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

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| **STACIE R LATHAM** | : | |
| | : | **HEARING NUMBER:** 20BUI-03382 |
| Claimant | : | |
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| and | : | **EMPLOYMENT APPEAL BOARD DECISION** |
| **FIRST RESOURCES CORP** | : | |
| | : | |
| 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 DENIED**

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:**

Stacie Latham (Claimant) worked for First Resources Corp. (Employer) as a part-time Behavior Health Intervention Services (BHIS) Provider from March 21, 2019 until she quit on March 25, 2020. Claimant's schedule varied. Claimant's direct supervisor was Brenda Swearingen, BHIS Supervisor. Her duties including teaching a child with diagnosed mental health impairments social skills and cognitive functioning skills. This job can be performed remotely.

As a BHIS provider, Claimant's job duties included interacting with clients inside their homes. On March 18, 2020, the Employer closed its offices and began allowing employees to work remotely due to Covid-19. Claimant used tele-connect (live video interaction) in order to perform her job duties instead of entering clients' homes.

On March 25, 2020, Swearingen told the Claimant she was to call clients and ask them questions about their Covid-19 exposure and symptoms and, if the clients reported no symptoms or exposure, Claimant was to visit the clients in their homes. Claimant expressed her discomfort with asking her clients the questions and her concerns regarding entering clients' homes. Claimant asked Swearingen if she could continue working remotely and not go into clients' homes. Swearingen told Claimant that the executive director had instructed she was to make every attempt to go into clients' homes. Swearingen mentioned to Claimant Swearingen's experience of entering home of sick clients who had responded negatively to the question of whether they were sick. The Claimant herself had the same experience multiple times with Influenza in past years. Claimant reasonably believed that it was a condition of her employment to visit client homes if the questionnaire answers were of the right type.

While the Employer encouraged employees to use personal protective equipment (PPE) when entering clients' homes the Employer did not have any PPE to provide to employees at that time. Employer had ordered face shields and masks but had not received them yet.

On March 25, 2020, claimant emailed Swearingen her resignation and completed employer's Notice of Resignation form. Claimant's resignation was effective immediately.

On March 17, 2020 Governor Reynolds announced a proclamation of public health emergency due to the Coronavirus pandemic. Governor Reynolds proclaimed in the premises of the declaration that "multiple cases of COVID-19 have been confirmed in Iowa, and the Iowa Department of Public Health has determined that community spread of COVID-19 is occurring within our state." *Proclamation of Disaster Emergency, Hon. Kimberly K. Reynolds, Governor* (March 17, 2020). The Governor declared a state of disaster emergency as a result of the pandemic and declared that this state of emergency was "effective immediately on March 16, 2020 shall continue for thirty (30) days, and shall expire on April 16, 2020, at 11:59 p.m., unless sooner terminated or extended in writing by [the Governor]." *Id.*

**REASONING AND CONCLUSIONS OF LAW:**

*Official Notice:* Iowa Code section 17A.14 provides:

> Rules of evidence -- official notice.
> In contested cases: …
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> 4. Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. Parties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data, and the parties shall be afforded an opportunity to contest such facts before the decision is announced unless the agency determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts.

Under the rules of court, the matters of which judicial notice may be taken are:

> Rule 5.201 Judicial notice of adjudicative facts.
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> a. Scope of rule. This rule governs only judicial notice of adjudicative facts.
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> b. Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Iowa Rule of Evidence 5.201.

Under these provisions, of course, we are "permitted to dispense with formal proof of matters which everyone knows." *In re Marriage of Tresnak*, 297 NW 2d 109, 112 (Iowa 1980). Moreover, the fact that Governor Reynolds entered proclamations making certain findings on certain dates is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," and fairness to the parties does not require an opportunity to contest the fact of the content and timing of the Governor's proclamations.

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

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.

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)). "Good cause attributable to the employer" **does not require fault, negligence, wrongdoing or bad faith by the employer**. *Dehmel v. Employment Appeal Board*, 433 N.W.2d 700, 702 (Iowa 1988)("[G]ood cause attributable to the employer can exist even though the employer is free from all

negligence or wrongdoing in connection therewith"); *Shontz v. Iowa Employment Sec. Commission*, 248 N.W.2d 88, 91 (Iowa 1976)(benefits payable even though employer "free from fault"); *Raffety v. Iowa Employment Security Commission*, 76 N.W.2d 787, 788 (Iowa 1956)("The good cause attributable to the employer need not be based upon a fault or wrong of such employer."). Good cause may be attributable to "the employment itself" rather than the employer personally and still satisfy the requirements of the Act. *E.g. Raffety v. Iowa Employment Security Commission*, 76 N.W.2d 787, 788 (Iowa 1956).

*Good Cause:* 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 Claimant's testimony that the Employer had made clear that as a condition of continued employment the Claimant was expected to render services in the homes of clients unless the questionnaire responses were of the wrong type.

We now turn to whether that job requirement constituted detrimental working conditions sufficient to justify quitting. We find good cause. The fact that someone does not report feeling sick or a fever is by no means a guarantee of safety from Covid-19 infection. It reduces the risk somewhat. Yet even those without symptoms, or with mild symptoms that the person does not recognize as anything but routine, may still transmit the disease. *E.g.* https://wwwnc.cdc.gov/ eid/ article/ 26/ 7/ 20-1595_article. Furthermore, not everyone tells the full truth in response to questionnaires, and this may include clients who wish to receive their visit. We do not say that the Employer's clients are more dishonest than anyone else, but only that where one has a personal interest in the answers coming out a certain way, one is more likely to subconsciously shade the facts. This combination of factors was justifiably concerning to the Claimant.

Critically in this case, 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 [had unsafe working conditions], only that it was reasonable for the employee to believe so." *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993). The question of good faith must be measured by an objective standard. 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 the conditions at the job site "necessitated h[er] quitting." *O'Brien* at 662; *accord Aalbers v. Iowa Department of Job Service*,

431 N.W.2d 330, 337 (Iowa 1988)(misconduct case). Here we find that a reasonable person in the Claimant position in March of 2020 would find the job conditions sufficient to justify quitting. We find that under the circumstances faced by the Claimant that a reasonable person would feel compelled to resign. *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993). Not everyone would, but it was not *unreasonable* to do so at the time the Claimant did.

*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 if the safety problems were not addressed.

*Notice of Intolerable 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 detrimental conditions, we find that the Claimant has satisfied any reasonable requirement of notice. The Claimant clearly did raise the issue with the Employer. Plus, literally everyone knew about the pandemic. The risk of visiting the home of multiple unrelated persons in a day is clear. Since the Claimant is not required to place the Employer on notice repeatedly, the notice received was adequate to survive what duty there may be.

We emphasize that the fact that the persistence of the problem may not be due to any negligence or fault of the Employer is not important. The Employer attempted an administrative control on the infection in the form of this questionnaire. We have found that good cause for quitting still persisted. The Employer had no PPE, but not through the Employer's fault. (We note cloth surgical masks and most face shields are source control devices, but generally not PPE. *E.g.* https://www.cdc.gov/coronavirus/ 2019-ncov/ prevent-getting-sick/ cloth-face-cover-guidance.html ) Engineering controls, such as barriers between client and worker, are not possible to install in the client's own home. Similarly, safe work practices, like washing hands after visits, is of limited value where the worker spends more than a few seconds in the presence of the client, and breathing the air in the client's home. The situation was difficult for the Employer to manage. But in unemployment the focus is on the job conditions, not on fault of the Employer. "[G]ood cause attributable to the employer can exist even though the employer is free from all negligence or wrongdoing in connection therewith." *Dehmel v. Employment Appeal Board*, 433 N.W.2d 700, 702 (Iowa 1988); *accord Raffety v. Iowa Employment Security Commission*, 76 N.W.2d 787, 788 (Iowa 1956) ("The good cause attributable to the employer need not be based upon a fault or wrong of such employer."). Here after a complaint the problem persisted, for whatever reason, and thus any notice requirement was satisfied.

Finally, we note for the edification of the parties, that "[a] finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States." Iowa Code §96.6(4)(emphasis added). This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise. See also Iowa Code §96.11(6)(b)(3)("Information obtained from an employing unit or individual in the course of administering this chapter and an initial determination made by a representative of the department under section 96.6, subsection 2, as to benefit rights of an individual shall not be used in any action or proceeding, except in a contested case proceeding or judicial review under chapter 17A…).

**DECISION:**

The administrative law judge's decision dated May 20, 2020 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was quit for good cause attributable to the employment. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. The overpayment entered against claimant in the amount of $6,787.00 is vacated and set aside.

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Ashley R. Koopmans

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James M. Strohman

**DISSENTING OPINION OF MYRON R. LINN:**

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. In particular, I would hold that where there is no immediate danger posed by talking the issue over with the Employer, there was no then existing unsafe job environment at the time the Claimant quit. Since an unsafe job environment cannot be acquiesced in, unlike a change in contract, a reasonable worker would have at least explored the issue with the Employer before quitting.

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Myron R. Linn

RRA/fnv