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

DENISE J SOMMERFELT	:	
Claimant,	:	**HEARING NUMBER:** 09B-UI-08611
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
WAVERLY HEALTH CENTER	:	
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. 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:

Denise Sommerfelt (Claimant) was employed by Waverly Health Center (Employer) as a full-time emergency medical technician (E.M.T.) from August 2006 until April 15, 2009, when she quit the employment. (Tran at p. 3-4; p. 9). The Claimant's supervisor was ambulance manager Jim Schutte. (Tran at p. 4; p. 9; p. 17).

The Claimant was required to work everyday with Joe Cellucci, a paramedic. (Tran at p. 5; p. 8). In February, 2009 the Claimant observed Mr. Cellucci several times send text message while driving an ambulance with her in it. (Tran at p. 5; p. 8; Ex. A). During her employ, the Claimant was subjected to sexual remarks from Mr. Cellucci. (Tran at p. 5; p. 8; Ex. A). These included remarks about getting married so they could have sex every day, requests to date the Claimant's 17-year old daughter, and

frequent comments regarding his sexual fantasies about female co-workers. (Tran at p. 5; p. 7; p. 8; Ex. A). In addition Mr. Cellucci would often yell at the Claimant and refuse to help her with job duties. (Tran at p. 8; Ex. A). The Claimant had repeatedly complained verbally to Mr. Schutte. (Tran at p. 4; p. 19-20).

On April 13, the Claimant filed a written complaint about Mr. Cellucci with the Employer. (Tran at p. 10-11; p. 18-19; Ex. A). The complaint stated that Mr. Cellucci had twice had been texting on his cell phone while operating the employer's ambulance unit in February 2009, and that he had most recently sent a text message on his cell phone while on a call for service on April 13. (Cert. Rec. at p. 10-11; Ex. A). The Claimant's written complaint also cited the sexually harassing comments Mr. Cellucci had made to her. (Tran at p. 10-11; Ex. A). The Claimant submitted her written statement after a female coworker complained to Mr. Schutte about Mr. Cellucci. (Tran at p. 8; p. 13-14; p. 18).

The Employer has a policy against sexual harassment contained in an employee handbook. (Tran at p. 9; Ex. A). After the Employer received the Claimant's complaint and the complaint from the other female employee, the Employer interviewed all of the affected parties. (Tran at p. 11-15). The Employer reprimanded Mr. Cellucci, and gave him a ½ day suspension with pay. (Tran at p. 16; Ex. A). The Employer allowed him to continue in the employment. (Tran at p. 16; Ex. A). The Employer called the Claimant into the office and told her that "the past is the past" and that she should try to get along with Mr. Cellucci. (Ex. A). The Claimant reasonably believed that the corrective action was insufficient to deter Mr. Cellucci and that she would be subject to similar objectionable conduct in the future. (Tran at p. 4-5; p. 9; Ex. A). The Claimant for this reason decided to quit the employment. (Ex. A). On April 15, the Claimant telephoned Mr. Schutte and told him she would not be returning to the employment. (Tran at p. 3-5; Ex. A).

REASONING AND CONCLUSIONS OF LAW:

<u>A Legal Standards</u>: 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.

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).

Where an employee quits because of allegedly detrimental working conditions the reasonable belief standard applies. Under these standards all that need be established is that a reasonable person would have felt compelled to resign by the conditions at the Employer. 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 circumstances at the employer "necessitated [her] quitting." *O'Brien* at 662; *accord Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988)(misconduct case).

<u>B: Good Cause:</u> In our judgment the Claimant's testimony about Mr. Cellucci's behavior is credible and describes a job environment that a reasonable person would find adequate cause for quitting. Moreover even after complaining the Claimant was to keep working side-by-side with Mr. Cellucci. Given the nature of the discipline, and the history, we conclude that a person of reasonable prudence would believe that even following the suspension, the Claimant would be subjected to further objectionable conduct (sexual and otherwise) from Mr. Cellucci in the future.

<u>C. Notice of Intent To Quit:</u> "[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 Mr. Cellucci's behavior continued.

<u>D. Notice of Detrimental Conditions</u>: 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? The case will come, no doubt, when we will have to answer this question. This is not that case. On this record, even if we were to conclude the Claimant had an obligation to place the Employer on notice of the harassing conditions, we find that the Claimant has satisfied any reasonable requirement of notice.

We leave lengthy discussion to another day. Suffice it that we inform our consideration of the duty to notify of intolerable conditions by precedent. A lynchpin to this analysis is *O'Brien v. EAB*, 494 N.W.2d 660 (Iowa 1993). In that case Mr. O'Brien quit because of alleged illegal and intolerable working conditions. In its ruling the Court applied the holding from misconduct cases that 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 O'Brien, that improper or illegal activities were occurring at Ballstaedt Ford that necessitated his quitting." *Id.* Assuming that reasonable notice of the existence of the conditions is required we find that the Claimant has satisfied such a requirement. The Claimant testified that she complained and we have so found. In addition, the Employer's own evidence supports that it learned of the objectionable behavior. It is of no moment whether or not the Claimant initiated each complaint. The fact is that the Employer learned of the behavior and that the Claimant was upset by it. Moreover the Claimant knew the Employer had learned of it. This is adequate notice that something needed to be done. The Employer, to its credit, did not do nothing. Mr. Cellucci was given a half-day suspension. Although the Employer took action, the Claimant was still required to work with Mr. Cellucci. A reasonable person could believe, as did the Claimant, that the objectionable conduct would continue. The Claimant, under the Employment Security Law, was not required to complain any more than she did.

Finally, we emphasize this is not a civil rights case. *Perhaps* if the Claimant were seeking to impose *liability* on the Employer she would need to have more evidence of complaints that were not acted upon. *Perhaps* in a civil rights case the Employer could carry a burden of showing the familiar defense that the Claimant unreasonably failed to take opportunities to correct any harassment. Perhaps - if this were a civil rights case. But this is a benefits case. There is no "unreasonable failed to complain sooner" affirmative defense in these cases. We have to work around *Hy Vee* to find any duty to complain at all. In this benefits case the Claimant has put on sufficient evidence of her efforts to complain to collect benefits. *C.f.* Iowa Code §96.6(4)(Board findings are "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."). Also while complaints about texting and driving, and unpleasant yelling at the Claimant may not mean much in a civil rights case, we are able to take such contributing factors into account in this benefits case. The Claimant has proven good cause for quitting and for that reason benefits are allowed.

DECISION:

The administrative law judge's decision dated July 7, 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. 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.

John A. Peno

Elizabeth L. Seiser

Monique F. Kuester

RRA/fnv