

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

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**PATRICK R MORRIS**

Claimant,

and

**ED GARNER'S AUTORAMA RV CENTER**

Employer.

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**HEARING NUMBER: 11B-UI-05095**

**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, 96.3-7

**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:**

Patrick Morris (Claimant) was employed as a full-time service technician from June 8, 2010 through March 28, 2011. (Tran at p. 2; p. 6-7). His last day of work was March 25, 2011. (Tran at p. 3). At the end of that day, he picked up his paycheck, loaded up some of his personal tools and left. (Tran at p. 3-4). The Claimant took the tools so he could work on an electric door at his parent's house. (Tran at p. 8).

The Employer had an RV show with 90 units on display at the Iowa State Fairgrounds and the show ended on Sunday March 27, 2011. (Tran at p. 3; p. 5). All employees are required to help take down the show. (Tran at p. 3). Supervisor James Connett called all employees on Sunday to remind them to report to work at 4:00 p.m. (Tran at p. 3). Mr. Connett called the Claimant but there was no answer so he left a message for the Claimant to come to work at 4:00 p.m. (Tran at p. 3-4). The Claimant did not

show up for work at

4:00 p.m. and did not call the employer at all that day. (Tran at p. 3-4). The Claimant's father was gravely ill and the Claimant was with his father on March 27. (Tran at p. 5; p. 7). The Claimant had left his phone at his home and did not receive the Employer's message until he was on his way to work on Monday. (Tran at p. 7; p. 14). The Claimant had not realized he had to work on Sunday. (Tran at p. 8-9; p. 10). By the end of the week the Claimant's father had passed away. (Tran at p. 10).

The Employer assumed the Claimant had quit and hired a replacement by Monday. (Tran at p. 4; p. 6). The Claimant came to work on Monday and was told that the Employer believed he had voluntarily quit. (Tran at p. 4; p. 14). The Claimant was then separated from employment.

### **REASONING AND CONCLUSIONS OF LAW:**

Disqualification Under The Employment Security Law: An unemployed person who meets the basic eligibility criteria receives benefits unless they are disqualified for some reason. Iowa Code §96.4. Generally, disqualification from benefits is based on three provisions of the unemployment insurance law that disqualify claimants until they have been reemployed and have been paid wages for insured work equal to ten times their weekly benefit amount. An individual is subject to such a disqualification if the individual (1) "has left work voluntarily without good cause attributable to the individual's employer", Iowa Code § 96.5(1), or (2) is discharged for work-connected misconduct, Iowa Code § 96.5(2)"a", or (3) fails to accept suitable work without good cause, Iowa Code § 96.5(3).

The first two disqualifications are premised on the occurrence of a separation of employment. To be disqualified based on the nature of the separation the Claimant must either have been fired for misconduct or have quit but not for good cause attributable to the employer. Generally, the employer bears the burden of proving disqualification of the claimant. Iowa Code §96.6(2). Where a claimant has quit, however, the claimant has "the burden of proving that a voluntary quit pursuant to Iowa Code section 96.5, subsection 1, was for good cause attributable to the employer." Iowa Code §96.6(2). Since the employer has the burden of proving disqualification and the claimant only has the burden of proving the justification for a quit, the employer has the burden of proving that a particular separation is a quit rather than a discharge.

Did the Claimant Quit?: 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.

Generally a quit is defined to be "a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." 871 IAC 24.1(113)(b). Furthermore, Iowa Administrative Code 871—24.25 provides:

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.



Since the Employer had the burden of proving disqualification the Employer had the burden of proving that a quit rather than a discharge has taken place. 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). “[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent.” *FDL Foods, Inc. v. Employment Appeal Board*, 460 N.W.2d 885, 887 (Iowa App. 1990), accord *Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992).

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. We have found credible that the Claimant did not intend to quit. The Claimant took tools home to fix a door. He also focused on his father during what turned out to be their final weekend together. It is entirely credible that the Sunday work slipped his mind at this time. The fact that the Claimant did come to work on Monday tends to show that he did not quit on Friday. The Claimant did not intend to quit and thus cannot be found to have quit. under 871 IAC 24.25.

Was the Claimant fired for Misconduct?: Although the Employer does not claim it fired the Claimant for the sake of completeness we address the issue of misconduct.

Before absenteeism can be disqualifying it must be shown to be excessive and unexcused absenteeism. 871 IAC 24.32(7). The evidence shows only one absence, and one is not excessive. Furthermore, the greater weight of the evidence supports the conclusion that the Claimant simply forgot about the Sunday schedule because of his emotional upset. This error was the result of the distressing events facing the Claimant. The confusion of the Claimant does not stem from the Claimant failing to fulfill his obligations such as checking the schedule. The Claimant’s mistake was an honest good faith error. The Claimant will not be disqualified if the Employer shows only “inadvertencies or ordinary negligence in isolated instances.” 871 IAC 24.32(1)(a). Where the Employer proves only that the Claimant honestly forgot that he was supposed to work on a Sunday no act of misconduct is shown. Any termination would not be for an act of misconduct and the Claimant should not be disqualified from benefits.

Result Of Separation By Mutual Mistake: Finally, if there is no termination and no quit then the situation we face, which is surprisingly not that rare, would be separation by mutual mistake. The Employer thought the Claimant was quitting. The Claimant had forgotten, under the circumstances, that he had to work on Sunday. When the Claimant came to work on Monday he was told he had quit, even though this was news to him. One might wonder, then, whether this would be a quit or a discharge? Casting the issue in these terms, however, is a false dichotomy. Under the rules a separations include “**all** terminations of employment” and these in turn are “**generally** classifiable as layoffs, quits, discharges, or other separations.” 871 IAC 24.1 (emphasis added). Therefore a separation by mutual mistake is a “termination of employment” and falls within the definition of a “separation.” It is also clear that a separation by mistake does not fall within the definition of a quit or a discharge. We conclude, therefore, that the Claimant is not disqualified by the separation.

This treatment of separation by mutual mistake is compelled by logic. We know that the only disqualifying separations are discharges and quits. We assume, for this part of the analysis, that the Claimant was neither discharged nor did he quit. We are required to conclude, therefore, that the Claimant was not disqualified by the nature of his separation. This result is, we think, inescapable once it has been determined that the

separation was caused by a mutual mistake of the parties. Of course, the Claimant must otherwise be eligible and not have been disqualified by something other than the nature of the separation. In this appeal, however, we address only the allegation that the Claimant was disqualified by his separation and we find that he was not.

**DECISION:**

The administrative law judge's decision dated May 12, 2011 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. 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.

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John A. Peno

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Elizabeth L. Seiser

**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 F. Kuester

RRA/fnv