

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**TAMMIE BUTTZ**  
Claimant

**APPEAL NO. 10A-UI-17389-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MCDONALD'S**  
Employer

**OC: 04/11/10**  
**Claimant: Respondent (2/R)**

Iowa Code § 96.5-2-a - Discharge for Misconduct  
871 IAC 24.32(7) - Excessive Unexcused Absenteeism  
Iowa Code § 96.3-7 - Overpayment

**STATEMENT OF THE CASE:**

McDonald's (employer) appealed an unemployment insurance decision dated December 6, 2010, reference 02, which held that Tammie Buttz (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 17, 2011. The claimant participated in the hearing. The employer participated through Shea Newsom, Store Manager. Employer's Exhibits One through Three were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a full-time crew trainer from September 25, 2008 through November 14, 2010. She was discharged from employment due to poor work performance and excessive absenteeism with a final incident on November 14, 2010. The claimant called in her absence around 4:00 p.m. on November 14, 2010 for her overnight shift beginning at 9:00 p.m. She reported that her son was ill and she did not have a babysitter.

Store Manager Shea Newsom went to Target on November 14, 2010 at approximately 8:00 p.m. before going into the restaurant at 9:00 p.m. He saw the claimant working at Target, her second job, but did not know she had called in her absence until he arrived at the restaurant and was informed of that fact.

The employer issues a verbal warning for attendance and then a written warning before a final warning. The claimant received a final warning for repeated tardiness on October 21, 2010.

She told the store manager that she needed to get a second job and the manager told her that was okay, provided it did not interfere with her job there. The claimant got a full-time job at Target and worked there all day before reporting to work the night shift for the employer. The claimant was getting worn down trying to do both jobs and her performance was also lacking as a result.

The claimant received a written warning on November 11, 2010 that she refused to sign. She was working in a slow manner and told the employer she wanted to go home. The claimant then got something to eat at approximately 11:30 p.m. and sat down without saying anything or asking if it was okay. This was one of the employer's busier times and the claimant was warned if it happened again, she would be suspended or terminated. A second written warning was prepared on the morning of November 13, 2010 for the claimant's poor work performance on November 12, 2010. She told the employer she was leaving early and was told she did not have permission to leave early and that if she did leave, she would be considered to have voluntarily quit. The claimant no longer said she was going to leave early but refused to stay in her area working and was eventually sent home by the employer. The claimant never returned to work, so she did not receive the final warning.

The claimant filed a claim for unemployment insurance benefits effective April 11, 2010 and has received benefits after the separation from employment.

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

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

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 carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an

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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.

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). The claimant was discharged on November 14, 2010 for poor work performance and excessive unexcused absenteeism. Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The claimant's poor work performance and her excessive tardiness were the result of her working a second daytime job. She told the employer her second job would not interfere with her job there, but that was not the case. The claimant called in her absence on November 14, 2010 but was then found working at her second job. The employer has met its burden. The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

**DECISION:**

The unemployment insurance decision dated December 6, 2010, reference 02, is reversed. The claimant is not eligible to receive unemployment insurance benefits, because she was discharged from work for misconduct. Benefits are withheld 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/kjw