

**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**

**JAYMEE L APOLINARIO
502 S GUNNISON ST
BURLINGTON IA 52601-4109**

**RESTAURANT RESOURCES INC
105 – 6TH AVE N
CLINTON IA 52732**

**Appeal Number: 06A-UI-06930-JTT
OC: 06/11/06 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(1) – Voluntary Quit
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Restaurant Resources filed a timely appeal from the June 28, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 1, 2006. Claimant Jaymee Apolinario participated. Office Manager and Human Resources Director Jane Beasley represented the employer and presented additional testimony through District Manager Steve Dopson. Exhibits One through Eight, A and B were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jaymee Apolinario commenced her full-time employment with Restaurant Resources on February 17, 1999 and was the manager of the Pizza Hut Delivery restaurant in Burlington at the time she

separated from the employment. Ms. Apolinario last performed work for the employer on May 28, 2006. On May 29, Ms. Apolinario took a draft of the work schedule for May 31-June 6 to the restaurant and provided it to shift manager Michelle Clayton. Ms. Clayton ordinarily prepared the schedule. Ms. Apolinario had prepared the preliminary draft because she intended to take a week off and wanted to make certain the other managers were appropriately scheduled to cover her shifts. The schedule Ms. Apolinario brought to the store indicated that Ms. Apolinario would be on vacation during the week in question. Ms. Apolinario was familiar with the employer's procedure for requesting time off, which required written documentation of the request. However, Ms. Apolinario did not contact her immediate supervisor, District Manager Scott Dopson, to formally request time off. Though Ms. Apolinario was scheduled to assist with inventory on May 30, she contacted Assistant Manager Dan Scott on that day to indicate that she had a family emergency and would not be in. Mr. Scott alerted Mr. Dopson to Ms. Apolinario's absence due to the family emergency. It was at this time that Mr. Dopson first learned that Ms. Apolinario had scheduled herself off for the following week. On the same day, Mr. Dopson attempted to contact Ms. Apolinario by telephone out of concern, to get clarification of the family emergency and learn when Ms. Apolinario might be in a position to return to work. Mr. Dopson left message on Ms. Apolinario's home phone, but did not receive a response. Mr. Dopson made additional attempts to reach Ms. Apolinario by telephone.

On June 2, the employer changed the locks on the restaurant doors in response to missing cash and probable employee theft. Ms. Apolinario had no connection with the missing cash and the employer did not suspect her of any connection with the loss. The employer set aside a key to provide to Ms. Apolinario when she returned from dealing with her family emergency.

Ms. Apolinario had taken the time off for due to personal stress. Ms. Apolinario's grandmother was ill and passed away on June 2. On June 5, Ms. Apolinario traveled to Florida for the funeral. In the early hours of June 7, Ms. Apolinario arrived back in Burlington. Ms. Apolinario went to the store and discovered that her key no longer worked. Ms. Apolinario assumed she had been discharged. Ms. Apolinario and Shift Manager Michelle Clayton are friends, including outside of work. On June 7, Ms. Apolinario telephoned Ms. Clayton at the restaurant and learned that she had not been scheduled for any hours on the schedule posted for June 7-13. Ms. Apolinario asked Ms. Clayton why she did not have any hours on the schedule. Ms. Clayton told Ms. Apolinario that she did not know why Ms. Apolinario was not on the schedule and that Ms. Apolinario should telephone Mr. Dopson. Mr. Dopson had directed the staff not to schedule Ms. Apolinario for any hours because he had been unable to contact Ms. Apolinario and did not know when she might be able to return to work. Ms. Apolinario did not contact Mr. Dopson. On June 8 or 9, Ms. Clayton reported to Mr. Dopson that Ms. Apolinario had called and was back in town. Ms. Clayton told Mr. Dopson that Ms. Apolinario thought she was in trouble and, therefore, was not calling him. Mr. Dopson instructed Ms. Clayton to tell Ms. Apolinario that she was not in trouble and just needed to call. On June 9, Mr. Dopson went to Ms. Apolinario's home and knocked on the door, but got no response. On June 10, Ms. Apolinario encountered one or more delivery drivers, who told her Mr. Dopson had informed the staff that Ms. Apolinario had quit the employment. On June 11, Ms. Apolinario filed for unemployment insurance benefits. On June 14, the employer received notice of the claim and concluded Ms. Apolinario had in fact quit. On June 15, Ms. Apolinario telephoned Ms. Clayton and told her that she knew she had been fired.

Ms. Apolinario's claim for benefits was effective June 11, 2006. Ms. Apolinario has received benefits totaling \$2,569.00.

REASONING AND CONCLUSIONS OF LAW:

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 first question is whether Ms. Apolinario reasonably concluded that she had been discharged from the employment. Based on the facts in evidence, as set forth above, the administrative law judge concludes that a reasonable person would not have concluded that he or she had been discharged from the employment. Instead, a reasonable person would have made appropriate contact with the employer before, during, and after the absence from work. The evidence in the record establishes that Ms. Apolinario initiated the separation from the employment, not the employer. See 871 IAC 24.1(113)(b).

Accordingly, the question is whether the evidence in the record establishes that Ms. Apolinario voluntarily 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.

The evidence in the record establishes that Ms. Apolinario voluntarily separated from the employment for personal reasons, not for good cause attributable to the employer. Ms. Apolinario failed to return to the employment after a one-week unauthorized vacation. Ms. Apolinario failed to return because she thought she would be subject to discipline. A quit in response to a reprimand is presumed to be without good cause attributable to the employer. See 871 IAC 24.25(28). Where an employee voluntarily separates from the employment because she believes her job performance is not to the satisfaction of the employer, but the employer has not requested that the employee leave and continued work is available, the quit is presumed to be without good cause attributable to the employer. See 871 IAC 24.25(33).

The evidence in the record indicates that Ms. Apolinario's voluntary quit was without good cause attributable to the employer. Accordingly, Ms. Apolinario is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. 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. Apolinario has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Apolinario must repay to Iowa Workforce Development. Ms. Apolinario is overpaid \$2,569.00.

DECISION:

The Agency representative's June 28, 2006, reference 01, decision 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 and 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 \$2,569.00.

jt/kjw