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

ALAN D SETTLES	:	
	:	**HEARING NUMBER:** 10B-UI-09882
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
PINNACLE FOODS GROUP 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: 96.5-1, 96.3-7

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. Two 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:

Alan Settles (Claimant) worked for Pinnacle Foods Group (Employer) as a full-time production technician from March 23, 2009 through May 29, 2009. (Tran at p. 3-4; p. 7; p. 8; Ex 1; Ex. 3). A written offer of work was made on March 4, 2009 and the offer was for a minimum of three days including Tuesday, Thursday and Friday. (Tran at p. 8; p. 12; p. 15-16; Ex. 1; Ex. 3). The Claimant was hired for a canning line and the first 90 days would constitute a probationary period. (Tran at p. 8; Ex. 1; Ex. 3). He would receive benefits after that and since the Employer is a union facility, the Claimant was advised his schedule may change after his probationary period. (Ex. 1; Ex. 3). He was informed “at that time your schedule should be a minimum of 36 hours a week.” (Ex. 1; *see also* p. 21-22).

Production was down and the Employer had to place the senior employees in the jobs for which the Claimant and several others were hired. (Tran at p. 6; p. 16-17). During a company meeting on May 22, 2009 the Claimant and other employees were taken off the regular schedule and placed on an on-call status. (Tran at p. 6; p. 7; p. 12; p. 17-18; p. 19). The newer employees were advised they would be placed on the A call list for returning to work, which meant they had the highest priority. (Tran at p. 8-9). If the employee fails to respond to the Employer's calls four times, he is then placed on the B call list. (Tran at p. 9). If the employee fails to respond to the Employer's calls four more times, he is then placed on the C call list which indicates to the Employer the employee is not interested in working. (Tran at p. 9).

After being called the Claimant returned to work from May 27, 2009 through May 29, 2009. (Tran at p. 4; p. 14). Eight messages were left for the Claimant beginning June 1, 2009 and going through September 23, 2009 but he never returned the calls and never returned to work. (Ex. 7). He was placed on the B call list after he failed to return calls to the Employer on June 1, 4, 9, and 18. (Tran at p. 10-11; Ex. 7). The Employer attempted to reach the Claimant on September 15, 21, 22, and 23 and again there was no response. (Ex. 7). The Employer considered the Claimant was not interested in working after the final call on September 23, 2009. (Ex. 5). The Claimant was not aware that any messages had been left for him. (Tran at p. 22).

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.

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).

Meanwhile, the rules of the Department define a "layoff":

> 24.1(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations
>
> a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

It is quite clear that the Claimant was laid off. This is a "suspension from pay status" during which a claimant may collect benefits. After being laid off the Employer called the Claimant to offer temporary part-time work. When the Claimant did not return the Employer's calls, the Employer stopped calling him. While this is a complicated situation things are made clear by asking one question: why wasn't the Claimant working? The answer is that he was laid off for lack of work. This is not disqualifying. He then worked as an on-call worker. Since the Employer has not proved that the Claimant was aware he had been called, the Employer has failed to prove job abandonment by the Claimant. The Employer relies entirely on messages left on a telephone to prove that the Claimant chose not to come in. The Claimant gives first-hand testimony that he received no such messages. We find the Claimant's explanation credible, and thus have found that he did not actually receive the messages. Had the Employer sent the Claimant a letter at the time of the final offer, rather than relying on the phone, we might have reached a different conclusion. As it is, we have found that the Claimant did not call back, because he did not know he had been called.

Yet even if we were to rule the separation was a quit, the fact that the Claimant's hours had been reduced due to a lack of work would be good cause for quitting. *Dehmel v. Employment Appeal Board*, 433 N.W.2d 700, 702 (Iowa 1988). Second, even if we found that the Claimant made a choice not to continue on an on-call basis, this is not equivalent to a quit. It is merely a decision not to accept that type of work anymore. *C.f.* 871 IAC 24.26(19).

Finally, we address the question of refusal of suitable work. We cannot actually rule on this issue since it was not in the notice of hearing. *Silva v. Employment Appeal Bd.* 547 N.W.2d 232 (Iowa App. 1996); Iowa Code § 17A.12(2)(c) and (d). We would normally remand on such an issue, but do not do so today. We refrain from a remand for two reasons, each of which is sufficient to void any need for a remand. First, the uncontradicted evidence is that the Employer left messages, but did not speak with the Claimant. (Ex. 5; Ex. 7). An offer of suitable work must be by "personal contact," and in cases of a recall can be by letter. 871 IAC 24.24(1)(a). A message left on the phone is neither. Thus no refusal of suitable work case can be made out. Second, the refusal must occur within the current benefit year. 871 IAC 24.24(8). The refusal did not take place in the current benefit year and cannot affect our award of benefits for this year. A remand is not warranted.

DECISION:

The administrative law judge's decision dated October 7, 2010 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

RRA/fnv