

**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**

**DONNIE L BENDA
506 HARMON ST
TAMA IA 52339**

**INNS OF IOWA LIMITED
c/o EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000**

**Appeal Number: 04A-UI-05585-RT
OC: 04-11-04 R: 02
Claimant: Respondent (3)**

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 Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Inns of Iowa Limited, filed a timely appeal from an unemployment insurance decision dated May 10, 2004, reference 04, allowing unemployment insurance benefits to the claimant, Donnie L. Benda. After due notice was issued, a telephone hearing was held on June 10, 2004 with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. Alicia Sears, Comptroller, and Pat Schade, Owner and President, participated in the hearing for the employer. The employer was represented by Marcy Schneider of Employers Unity, Inc. The administrative law judge

takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibits 1 through 4 were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 through 4, the administrative law judge finds: The claimant was employed by the employer as a full-time wait staff and occasional host from April 17, 2003 until he voluntarily quit on September 15, 2003. On that day the claimant walked off the job before his shift was over and has never returned to work. The employer has a policy at Employer's Exhibit 4 indicating that an employee who fails to show up for a period of three days and fails to notify the employer will be deemed to have voluntarily quit. The claimant never returned to work after September 15, 2003 and did not notify the employer. At fact finding the claimant even concedes that he quit.

The claimant quit because he believed that he was being shorted on tips but the claimant was always given all tips to which he was entitled. Individual customers leave tips at the table or by credit card and the individual wait staff person receives those and reports them to the employer as required. For banquet tips a banquet ticket is made up as shown at Employer's Exhibit 1 and every person who works the banquet is expected to sign his or her name and then the tip for that banquet is divided appropriately. On June 7, June 12, and June 14, 2003, the claimant worked banquets but failed to write his name on the banquet ticket as required as shown at Employer's Exhibit 1. The claimant got no tips for these banquets but, when he called this to the attention of the employer, the employer paid the claimant appropriately for the tips to which he was entitled. The claimant also alleged that he was entitled to tips for two banquets on June 18, 2003 but as shown at Employer's Exhibit 2, which is the employer's schedule, the claimant did not work in the evening but only worked from 10:00 a.m. to 2:00 p.m. and, further, for the noon banquet, the schedule shows that someone else worked the banquet. The claimant would often forget or fail to put his name on the ticket for the banquet and whenever this was called to the employer's attention the claimant was paid his appropriate share of the tips. The claimant was paid all the tips to which he was appropriately entitled. Employer's Exhibit 3 indicates that on July 19, 2003 the claimant took his cash tips but refused to inform the employer and enter them in the employer's records. The claimant did express concerns about these tips to the employer but in all cases the employer addressed his concerns. The claimant really never indicated or announced an intention to quit over these matters.

During the time that the claimant was employed with the employer, the claimant had a claim for unemployment insurance benefits for benefit year from April 6, 2003 to April 4, 2004 and received substantial unemployment insurance benefits during that benefit year. The claimant did report earnings during the time that he was employed by the employer herein. None of the benefits received by the claimant were charged to the account of the employer herein. Further, the benefits received by the claimant in that benefit year were not determined using the wages paid by the employer herein. The claimant then opened a new claim for unemployment insurance benefits effective April 11, 2004 but has received no unemployment insurance benefits being shown as disqualified because of a disqualifying separation from a subsequent employer, TR Chef, Inc., on February 28, 2004, by decision dated April 23, 2004, reference 01, which decision has not been appealed.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was potentially disqualifying but because the employment firm which the claimant quit without cause was part time, he is not automatically disqualified.

2. Whether the claimant is overpaid unemployment insurance benefits. He is 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.

871 IAC 24.26(1) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

The employer's witness, Alicia Sears, Comptroller, credibly testified that the claimant voluntarily quit on September 15, 2003 when he walked off the job and never returned to the employer. The employer has a policy that three absences as a no-call/no-show without notifying the employer will be deemed a voluntary quit. At fact finding the claimant even concedes that he quit. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily. The issue then becomes whether the claimant left his employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that he has left his employment with the employer herein with good cause attributable to the employer. See Iowa Code Section 96.6-2. The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The claimant did not participate in the hearing and provide a preponderance of the evidence of reasons attributable to the employer for his quit. The claimant alleged at fact finding that he quit because he was shorted tips from banquets. Ms. Sears credibly testified that although the claimant did allege that he had failed to get banquet tips he received all tips to which he was entitled. The problem was that the claimant did not always, as necessary and as instructed, write his name on the banquet tickets so as to share in the division of the tips. However, when this was pointed out to the employer the employer paid the claimant all the tips to which he was entitled. There were occasions when the claimant was not entitled to tips. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant was not paid appropriately for any tips to which he was entitled. If the claimant was not paid for some tips it was due to his own actions rather than that of the employer. Therefore, the

administrative law judge concludes that the employer did not willfully breach the claimant's contract of hire concerning remuneration. It does appear that the claimant left his employment because he was dissatisfied with the work environment but this is not good cause attributable to the employer. See 871 IAC 24.25(21). The claimant did express concerns about these matters but they were in all cases addressed by the employer and the claimant never indicated or announced an intention to quit if his concerns were not addressed.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant left his employment voluntarily without good cause attributable to the employer. Because it appears as discussed below that this employment was part-time, the claimant is not automatically disqualified to receive unemployment insurance benefits if he is otherwise monetarily eligible for such benefits based on wages paid by other base period employers. See 871 IAC 24.27. For the current benefit year from April 11, 2004 to April 10, 2005, the claimant will be entitled to unemployment insurance benefits if he is otherwise monetarily eligible for benefits based on wages paid by other base period employers. However, benefit payments shall not be based on wages paid by the part-time employer herein and any benefits to which the claimant is entitled shall not be assessed against the part-time employer's account. The administrative law judge does not believe that it is now necessary to remand this matter for a determination of that issue because the administrative law judge notes that the claimant is presently disqualified to receive unemployment insurance benefits as a result of a disqualifying separation from a subsequent employer, TR Chef, Inc., on February 28, 2004 by decision dated April 23, 2004, reference 01. The administrative law judge notes that for a prior benefit year, from April 6, 2003 to April 4, 2004, the claimant received unemployment insurance benefits both during and after his separation from the employer herein but those benefits were not charged to the account of the employer herein and were not determined by the wages or earnings paid by this employer.

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.

The administrative law judge concludes that for the current benefit year, from April 11, 2004 to April 10, 2005, the claimant has received no unemployment insurance benefits and is therefore not overpaid any such benefits. For the prior benefit year, April 6, 2003 to April 4, 2004, the claimant did receive benefits after separating from the employer herein. However, he also received benefits while employed by the employer and it appears to the administrative law judge that the claimant's employment with the employer was part-time because he did report earnings for the weeks in which he was employed by the employer but was still entitled to benefits. The employer's witness, Alicia Sears, Comptroller, testified that the claimant's employment was full-time but the administrative law judge is not convinced after reviewing the

schedule at Employer's Exhibit 2. It appears to the administrative law judge that the claimant's employment was part-time and he was drawing benefits from other employers and that during that benefit year his earnings from the employer were not used to determine his benefits and that no benefits for that year were charged to the account of the employer herein. Accordingly, the administrative law judge concludes that the claimant is not overpaid for any unemployment insurance benefits for the prior benefit year, from April 6, 2003 to April 4, 2004, because his voluntary quit was from part-time employment and he appears to be otherwise monetarily eligible for benefits based on wages paid by other employers and therefore is not overpaid the benefits he received. See 871 IAC 24.27.

DECISION:

The representative's decision of May 10, 2004, reference 04, is modified. The claimant, Donnie L. Benda, left his employment with the employer herein, Inns of Iowa Limited, without good cause attributable to the employer. Because this voluntary quit was of part-time employment and the claimant was otherwise monetarily eligible for benefits in the prior benefit year, from April 6, 2003 to April 4, 2004, and the earnings from this employer were not used to determine those benefits and the employer was not charged for such benefits, the claimant is entitled to those benefits for that benefit year and he is not overpaid such benefits. For the new benefit year, from April 11, 2004 to April 10, 2005, the claimant is also entitled to unemployment insurance benefits if he is otherwise monetarily eligible for such benefits based on wages paid by other employers in the base period but his benefit amount shall not be based on wages paid by the part-time employer herein and any benefits to which the claimant is entitled shall not be charged to the account of the employer herein. The administrative law judge does note that the claimant is disqualified to receive unemployment insurance benefits pursuant to a disqualifying separation from a subsequent employer, TR Chef, Inc., by decision dated April 23, 2004, reference 01, from which the claimant has not appealed. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits.

tjc/b