

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**JESSICA R KERN  
1027 W 7<sup>TH</sup> ST  
DAVENPORT IA 52802-3304**

**APAC CUSTOMER SERVICES OF IOWA  
LLC  
c/o TALX UCM SERVICES INC  
PO BOX 283  
ST LOUIS MO 63166**

**Appeal Number: 06A-UI-06557-JTT  
OC: 04/30/06 R: 04  
Claimant: Respondent (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct  
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

APAC Customer Services of Iowa filed a timely appeal from the June 12, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 20, 2006. Benefits Administrator Turkessa Hill represented the employer. Claimant Jessica Kern participated. The administrative law judge took official notice of Agency's records regarding benefits disbursed to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On October 10, 2005, Jessica Kern commenced her employment with APAC Customer Services as a full-time customer service representative. Ms. Kern last appeared and worked a shift on

April 26, 2006. Thereafter, Ms. Kern was absent due to illness on April 27, 28, May 1, 2, 3, 5, and 8. For each of the days, Ms. Kern complied with the employer's written attendance policy, which required Ms. Kern to notify the employer before the start of her shift each day she needed to be absent. During this period of absences, Ms. Kern and her four-year-old daughter had both been suffering from bronchitis.

On May 8, Ms. Kern spoke by telephone with her immediate supervisor, Team Leader Patty Neese. Ms. Neese told Ms. Kern that unless she was able to produce a doctor's excuse for her absences, Ms. Kern would most likely be discharged when she returned to work because of the attendance "points" she had incurred. At that time, Ms. Kern indicated that she might not return to the employment. In April, Ms. Neese had issued to Ms. Kern a final warning for attendance and had advised Ms. Kern that the next time she was absent she would be discharged. Though Ms. Kern had been subject to discharge under the employer's policy at the time of the April reprimand, the employer made an exception to its attendance policy so that she could continue in the employment. The employer was aware that Ms. Kern and her daughter were frequently ill. Despite the employer's attendance policy, Benefits Coordinator Turkessa Hill had previously agreed to make exceptions to the employer's attendance policy so that Ms. Kern could continue in the employment. Ms. Kern did not seek an exception to the attendance policy with regard to her April 27-May 8 absences. After making contact with the employer on May 8, Ms. Kern made no further contact with the employer. After Ms. Kern failed to appear for her scheduled shifts on May 9, 10, 11, and 12, the employer terminated her employment under its "no-call, no-show" policy. Under the attendance policy, the employer deemed three consecutive absences without notifying the employer a voluntary quit. Ms. Kern was aware of the attendance policy.

Ms. Kern established a claim for benefits that was effective April 30, 2006, and has received benefits. The administrative law judge notes that Agency records indicate that Ms. Kern told the Agency at the time she established her claim that she had been discharged from the employment on *April 20*. The administrative law judge also notes that a claim effective April 30 could only be based on an application filed no later than Saturday, May 6. Accordingly, Ms. Kern's claim for benefits preceded the May 8 telephone call to Ms. Neese.

#### REASONING AND CONCLUSIONS OF LAW:

The first question for the administrative law judge is whether Ms. Kern's separation from the employment should be deemed a quit or a discharge.

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

The greater weight of the evidence establishes that the employer did not discharge Ms. Kern. Instead, on May 8, Ms. Kern's supervisor merely instructed her to provide a doctor's excuse or face *probable* discharge from the employment. Neither Ms. Neese nor anyone else at APAC told Ms. Kern she was in fact discharged from the employment. This is supported by Ms. Kern's own testimony regarding the phone call. Ms. Neese specifically told Ms. Kern that Ms. Neese would need to check with another supervisor regarding whether Ms. Kern would be allowed to continue in the employment. In light of information Ms. Neese conveyed to Ms. Kern during the May 8 phone call and in light of the prior exception to the attendance policy Ms. Kern had been granted, it was unreasonable for Ms. Kern to conclude she was in fact discharged from the employment. The administrative law judge concludes that Ms. Kern was not discharged, but instead, quit.

The next question is whether the evidence in the record establishes that Ms. Kern voluntary quit was for good cause attributable to the employer. It does not.

Iowa Code section 96.5-1 provides:

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.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

871 IAC 24.25(4) 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. 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:

- (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Despite the fact that Ms. Neese did not testify, the greater weight of the evidence indicates that Ms. Kern told Ms. Neese that she might not return to the employment. The evidence also indicates that Ms. Kern was absent for four consecutive shifts without notifying the employer before the employer concluded she had abandoned the employment, pursuant to the attendance policy.

Base on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Kern voluntarily quit the employment without good cause attributable to the employer. Accordingly, Ms. Kern is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account will not be charged.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Ms. Kern has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Kern must repay to Iowa Workforce Development. Ms. Kern is overpaid \$1,790.00.

**DECISION:**

The Agency representative's decision dated June 12, 2006, reference 01, is reversed. The claimant voluntarily quit the employment without good cause attributable to the employer. The claimant is disqualified for benefits until she has worked in a been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged. The claimant is overpaid \$1,790.00.

jt/pjs