

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

YORDANIS ALVAREZ

Claimant

and

SMITHFIELD FRESH MEATS CORP

Employer

HEARING NUMBER: 20BUI-02010

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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, 96.5-2-A

DECISION

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:

Yordanis Alvarez (Claimant) worked for Smithfield Meats (Employer) from July 18, 2017 through December 26, 2019. On November 29, 2019 the Claimant received permission from the Employer to go to Cuba to deal with a family emergency. The Employer instructed the Claimant to remain in contact, and indicated that email would be the best way.

Claimant learned upon arriving in Cuba that his mother had undergone two heart procedures. He stayed in Cuba to help care for his mother for approximately two months. It was necessary for the Claimant to render care to his mother. The Claimant was hampered in his attempt to contact the Employer by the remote location of his family. While the Claimant was occasionally able to get internet access, as a technical matter, he was impeded in doing so by his status as a foreigner in the eyes of the Cuban government. As a result, the Claimant was not in regular contact with the Employer.

02010

The Claimant's remaining in Cuba was necessary to the care of his mother, and this need was the sole purpose of the Claimant's decision to remain. Once his care was no longer required the Claimant returned. The Claimant returned to the country on January 31, 2020, a Friday. He immediately drove from Miami, Florida to Iowa. On Monday, February 3 he tried to return to work but discovered his access card no longer worked. He was told he was no longer considered an employee.

REASONING AND CONCLUSIONS OF LAW:

Consistent with the claim representative decision, we view this as a case of job abandonment, that is, a quit. First off, job abandonment is a form of quitting. It may or may not be disqualifying, depending on the reason for the quit. Job abandonment is not automatically disqualifying. For example, a worker who is sexually harassed and quits over it need not give notice. *Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 5 (Iowa 2005). A quit by such a worker does not become disqualifying by calling the quit a discharge merely because the worker quit without telling the Employer. So, job abandonment is not *per se* disqualifying – it depends on what the worker can prove about *why* the worker abandoned the job. Here, as we found, the Claimant clearly abandoned work. But because he proved compliance with a statutory exception to a quit disqualification we allow benefits. This is not avoided by calling the job abandonment, a termination for attendance violations.

Iowa Code §96.5(1)(c) states:

An individual shall be disqualified for benefits:

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:

c. The individual left employment for the **necessary and sole purpose of taking care of a member of the individual's immediate family** who was then **injured** or ill, and if after said member of the family sufficiently recovered, the individual **immediately returned** to and offered the individual's services to the individual's employer, provided, however, that during such period the individual did not accept any other employment.

We note an important omission in this provision. Iowa Code §96.5(1)(f) contains an exception for leaving work for compelling personal reasons. In that paragraph the worker must “prior to such leaving had informed the individual's employer of such compelling personal reasons” for leaving. There is no such prior notice provision in Iowa Code §96.5(1)(c). We therefore see no basis for disqualification based on lack of prior notice alone. *E.g. Irving v. EAB*, 883 N.W.2d 179, 193 (Iowa 2016).

“Immediate family is defined as a collective body of persons who live under one roof and under one head or management, or a son or daughter, stepson, stepdaughter, father, mother, father-in-law, mother-in-law.” 871 IAC 24.26(8).

02010

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 concerning his activities in Cuba, and his mother's need for his personal care.

We have found that the Claimant did not return, and abandoned his employment, for the necessary and sole purpose of taking care of his mother. Since a mother is, by law and by nature, an immediate of family member any quit would fall under the protection of Iowa Code §96.5(1)(c). Since the Claimant promptly offered to return to work once his mother was sufficiently recovered but his job was no longer available he is allowed benefits from that date. Given that he was in Cuba on Thursday, in Miami on Friday, and returned to the Employer on the following Monday his return was "immediate" within the meaning of the statute.

We also do not disqualify based on the difficulties of communication over the leave. Even faulting the Claimant for these difficulties what they mean *at worst* is that the Claimant can be deemed to be the one who initiated the loss of work by his failure to effectively request leave before taking it. This being the case we concluded that he left work. But leaving work is not disqualifying if it falls under Iowa Code §96.5(1)(c). We cannot see how a Claimant who *tries* to stay job connected by returning to work, and who had failed in requesting leave due to communication problems, should be worse off than a Claimant who just leaves without notice in order to care for mom. Benefits are allowed.

DECISION:

The administrative law judge's decision dated April 22, 2020 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.

RRA/fnv

Myron R. Linn