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

TAMMY K SMITH	:	
	:	HEARING NUMBER: 08B-UI-07972
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
ARAMARK FACILITY SERVICES LLC	:	
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: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The employer 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:

Tammy Smith (Claimant) worked for Aramark Facility Services LLC (Employer) as a full-time custodian from March 18, 2005 until July 16, 2008. (Tran at p. 3; p. 6; Ex. 1). Rocky Sanders was the custodial manager for the Employer. (Tran at p. 2). On July 11 the Claimant learned from her manager Rocky Sanders that he would be hiring a certain woman and the Claimant then went on to describe this woman to Mr. Sanders with the epithet "whore." (Ex. 2, p. 2, p. 4). On July 14 the Claimant used this aspersion coupled with the appellation "bitch" in the presence of several others, including her supervisor Thomas Moore. (Ex. 2, p. 2, p. 4). The following day the Claimant again used this slur while speaking with

Mr. Moore. (Ex. 2, p. 2). On the next day Mr. Sanders confronted the Claimant, and her co-worker Catina McKay, over their use of vulgarities concerning this co-worker. (Ex. 2, p. 3 ff., p. 7-8). During this meeting the two women were given a disciplinary notice for harassment of a co-worker. (Tran at p. 3; Ex 2, p. 3 ff, p. 7-8). This notice required the women to participate in a single-day training program over sexual and other workplace harassment, and to read a copy of the Employer's policy on harassment. (Tran at p. 4-5; Ex. 2, p. 4-p.5). The Employer has a zero-tolerance harassment policy. (Tran at p. 4). After this meeting the Claimant became very upset. (Tran at p. 3; Ex 2, p. 6). After the meeting Mr. Moore reported to Mr. Sanders allegations that a worker at their client had previously complained about the language used by the two women. (Ex. 2, p. 6). Sanders and Moore were on their way to investigate this allegation when they were approached by the Claimant and her reprimanded co-worker. (Ex. 2, p. 6). They expressed to Mr. Sanders that they wanted to go home as the Claimant was too upset to work. (Tran at p. 3; p. 6; Ex. 2, p. 6). They were told to work and that if they left it would be a quit. (Tran at p. 3; p. 5; p. 6-7; Ex. 1, p. 12; Ex. 2, p. 6). After being told this the Claimant quit in reaction to her reprimand. (Tran at p. 3-4; p. 5; p. 6; Ex. 1, p. 12; Ex. 2, p. 6). The Claimant had been written up on September 26, 2007 for leaving work without permission. (Tran at p. 4; p. 7; Ex. 1, p. 13).

REASONING AND CONCLUSIONS OF LAW: We analyze this case using a twin analysis – as a quit and in the alternative as a termination. Under neither analysis does the Claimant receive benefits.

Quit Analysis: Concerning quits 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 rule 24.25:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
> …
> 24.25(27) The claimant left rather than perform the assigned work as instructed. 24.25(28) The claimant left after being reprimanded.

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)).

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

The facts of this case fall squarely within rule 24.25(28). The Claimant was reprimanded, she didn't like it, she quit. This, by rule, is not a quit for good cause.

Viewed differently, the Claimant was asked to perform her job duties and refused because she was too upset. The Claimant would than have to prove that her upset was good cause for quitting rather than doing her job. The question therefore become whether someone who calls a co-worker a "bitch" and a "whore" has good cause for quitting because they get upset when they are told to knock it off? The question answers itself. This is not good cause for quitting, and indeed appears to be little more than pique. The Claimant has failed to prove good cause for her decision to quit.

Termination Analysis: Even when analyzed as a termination, where the Employer has the burden of proof, the Claimant's separation is still disqualifying.

Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(a):

> *Misconduct* is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in the carelessness or negligence of such degree of recurrence as to manifest equal

> culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." Huntoon v. Iowa Department of Job Service, 275 N.W.2d, 445, 448 (Iowa 1979). In consonance with this, the law provides:

> *Past acts of misconduct.* While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(8); accord Lee v. Employment Appeal Bd. 616 N.W.2d 661, 665 (Iowa, 2000); Ringland Johnson, Inc. v EAB 585 NW2d 269, 271 (Iowa 1998); Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988); Myers v. IDJS, 373 N.W.2d 507, 510 (Iowa App. 1985).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

More specifically, failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. "[W]illful misconduct can be established where an employee manifests an intent to disobey the reasonable instructions of his employer." Myers v. IDJS, 373 N.W.2d 507, 510 (Iowa 1983)(quoting Sturniolo v. Commonwealth, Unemployment Compensation Bd. of Review, 19 Cmwlth. 475, 338 A.2d 794, 796 (1975)); Pierce v. IDJS, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988). The Board must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985). "The key question is what a reasonable person would have believed under the circumstances." Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330, 337 (Iowa 1988); accord O'Brien v. EAB, 494 N.W.2d 660 (Iowa 1993)(objective good faith is test in quits for good cause).

Applying the standards to this case, the Employer has proved misconduct. We emphasize that walking off the job in protest of having received discipline is not just another unexcused absence. It is much more than that. Not only does it require disregarding the direction to go to work but it is a challenge to

the decision to discipline, that is, is an attempt to undermine the Employer's authority. Balancing the need

for compliance with the directive to work with the Claimant's asserted upset and need to go home we find the evidence clearly favors the Employer. We emphasize a refusal to go to work may not constitute misconduct if such refusal is in "good faith" or is for "good cause." Here the Employer has proven there was no such justification. The Employer has proven that the Claimant engaged in disqualifying insubordination by refusing to return to work after being reprimanded.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question.

DECISION:

The administrative law judge's decision dated September 23, 2008 is **REVERSED**. The Employment Appeal Board concludes that the claimant was separated from employment in a manner that disqualifies the Claimant from benefits. Accordingly, she is denied benefits until such time the Claimant has worked in and was paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(1)"g"; Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv

DISSENTING OPINION OF JOHN A PENO:

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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John A. Peno

RRA/fnv