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

GERALD LEACH Claimant and **REINHART FOODSERVICE LLC** Employer	:	**HEARING NUMBER:** 19BUI-00854 **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: 96.5-2-A, 24.32

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 from contested case proceedings below. The Appeal Board finds the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Board modifies the Administrative Law Judge's decision by adding the additional analysis to the Reasoning and Conclusions of Law as follows:

To be clear, the Administrative Law Judge did not find that the Claimant was told he had *already* been separated on August 31. The finding, which we have adopted, is that the Employer "told claimant that if he did not report to work, claimant would be at the limit for absences without notice per the employer's policy." Any argument that the Claimant can explain away his failure to appear, or call, during that first week in September because he had been told that he was at the limit for absences without notice and therefore he figured he was already fired, simply begs the question. If he thought job separation would automatically result from his volitional actions, he cannot now argue that he was surprised when those actions led to job separation. If you are told that continued failure to call or come in can result in job separation, and you neither call nor come in, the resulting separation is foreseeable to you at the time you chose to be AWOL.

A worker who quits because he is convinced he will be fired will generally be disqualified. For example, subrules 24.25(28), 24.25(29) and 24.25(33) all deal with situations where someone has made assumptions about future action by the Employer that still does not justify a quit. So simply being reprimanded does not justify a quit based on the assumption that worse is coming. 871 IAC 24.25(28). Also having looming layoffs will not justify quitting before the layoff materialize. 871 IAC 24.25(29). Similarly, having poor work performance does not justify a preemptive quit where the employer has not asked the person to leave. 871 IAC 24.25(33). In *LaGrange v. IDJS*, (Iowa App. June 26, 1984), 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. As for misconduct when a worker is told that he needs to report absences because he is at his limit for unreported absences, this cannot be taken as license to not report even more absences. In the case at bar if the Claimant was put on notice of the importance of coming to work or calling in, he cannot use that notice and his choice to disregard it as the ground for disregarding even more.

The Claimant also argues that when he was given one more chance to either come to work, or to report his absences then this "waived" everything he'd done before and so he gets *more* no call/no shows because his was given a last chance to comply with the requirement. This is not how last chances work. A final warning or last chance may operate to reduce the protections of a claimant as compared to other employees. *Warrell v. Iowa Department of Job Service*, 356 N.W.2d 587 (Iowa App. 1984); *Ray v. EAB*, 398 N.W.2d 191, 195 (Iowa App. 1986)("straw that broke the camel's back"). In such cases the final chance is less forgiving than the initial chances precisely because it is that one last chance. Obviously, the policy of the Employment Security Law should be to encourage giving one last chance over automatic termination.

Furthermore, the Claimant has simultaneously asserted to us that he was unaware, through the time of the first hearing, of the "seven strike" rule, and thus he can hardly claim that he in actual fact believed that he had a "fresh start" on the seven strikes. He cannot be confused about what he claims to have been unaware of. Nor can he claim lack of notice to him about the policy excuses his decision not to report or call, while simultaneously arguing that his understanding of the policy also excuses his conduct. And even if he did know about the seven strikes rule we have found that the Employer made clear both in August and in September what he had to do to preserve his employment, and thus the Claimant accordingly had no reasonable basis to think he would get seven more strikes. The facts as we have found them are that the Employer gave the Claimant extra chances and that he did not act so as to take advantage of them.

In general, "[c]ases involving misconduct under the employment security laws are not concerned with the available grounds for discharge under the contract of hire. The inquiry is whether the facts establish grounds for disqualification from unemployment benefits under Iowa Code section 96.5(2)." *Hurtado v. IDJS*, 393 NW 2d 309, 310 (Iowa 1986). The relevance of policies is to provide notice so that a worker is aware that his conduct may lead to a loss of employment. Here the Claimant was explicitly made aware of this back in August. The relevance of a point system is merely that if a claimant relies on the system, believes his job is not in jeopardy, misses work, but is nevertheless

fired then the violation is not a knowing disregard of the Employer's interests. *E.g. Henry v. Iowa Dept. of Job Service*, 391 N.W.2d 731 (Iowa App. 1986)(failure to have policy supports

conclusion that action of employee was good faith misunderstanding). But if a claimant is absent and is terminated because of that absence then the issue before the Board becomes whether the absence was misconduct, not whether the points were exceeded by legally unexcused absences. The law has never been that a claimant gets benefits if the employer made a mistake in applying its policy. If a claimant is absent and is terminated because of that absence then the issue before the Board becomes whether the absence was misconduct, not whether the Employer miscalculated. Oft the Board has explained that the propriety of a discharge is not at issue in an unemployment insurance case. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000). When discharge is caused by misconduct, a claimant is disqualified even if the discharge is precipitous, poorly thought out, or contrary to the wishes of higher management. It is the Board, not the employer, who decides if misconduct is shown. It is a question of applying the law, not the Employer's particular policies. Thus in cases of absenteeism it is the law, and not the Employer's policies, that decides whether absences are excused or not. *Gaborit v. Employment Appeal Board,* 743 N.W.2d 554, 557-58 (Iowa App. 2007). It is the same with excessiveness of absences.

For example, in *Armel v. EAB*, 2007 WL 3376929 (Iowa App. Nov. 15, 2007) the employer had a policy where a claimant would be terminated for seven points in a six month period. Ms. Armel missed two days in May and was fired. Over the rolling six month period she had only 5 points. Still she was disqualified. And she was disqualified, not upon a showing of 7 unexcused absences, but upon only three. The absences the Court found disqualifying were spread over, not 6 months but over 8 months (October through May). Or again in *Higgins v. IDJS,* 350 N.W.2d 187 (Iowa 1984) the Court listed out numerous absences, many of which were excused under the law. *Higgins* at 189, 191 [excused illness]. This brought her well under the absentee level that had resulted in her warning. Yet this did not mean that the Ms. Higgins got benefits. The Court simply reviewed the remaining absences, found them to be excessive and denied benefits. It did not even mention the level of tolerance the employer had for absences. Or again, in *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984) the employer had a policy that three written warnings in a nine month period resulted in discharge. It had no maximum "point" policy at all. Only that three warnings meant discharge. The third warning was for absenteeism, and discharge resulted. The Court of Appeals found that the first two warnings did not constitute misconduct, and had to be disregarded. *Infante* at 266. The Court then independently reviewed Ms. Infante's attendance record, and found disqualifying misconduct based on the "acts for which petitioner was ultimately discharged…" *Infante* at 266. None of these decisions hogtie misconduct to the Employer's point system. So since the Claimant was not lulled into thinking he gets seven more absences, the actual point count is not dispositive of whether the legally unexcused absences were legally excessive under the application of the law. That determination is made, of course, through the application of the law. As the Administrative Law Judge, we find the unexcused absences excessive.

We agree fully with the Administrative Law Judge's credibility assessments. When we analyze the case, however, our conclusion is not changed even if we just looked to the dates before the 6th of September. Also we would normally think, in the *abstract*, that lack of transportation actually resulting from work-related injury could be work-related. Still, we concur with the Administrative Law Judge's assessment that the "Claimant's testimony that he did not return to work because he had concerns operating a motor vehicle lacks credibility."

Although we concur with the Administrative Law Judge's analysis on the issue of termination, we could also analyze the case as a voluntary leaving of work.

Voluntary Leaving

Iowa Code section 96.5(1) provides that "An individual shall be disqualified for benefits…[i]f the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department."

Since the Employer had the burden of proving disqualification the Employer had the burden of proving that a voluntary leaving rather than a discharge has taken place. *E.g. Irving v. EAB*, 883 NW 2d 179, 210 (Iowa 2016). On the issue of whether a voluntary leaving is for good cause attributable to the employer the Claimant had the burden of proof by statute. Iowa Code §96.6(2).

We note that the statute uses the phrase "voluntarily left work" not "quit." Clearly a worker's voluntary choice to permanently sever the employment relationship, *aka* a "quit," is a form of voluntary leaving of work. But it does not exhaust the category. We can tell this simply by reading the statute. Code subsection 96.5(1) has ten paragraphs lettered (a) through (j). These all appear following the phrase "But the individual shall not be disqualified if the department finds that:…" Iowa Code §96.5(1)(first unlettered paragraph). These paragraphs are thus stated as exceptions to disqualification, meaning that failure to satisfy the exception would mean disqualification. In particular temporarily leaving for a sick family member is disqualifying but only so long as the worker stays away from work. Iowa Code §96.5(1)(c). Also temporarily leaving for your own non-work illness is disqualifying but only so long as the worker stays away from work. Iowa Code §96.5(1)(d). Temporarily leaving to take a family member to another climate for health reasons is disqualifying but only so long as the worker stays away from the job. Iowa Code §96.5(1)(e). And finally leaving work for a period of no more than 10 days because of compelling personal reasons is disqualifying, but only for those ten days, after which benefits are allowed if the worker is not returned to work. Iowa Code §96.5(1)(f). This last is instructive. The situation described by the *Code* is a period lasting ten working days. If the worker leaves for compelling reasons, and stay gone for no more than 10 working days, and then the Employer does not allow the worker to return to duty, then the worker will thereafter be allowed benefits. Consider if the worker stayed away for 11 working days, and never intended to leave for longer than 11 working days. This would not be a quit, in the sense of permanent separation. Yet clearly the 11-day worker would *not* be allowed benefits else why specify 10 days in the Code? Thus even a temporary voluntary leaving of employment can be disqualifying. *Gilmore v. EAB,* No. 03-2099 (Iowa App. 11/15/2004). In this context we assess the nature of the leaving here.

First of all, there is the job abandonment rule. Under that regulation it is a disqualifying leaving of work if "[t]he claimant was absent for three days without giving notice to employer in violation of company rule." 871 IAC 24.25(4). Here the Employer has a rule of two days no call/no show is job abandonment. We would not find job abandonment under the regulation with a showing of only 2 days of no call/no show because the regulation says "three." And we would not find job abandonment on three days if the Employer's policy gave five, because the Claimant would not be on reasonable notice that three days' notice would constitute abandonment. But if the policy says two, then the Claimant would be on notice that *more than* two would be worse, and thus at three days' no call/no show the rule is satisfied in this case. The only way around this would be if, as a matter of fact, the Claimant *would have* called the third day, but figured after 2-days he was fired and so didn't bother. We do not so find, and instead find that the Claimant's failure not to call in was because he'd decided to stop coming to work. We do not find that the Claimant ever intended to call in for the subsequent days, but demurred because he assumed he'd already been separated. Here we have August 30, 31 with late notice of the absences, and then September 3, 4, 5, and 6 all no call/no show to scheduled shirts. While the Claimant alleges he didn't call in

during the first week in September because he was already informed that he was separated, we have found otherwise based on our weighing of the evidence. Thus these four September absences are sufficient under the rule to constitute a quit through job abandonment. We would so find even with just the 3rd, 4th and 5th. *C.f. Spence v. Iowa Employment Sec. Commission,* 249 Iowa 154, 86 N.W.2d 154 (Iowa 1957)(claimant who left work after injuring his back, without getting approval for leave, and did not call in except twice, was disqualified as voluntary quit).

In the alternative, the rule on leave of absence provides:

> j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.
>
> (1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.
>
> (2) **If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit** and therefore is ineligible for benefits.
>
> (3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed

871 IAC 24.22(2)(j). The Claimant has unapproved absences with late notice after August 30, and no call/no shows after August 31. As the other analysis shows these will result in disqualification under a discharge theory, and will establish a quit under a job abandonment theory. These facts can also be viewed as a decision not to return from leave on August 30, that is, a quit under rule 24.22(2)(j)(2). This, of course, would explain why the Claimant was no call/no show on subsequent days; he had already decided not to come to work back on August 30. By regulation this is a quit by failing to return from a leave of absence.

When we find a voluntary leaving in an unemployment case the next step is to address *why* the employee voluntarily left employment. This does not change just because the leaving takes the form of a failure to return from leave, or of job abandonment. These are ways of leaving employment that differ from a expressed decision, but the reasons for leaving still can be good cause attributable to the employment even if the leaving is through inaction or nonappearance. We thus turn to the issues shown in the record for the Claimant's decision not to return following leave.

It is not hard to find why the Claimant did not return. He had concern over his back injury, and disagreed with his medical release. The injury in question is undoubtedly work related. Thus the work related health condition rule is implicated. As noted by the Supreme Court of Iowa that rule "basically provides that, when a claimant is compelled to leave employment because of illness, injury, or allergy condition attributable to employment (i.e., factors and circumstances directly connected with employment aggravated these ailments), the claimant will be eligible for benefits if they satisfy several conditions…" *Hy Vee v. EAB*, 710 NW 2d 1, 5 n. 1 (Iowa 2005). Those conditions include that the worker have adequate health reasons for leaving (*i.e.* not returning), that the worker inform the employer of the health condition, and that the worker tell the employer of his intent to leave if not accommodated. 871 IAC 21.26(6)(b). Here the Claimant did file a worker's compensation claim, and so did notify the Employer in general of a work-related health condition. But judged under the objective standard of reasonableness he did not have adequate reasons for not presenting himself at work, and he did not indicate what accommodation he needed or have reasonable grounds to think

that he would *not* be given whatever accommodation was needed.

Good cause for quitting is based on an objective standard. "[W]hat a reasonable person would have believed under the circumstances" is the "standard [that] should be applied in determining whether a claimant left work voluntarily with good cause attributable to the employer." *O'Brien v. EAB*, 494 N.W.2d 660, 662 (Iowa 1993) *see Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988)(For misconduct good faith is objective rather than "behavior is in fact grounded upon some sincere but irrational belief and where the behavior may be properly deemed misconduct.") Applying this standard to the health quit rule we find the Claimant did not prove his case of good cause attributable to the employer.

We understand the Claimant had a subjective fear of re-injury, but we do not think he has presented evidence that at the time he made the decision he had adequate health reasons for not returning to at least light-duty work. Given the obligation of the employer to accommodate even temporary non-disabling restrictions (because the injury is job related) and the Employer's willingness to do so in the past, the flat refusal to return has not been proven to have been reasonable under the circumstances. The case is similar to *Brockway v. Employment Appeal Board*, 469 N.W.2d 256 (Iowa App. 1991). Mr. Brockway "suffered a job-related injury [and] received workers' compensation benefits as a result of the injury." *Brockway* at 257. *Brockway* was released to work with restrictions, but he did not present himself to work. He was subsequently told he was terminated. He claimed that since the vocational rehabilitation experts were aware of the release, then so was the employer and so he did not have to return. The Court disagreed, and found that since Brockway did not return to the *employer* "the Board was entitled to conclude Brockway did not return to Cedar Valley and offer to perform services" and thus affirmed the "Board's conclusion that Brockway quit voluntarily, disqualifying him from unemployment benefits…" *Brockway* at 258. Here also the Claimant did not return with his release and present himself to the Employer. As with *Brockway* the Claimant would have had to have been accommodated within his restrictions (including alleged transportation issues) but he has to tell the Employer he was willing to work if accommodated, and this the Claimant did not do. Instead he was incommunicado and this is not returning under any ordinary understanding of the word.

In addition, and as an independent ground for denying benefits, the Claimant did not give notice that he intended to leave employment if not accommodated on the job. This is explicitly required by 871 IAC 21.26(6)(b), and is consistent with the rule laid down since *Cobb v. Employment Appeal Board*, 506 N.W.2d 445, 446-48 (Iowa 1993). In *Cobb* the employer was aware that Mr. Cobb had been injured at work and had certain work restrictions. Mr. Cobb then quit without ever informing his employer that he was being asked to exceed his work restriction by his job, or asking for accommodation. The Supreme Court rejected the argument that the employer was "on notice" simply by the existence of the injury coupled with the claimant's opinion that he was being asked to exceed limitations. The regulation, consistent with *Cobb*, thus requires the worker to explore the issue of accommodation *before* leaving work. This is not unlike the "interactive process of accommodation" under the ADA where the law expects the employee and employer to cooperate to keep the worker performing services if reasonably possible. *See Deeds v. City of Marion,* 914 NW 2d 330, 343 (Iowa 2018). Indeed, under the Employment Security Law the Employer will be expected to do more for a work-related condition than what would be required under the ADA since if the Employer does not, then the resulting period of unemployment will be attributable to the Employer, and thus compensable. The Claimant received the leave of absence until he was released. He disagreed with the return date, but he did not make adequate efforts to share with the Employer what he needed from the Employer in order to return. The breakdown in the process of accommodation here was due to the Claimant's actions. He did not request or explore with the Employer an accommodation that would keep him on the job, and so he did not before leaving work (by abandonment/failure to return) tell the Employer of

his intent to leave if not accommodated. 871 IAC 21.26(6)(b). This also is a ground for denying benefits.

Finally, the Petitioner cites to *Prairie Ridge Addiction Treatment Services v. Jackson & EAB*, 11-0784 (Iowa App. January 19, 2012). The case is not on point. In *Prairie Ridge* the worker while on the leave of absence requested additional leave. And then, while the worker was still on approved leave, the employer contacted her by letter and not only denied the additional leave, but terminated her. *Prairie Ridge*, slip op. at 3. The Court refused to distinguish *Porazil v. Iowa Workforce Dev*. No. 02-1583 (Iowa Ct. App. Aug. 27, 2003) because "[b]oth claimants were told they were being terminated while they were on approved medical leave and prior to the time they were released to return to work." *Prairie Ridge* at p. 7, n. 3 (emphasis added). Thus in *Prairie Ridge* the worker was terminated long before she ever had a chance to fail to return from leave, as in *Porazil*. Thus those cases dealt with terminations triggered by requests for leave and the termination predated the end of the approved leave. Those cases also involved zero no call/no show incidents. This case, however, has a claimant who failed to return at the end of leave and who was not notified of termination until after he had failed to return *and* had multiple no call/no shows. *Prairie Ridge* and *Porazil* are thus distinguishable.

We again note that the Claimant has failed, to date, to file a weekly claim for benefits. Benefits are denied until requalification.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv