalification provision in Iowa Code §96.5(1)(d).

Iowa Code Section 96.5(1) states:

> An individual shall be disqualified for benefits:
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> 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. But the individual shall not be disqualified if the department finds that:
> …
> d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

871 IAC 24.26(6)b provides:

> (6) Separation because of illness, injury, or pregnancy.
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> b. Non-employment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.

This provision is cast as a means by which an individual who would otherwise be disqualified for quitting may limit the disqualification to the time between the quit and the full release. In essence, the disqualified claimant is allowed to requalify by presenting a full release to the employer. If a claimant doesn't quit, or quits for good cause attributable to the employment, then Iowa Code §96.5(1)(d) is by its own terms inapplicable. *See Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991). Thus Iowa Code §96.5(1)(d) does not require a claimant to return to the employer to offer services after

a medical recovery or release if the employment has already been terminated. *Porazil v. IWD*, 2003 WL 22016794, No. 3-408 (Iowa Ct. App. Aug. 27, 2003).

As we have found, the Claimant did not actually quit. Thus, by its terms §96.5(1)(d) does not apply, and the Claimant was not required to return and offer services in order to avoid *disqualification*.

**DECISION:**

The administrative law judge's decision dated October 21, 2010 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.

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John A. Peno

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Elizabeth L. Seiser

RRA/kk