

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

AMBER D RODRIGUEZ
1215 W THOMAS AVE
SHENANDOAH IA 51601

UNITED STATES CELLULAR CORP
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-03861-RT
OC: 02-29-04 R: 01
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 Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, United States Cellular Corporation, filed a timely appeal from an unemployment insurance decision dated March 23, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Amber D. Rodriguez. After due notice was issued, a telephone hearing was held on April 28, 2004 with the claimant participating. Paige Hall, Associate Relations Manager, and Lee Ann Hawkins, Retail Store Manager in Shenandoah, Iowa, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

On April 12, 2004 at 1:10 p.m., the administrative law judge spoke with the claimant. The claimant asked for a continuance because a potential witness, her grandmother, was not available. After discussing the matter, the claimant determined that her grandmother would be available for the hearing and that if not she might be available by telephone otherwise so the claimant's request to reschedule a hearing was denied. The claimant's grandmother was available to testify but was not called because her testimony would have been repetitive and unnecessary.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time retail wireless consultant from October 29, 2001 until she separated from her employment on March 1, 2004. The claimant averaged approximately 30 hours per week. The claimant had had an attendance problem and was changing her schedule and was given a warning on February 12, 2004 by way of an annual review and an action plan. The claimant was informed that all her schedule changes had to be approved by the retail store manager, Lee Ann Hawkins, one of the employer's witnesses. The claimant received a final warning for this on February 20, 2004. On March 1, 2004, the claimant came to the employer's kiosk in a Wal-Mart Store in Shenandoah, Iowa, where the claimant was assigned. No one was working at the kiosk at that time. The claimant had shown up to check the schedule and if she was on the schedule she would have worked after she had obtained a babysitter but she did not have a babysitter immediately. When the claimant was unable to find the schedule, she did not stay at the kiosk or attempt to locate a babysitter and work at the kiosk but rather called Ms. Hawkins and left a message that she had been looking for the schedule and would be leaving because she could not stay because a babysitter was not available. The claimant was actually on the schedule to work that day. The claimant also called and left a message for the assistant manager, David Coble, indicating that she was leaving the kiosk and would be filing for unemployment insurance benefits on her way home. The claimant left these messages at approximately 10:00 a.m. When Ms. Hawkins received her telephone message from the claimant she called the claimant at approximately 10:30 a.m. to confirm the message. The claimant admitted to her that she had left and had filed for unemployment insurance benefits. Ms. Hawkins informed the claimant that her actions were considered a voluntary quit. Ms. Hawkins did not tell the claimant that she was fired or discharged at that time nor had she ever fired or discharged the claimant. The claimant was angry and annoyed that she could not find the schedule and left without making any arrangements to work. Ms. Hawkins had informed the claimant that if she continued to be tardy or absent that she would face discharge but the claimant was not discharged at that time.

The monthly schedule is faxed to the kiosk two weeks prior to the start of the month and also faxed or e-mailed to the employees including the claimant. The claimant got no schedule for the month of March and although she made efforts to do so had not obtained one. She could not find one on March 1, 2004 at the kiosk. The claimant never returned to work and filed for unemployment insurance benefits instead. The claimant had received all of her schedules for 2004 until the one for March. In the previous year there were a couple of schedules the claimant did not receive.

Pursuant to her claim for unemployment insurance benefits filed effective February 29, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,317.00 as follows: \$168.00 per week for four weeks from benefit week ending March 6, 2004 to benefit

week ending March 27, 2004; \$141.00 for benefit week ending April 3, 2004 (earnings \$69.00) and \$168.00 per week for three weeks from benefit week ending April 10, 2004 to benefit week ending April 24, 2004.

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 96.5-1 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 24.25(1), (17), (21), (28) provide:

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:

(17) The claimant left because of lack of child care.

(21) The claimant left because of dissatisfaction with the work environment.

(28) The claimant left after being reprimanded.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant left her employment voluntarily when she showed up for work at the kiosk but then left without bothering to attempt to work and not returning to work. The claimant maintains that she was discharged when she was informed that her actions were considered a voluntary quit. Although it is a close question, 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 left her employment voluntarily. The claimant testified that she came to work on March 1, 2004 intending to work if she was on the schedule but conceding that she did not have a babysitter. The claimant testified that if she had found the schedule and had been on the schedule she would have obtained a babysitter but since she could not find the schedule she did not and made the telephone messages as set out in the findings of fact and left and went home. The claimant testified that she was discharged but conceded that she was not told ever that she was discharged but only that she might be if she continued to be late and absent. The claimant did concede that she was annoyed and angry at the employer and therefore left. The employer's

witnesses testified credibly that the claimant was on the schedule and was assigned to work that day. The administrative law judge concludes that the claimant was aware that she had to work that day but was annoyed and angry that she could not find the schedule and did not have a schedule and therefore left. It should have been clear to the claimant when she arrived at the kiosk and saw that there was no one else there that she was on the schedule. The claimant testified that she was prepared to work that day and would have gone home and got a babysitter but decided not to. The claimant is not particularly credible and the administrative law judge must conclude that the claimant could have made an effort to work but chose not to because she was angry and annoyed. The claimant then left telephone messages for both the manager and the assistant manager indicating that she was leaving and informing the assistant manager that she was going to file for unemployment insurance benefits. This was confirmed by a direct telephone conversation between the claimant and the store manager, Lee Ann Hawkins, at approximately 10:30 a.m. that morning. The administrative law judge concludes that claimant's actions here in coming to the kiosk and leaving although noting that no one was there to work and then making the telephone messages that she did both demonstrate an intention to terminate the employment relationship and were overt acts to carry out that intention as required for a voluntary quit by Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment 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 her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The claimant testified that she was annoyed and angry that she did not get a schedule even after some attempts to get one. The claimant eventually conceded that in 2004 she had received all of the schedules except for the one for March. At one point the claimant said she had received all schedules but then later testified that there were a couple of schedules in 2003 that she had not received. The administrative law judge concludes that the failure to get a schedule for March after having received all the schedules in 2004 and at least most in 2003, did not make her working conditions unsafe, unlawful, intolerable or detrimental nor does it subject the claimant to a substantial change in her contract of hire. The claimant's schedule could have been misdirected or misplaced as could the schedule at the kiosk. In any event, the claimant was angry and left even though, as noted above, the claimant should have known that she was to work that day. There was evidence that the claimant had been reprimanded for her attendance recently but leaving work because of a reprimand is not good cause attributable to the employer. There is also some evidence that the claimant left work because of a lack of a babysitter but this also is not good cause attributable to the employer. Finally, there is some evidence that the claimant was dissatisfied with her work environment but this also is not good cause attributable to the employer. There is also no evidence that the claimant ever really expressed any substantial concerns to the store manager about these matters or that she indicated or announced an intention to quit over these concerns. The claimant's testimony to the contrary to the matters discussed herein was not credible. The claimant was inconsistent in her testimony about working and a babysitter and about the schedule that she had or had not received. The administrative law judge does not believe that the employer or her coworkers were deliberately keeping the claimant's schedule from her.

Accordingly, although it is a close question, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer, and, as a consequence, 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 \$1,317.00 since separating from her employer on or about March 1, 2004 and filing for such benefits effective February 29, 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 March 23, 2004, reference 01, is reversed. The claimant, Amber D. Rodriguez, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits because she voluntarily left her employment without good cause attributable to the employer. She has been overpaid unemployment insurance benefits in the amount of \$1,317.00.

tjc/kjf