

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

CHANTEL M WERNER
103 CHICGO ST
WATERLOO IA 50701

KWIK TRIP INC
1626 OAK ST
PO BOX 2107
LACROSSE WI 54602-2107

Appeal Number: 04A-UI-06246-RT
OC: 05-02-04 R: 03
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 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Kwik Trip, Inc., filed a timely appeal from an unemployment insurance decision dated May 27, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Chantel M. Werner. After due notice was issued, a telephone hearing was held on July 1, 2004 with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. Steve Tupy, Manager at a store in Waterloo, Iowa, where the claimant was employed, participated in the hearing for the employer. Employer's Exhibits 1 and 2 were admitted into evidence. The administrative law judge takes

official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, including Employer's Exhibits 1 and 2, the administrative law judge finds: The claimant was employed by the employer as a full-time cashier from September 29, 2003 until she was discharged on April 15, 2004 for poor attendance. The employer has an attendance policy, as shown at Employer's Exhibit 1, that provides that an employee must personally call the supervisor about the absence and that employee is responsible for finding someone to work in the employee's absence. This must be done prior to the employee's shift. On April 15, 2004, the claimant called in to the store instead of her supervisor, Steve Tupy, Manager and the employer's witness, and informed the store that she would not be in because she was ill. The claimant had not found a replacement. The claimant was then discharged. The claimant had other absences in slightly over two months prior to her discharge as follows: March 12, 2004; March 11, 2004; and February 9, 2004. On each occasion the claimant called in sick but never called Mr. Tupy nor did the claimant ever get a replacement. The claimant had two or three other absences previously for which no dates were provided but for which the claimant received verbal warnings. The claimant also received a verbal warning on October 3, 2003 and three written warnings on February 9, 2004; March 11, 2004; and March 14, 2004, as shown at Employer's Exhibit 2. The claimant was told in the last warning that another breach of the employer's policy would result in a termination. The claimant again failed to follow the policy and was discharged.

Pursuant to her claim for unemployment insurance benefits filed effective May 2, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,099.00 as follows: \$157.00 per week for seven weeks from benefit week ending May 8, 2004 to benefit week ending June 19, 2004. Of that amount \$284.00 was offset against an overpayment from 1997 leaving the claimant's overpayment balance zero.

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

Iowa Code Section 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, (7) provide:

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 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The administrative law judge concludes that the claimant was discharged on April 15, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. The employer's witness, Steve Tupy, Manager at the Waterloo, Iowa, store where the claimant was employed, credibly testified that in a little over two months prior to her discharge the claimant had four absences as set out in the findings of fact, none of which were properly reported. The employer's policy at Employer's Exhibit 1 is clear that an employee who is going to be absent must find a replacement and must notify the supervisor immediately. The supervisor was Mr. Tupy. The claimant did neither on these four occasions. The claimant also had other absences for which Mr. Tupy did not have documentation. These absences also were not properly reported. The claimant received two or three verbal warnings and then another verbal warning on October 3, 2003 and then three written warnings on February 9, 2004; March 11, 2004; and March 12, 2004; as shown at Employer's Exhibit 2. The last written warning informed the claimant that another breach of the policy would result in a termination. The claimant breached the policy and was terminated. Under the circumstances here, the administrative law judge is constrained to conclude that claimant's absences were not properly reported and were excessive unexcused absenteeism and disqualifying misconduct. The

claimant should have been well aware pursuant to her warnings that her procedure in reporting her absences was improper but nevertheless she persisted in doing so improperly.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism, and, as a result, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

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 the claimant has received unemployment insurance benefits in the amount of \$1,099.00 since separating from the employer herein on or about April 15, 2004 and filing for such benefits effective May 2, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 27, 2004, reference 01, is reversed. The claimant, Chantel M. Werner, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,099.00.

tjc/tjc