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

OWEN W TURK

Claimant,

and

KUM & GO LC

Employer.

HEARING NUMBER: 08B-UI-02665

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(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. 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:

Owen Turk (Claimant) was employed by Kum and Go (Employer) from February 27, 2006 until January 30, 2008. (Tran at p. 2; p. 6). He had been a general manager at a store but in December 2007, he asked District Supervisor Diane Gates to be moved from that location. (Tran at p. 3). The only job available to him was as a "floater" general manager and he accepted that. (Tran at p. 3; p. 6). The Employer subsequently decided to demote the Claimant to the job of sales manager. (Tran at p. 2). This entailed a cut in pay from $682.50 weekly to $605.00 weekly. (Tran at p. 4-5). The demotion also meant a reduction in responsibility for the Claimant. (Tran at p. 4-5). The Claimant was never given any reason for the demotion but lack of leadership skill. (Tran at p. 4; p. 5; p. 9). The only alternative to the demotion was termination. (Tran at p. 3). Another employee had been hired to take over the Polk City store. (Tran at p. 8-9). The Claimant thought about it, told the Employer he would

quit rather than accept the demotion, and asked to stay on while he looked for other work. (Tran at p. 2; p. 8; p. 9; p. 10; p. 13). The Employer accepted the Claimant's resignation effective immediately. (Tran at p. 2; p. 10).

REASONING AND CONCLUSIONS OF LAW:

Background: 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.

871 IAC 24.26(1) provides:

The following are reasons for a claimant leaving employment with good cause attributable to the employer:

A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifying issue. This would include any change that would jeopardize the worker's safety, health, or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine of the job would not constitute a change of contract of hire.

"Change in the contract of hire" means a substantial change in the terms or conditions of employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986). Generally, a substantial reduction in hours or pay will give an employee good cause for quitting. See Dehmel v. Employment Appeal Board, 433 N.W.2d 700 (Iowa 1988). In analyzing such cases, the Iowa Courts look at the impact on the claimant, rather than the employer's motivation. Id. The test is whether a reasonable person would have quit under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988); O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993). An employee acquiesces in a change in the conditions of employment if he or she does not resign in a timely manner. See Olson v. Employment Appeal Board, 460 N.W.2d 865 (Iowa Ct. App. 1990). The touchstone in deciding whether a delay in resigning will disqualify the Claimant from benefits is whether his "conduct indicates he accepted the changed in his contract of hire." Olson at 868.

Substantial Change: In Dehmel v. Employment Appeal Board, 433 N.W.2d 700 (Iowa 1988), the Iowa Supreme Court ruled that a 25 percent to 35 percent reduction in wage was, as a matter of law, a substantial change in the contract of hire. The Court in Dehmel cited cases from other jurisdictions that had held wage reductions ranging from 15 percent to 26 percent were substantial. Id. at 703. We are aided in resolving this issue by the observation in Dehmel that the determination is subject to no "talismatic percentage figure" but must be judged in consideration of the individual case. Dehmel at 703. All that is required is that a reasonable person would have quit under the circumstances. See O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

Here the Claimant suffered a 11% cut in his wage rate. Also the Claimant's loss of his management duties is significant. This change in responsibility coupled with the cut in pay was a substantial change in the contract of hire. C.f. Van Meter Industrial v. Mason City Human Rights Commission, 675 N.W.2d 503 (Iowa 2004)(finding constructive discharge where complainant was placed in a position with "no reasonable likelihood of advancement"). The Claimant thus had good cause attributable to the Employer for quitting.

If evidence had shown that the demotion was for misconduct we might reach a different conclusion. It would be anomalous for an employee to receive benefits for quitting in reaction to a demotion based on misconduct but not receive benefits for a termination based on misconduct. Certainly, it would be odd for the more lenient employer to be charged for benefits. But even in cases of quits in reaction to a demotion the burden of proving misconduct justifying the demotion would be on the employer. Here, the Employer's allegations of misconduct were insufficient, by themselves, for us to find the Claimant actually committed misconduct.

First, we have almost no evidentiary foundation for the asserted misconduct. We know only that the Employer's witness "had" documentation and a video that purported to show leaving work early. The Employer's witness did not describe how he knew what the video showed – we don't know if he actually watched it himself – nor even what the documentation *was*. The Claimant was not questioned about the incidents. Second, in addition to this thin proof, the seriousness of the offenses is such that "they could be" dischargeable offenses. Yet the Employer did not discharge for these offenses nor even tell the Claimant that the Employer found them objectionable. Without some further explanation it is not immediately obvious why the Employer tracks a manager's time so closely. We could imagine reasons and policies justifying this, but the point is that we are left to imagine as the Employer submitted no proof of what its policies were and what interests were at stake. Under the state of this record we cannot find the Employer proved misconduct lead to the demotion.

In the alternative we would also find that even if misconduct were proved as the reason for the demotion this would be insufficient to disqualify the Claimant based on his quit. The Claimant quit because he was demoted but he was never told *why* he was demoted. Thus, as far as the Claimant knew, it was a change in contract unconnected to anything he did wrong. Where the reasons for a demotion are unexplained we cannot hold that the Claimant's actions that were the putative cause of his demotion should disqualify him when he then quits in reaction to the demotion. The Employer's subjective motivation for the demotion, that is unknown to the Claimant, is not a cause of the quit. Moreover where a Claimant is demoted for reasons that are not explained the demotion looks less like discipline than like a business judgment that the Claimant is not suited to the superior job. Discipline enacted for reasons that are not explained is almost pointless – if you don't know what you did wrong what lesson are you to learn from the discipline? For these reasons we hold that, at least in cases where the grounds for discipline are not blatant, a demotion that is imposed for reasons not explained to a Claimant cannot be disqualifying based on the argument that the demotion was in reaction to misconduct.

Notice: Under some circumstances, an employee must give prior notice to the employer before quitting due to a change in the contract of hire. Cobb v. Employment Appeal Board, 506 N.W.2d 445 (Iowa 1993). Although we are not convinced that Cobb applies to cases such as this one, we do not reach the

issue since even if Cobb applies the Claimant is not disqualified. Where Cobb applies an employee is

required to take the reasonable step of informing the employer about the changes that the employee believes are substantial and that he intends to quit employment unless the conditions are corrected. Cobb v. Employment Appeal Board, 506 N.W.2d 445 (Iowa 1993). Here the Claimant made clear that he would not accept the demotion and he requested to keep working, at least for some time. Had the Claimant said "I will quit in the future if you demote me" this would clearly satisfy Cobb. There is a technical difference between a conditional intent to resign on a certain day unless a change in contract is remedied and a completed intent to quit effective that same day because of the change in contract. But in this context it would serve no purpose to treat the difference as legally significant. Either way the employer has an equal amount of time to address the situation before the employee leaves and an equal chance that the quit will not result. Any other view would be contrary to the directive that we must "interpret strictly the law's disqualification provisions, again with a view to further the purpose of the law". Bridgestone/Firestone, Inc. v. Employment Appeal Bd., 570 N.W.2d 85, 96 (Iowa 1997). We think the Claimant gave sufficient notice to satisfy Cobb. Moreover the Claimant had already been replaced and the Employer was clear that the only alternative to the demotion was termination. Under such circumstances the Cobb notice would be an exercise in futility and could not be fairly required as a condition of receiving benefits. Brandenburg v. Carmichael, 192 Iowa 694, 704, 185 N.W. 486, 490 (1921)(citing Smith v. McLean, 24 Iowa 322, 326)(law does not require "vain and useless labor"). The Claimant has proved that he quit for good cause attributable to the Employer and is therefore eligible for benefits.

DECISION:

The administrative law judge's decision dated April 2, 2008 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. The overpayment entered against claimant in the amount of $694.00 is vacated and set aside.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE KUESTER:

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.

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Monique Kuester

RRA/fnv