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

JOANN FISCHER	:	
	:	**HEARING NUMBER:** 20B-UI-07880
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
FAREWAY STORES INC	:	
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 DENIED

The Employer 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:

The Administrative Law Judge's findings of fact are adopted by the Board as its own.

In addition, the Board makes the finding that the Claimant had exhausted her claim for regular benefits on December 28, 2019. On April 4, 2020 the Claimant applied for benefits under the federal PEUC program that allows up to thirteen weeks of benefits over and above regular state benefits. The Claimant later on applied for and was approved for Pandemic Unemployment Assistance [PUA], which allows benefits to those who are unable to collect regular benefits due to listed COVID-related reasons. The approval for PUA was backdated effective March 15, 2020 with a weekly benefit amount of $397.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1) provides:

> 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.

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. On the issue of whether voluntary leaving is for good cause attributable to the employer, the Claimant had the burden of proof by statute. Iowa Code §96.6(2).

Quitting is not the only form of leaving work. The statute does not use the word "quit." The statute refers to having "left work." The structure of the actual statute makes clear that the concept of a permanent quit is included within the concept of "leaving work," but it does not exhaust the forms of "leaving work." When we look to the other paragraphs found in §96.5(1) it is clear that the Code considers a request for a temporary or indefinite leaving of work is a leaving of work, not a leave of absence. Paragraphs (c) through (f) impose similar conditions for such a person to collect benefits. They all agree: the temporary leaving is a voluntary leaving of work (else why have conditions for requalification?), the worker is thus disqualified, the worker remains disqualified while not job attached, and the worker can lift the disqualification by returning to work and offering services. Workers in these categories of voluntary leaving can requalify by returning to offer services and do not have to earn ten times their weekly benefit amount to requalify. Iowa Code §§96.5(1)(c)-(f); *see also Gilmore v. EAB,* No. 03-2099 (Iowa App. 11/15/2004).

The law states that one who leaves work "because of illness, injury or pregnancy upon the advice of a licensed and practicing physician" and "after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services" then the person can receive benefits if "the individual's regular work or comparable suitable work was not available…" Iowa Code §96.5(1)(d).

Expounding on this 871 IAC 24.26 provides:

> 24.26(6) Separation because of illness, injury, or pregnancy.
>
> a. Nonemployment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. **Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment**.

Here the Claimant left work in May based on the advice of a physician but for a non-work-related health condition. She is thus disqualified **but** she will requalify for benefits as soon as she returns and offers her services to the Employer, or until she earns ten times her weekly benefit amount, whichever is sooner. This means the Claimant is denied **regular benefits and PEUC benefits** until she is fully able to return to work as a clerk, and then returns to Fareway and offers her services, but is rejected. This is the requirements set by Iowa Code §96.5(1)(d). *See Hedges v. Iowa Dep't of Job Serv., 368 N.W.2d 862, 867 (Iowa Ct. App. 1985)*; 871 IAC 24.26(6)(a).

As far as good cause we cannot rely on the change of contract basis. The theory of the Administrative Law Judge is that a worldwide change of circumstance means that working under unchanged terms of employment constitutes a change in the contract. The idea seems to be that when non-contract conditions change then a failure to change the contract is a change in contract. This is not the law of contract, nor of how contract changes work in the unemployment case. This case is thus not a quit for a change in contract of hire.

The detrimental working condition theory also fails to provide good cause attributable to the employment for the Claimant's leaving of work.

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 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 violated the law, only that it was reasonable for the employee to believe so." *O'Brien v. EAB,* 494 N.W.2d 660, 662 (Iowa 1993). Good faith under this standard is not determined by the Claimant's subjective understanding. 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 improper or illegal activities were occurring at [Employer] that necessitated his quitting." *O'Brien* at 662; *accord Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988)(misconduct case). *C.f. Haskenhoff v. Homeland Energy Solutions*, 897 N.W.2d 553, 592 (Iowa 2017) ("The test for constructive discharge is objective…").

Under the objective standard the fact that a risk is posed to the Claimant's health because of the Claimant's personal circumstances is not good cause attributable to the Employer. If it were then *every* Claimant who left upon the advice of a physician would get benefits regardless of whether they are ever released to work, or ever return and offer their services. As we set out above, this is not the law. We must assess whether the Employer's job site was unreasonably unsafe to the average person, not whether it was unreasonably unsafe to persons with particular vulnerability to the Coronavirus. Under this standard good cause for leaving work was not shown. Notably, even assuming the Claimant was seeing a high volume of customers her position was generally classifiable as medium risk under OSHA standards. There was nothing proven about this job site that less safe than comparable retail jobs.

Although we have denied regular benefits and PEUC we write further to give important information to the Claimant about the effect of our decision.

Regular Benefits & PEUC

On the separation, a worker who leaves upon medical advice, after telling the Employer she will quit if not accommodated, is temporarily denied benefits. Such a quit is for good cause but not good cause attributable to the Employer. Notably the leaving on medical advice will deny benefits only until the worker returns to offer her

services. Thus, we have found the quit disqualifying **until** the Claimant is **fully released** to return to work as a clerk **and** she returns to offer her services at Fareway. Once this occurs the Claimant will be eligible to collect PEUC benefits, and then an amount of additional benefits under the state Extended Benefits program, **if** she is otherwise eligible.

Pandemic Unemployment Assistance

PUA is a benefit payable to people for various COVID related reasons. One of these is that the individual is unemployed because the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis, or has been recommended to self-quarantine. Another is the individual is unemployed because a member of the individual's household has been diagnosed with COVID-19.

The Claimant has been approved for PUA effective March 15, 2020. Our ruling on regular benefits **in no way** changes the allowance of PUA. Because of this, and because our ruling only affects PEUC, we do not assess an overpayment or remand for one. It is apparent that one way or the other the Claimant is likely to receive benefits covering at least some of the period in question. If she should be denied PUA benefits for some period when she received PEUC, and as a result be assessed an overpayment, then she could appeal any assessment of the overpayment at that time.

DECISION: The administrative law judge's decision dated August 21, 2020 is **REVERSED**. The Employment Appeal Board concludes that the Claimant left employment under circumstances governed by Iowa Code §96.5(1)(d). Accordingly, the Claimant is denied regular state benefits (and thus PEUC) until the earlier of (1) such time the Claimant has worked in and was paid wages for insured work equal to ten times the Claimant's weekly benefit amount, or (2) such time as the Claimant fully recovers and then returns and offers her services to the Employer. Of course, the Claimant may not collect benefits even after requalifying unless she is otherwise eligible.

Since the Claimant has been approved for PUA which should cover at least some, if not all, of any possible overpayment the issue is left for determination at a later time if necessary.

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Ashley R. Koopmans

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James M. Strohman

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Myron R. Linn

RRA/fnv