

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBIN C WEEKS
Claimant

APPEAL NO. 07A-UI-10452-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COMES INVESTMENTS INC
Employer

**OC: 10/07/07 R: 02
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

Comes Investments, Inc., filed a timely appeal from the November 5, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 6, 2007. Claimant Robin Weeks participated and presented additional testimony through Christine Fast. Jim Van Scoyk, Area Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit One into evidence.

ISSUES:

Whether the claimant voluntarily quit or was discharged from the employment. The administrative law judge concludes the claimant voluntarily quit the employment.

Whether the claimant's voluntary quit was for good cause attributable to the employer.

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: In March 2007, Robin Weeks commenced her full-time employment with Comes Investments, Inc., d/b/a Pizza Hut. Ms. Weeks was the acting manager of the employer's restaurant in Winterset. Ms. Weeks last appeared and performed work for the employer on September 22, 2007. At the beginning of August 2007, Jim Van Scoyk, Area Manager, became Ms. Weeks' immediate supervisor. Mr. Van Scoyk works out of Storm Lake.

At about 8:00 p.m. on Sunday, September 23, 2007, an hourly employee of the Winterset Pizza Hut contacted Mr. Van Scoyk and advised there was no manager present at the Winterset Pizza Hut and that the hourly employees lacked keys to secure the restaurant. Mr. Van Scoyk directed the employee to take the restaurant's money home with him. Mr. Van Scoyk subsequently learned that Assistant Manager Sara Brittain had been scheduled to work that evening, but had an emergency that prompted her to leave the restaurant.

Early Monday morning, September 24, Mr. Van Scoyk traveled to the Winterset Pizza Hut. Mr. Van Scoyk intended to meet with the restaurant's managers to discuss multiple recent problems with the restaurant's operations. In addition to meeting with Ms. Weeks, Mr. Van Scoyk intended to meet with Ms. Brittain and with Shift Manager Janelle Flores. Between 9:00 a.m. and 9:30 a.m., Mr. Van Scoyk telephoned Ms. Weeks to advise that he was at the Winterset store and wanted to meet with her before the restaurant opened at 11:00 a.m. Ms. Weeks was scheduled to open the restaurant that day. Ms. Weeks advised that she would get ready and come to the restaurant.

Ms. Weeks did not appear at the restaurant. A friend, Christine Fast, had agreed to give Ms. Weeks a ride to the restaurant. On the way to the restaurant, Ms. Fast lost control of her car and the car came to rest in a ditch. Neither Ms. Weeks nor Ms. Fast was injured. Ms. Weeks had her cell phone with her in the car. Between 11:00 a.m. and noon, Ms. Weeks telephoned the restaurant. Ms. Weeks notified a member of the restaurant staff that she had been in an accident, but would be in as soon as she could. The restaurant employee passed this information on to Mr. Van Scoyk. Ms. Weeks did not come to the restaurant or attempt to speak further with Mr. Van Scoyk. Mr. Van Scoyk attempted to reach Ms. Weeks on her cell phone, left messages, but was not able to speak with Ms. Weeks. Mr. Van Scoyk returned to the restaurant the next two days, but Ms. Weeks did not appear. Ms. Weeks was scheduled to work on September 25 and 26, but did not appear for her shifts or notify anyone that she would be absent for those shifts.

Before Mr. Van Scoyk departed for Storm Lake on September 26, he made two work schedules for the week. One schedule had Ms. Weeks on it. The other did not have Ms. Weeks on it and assigned Ms. Weeks' shifts to Ms. Brittain and Ms. Flores. Mr. Van Scoyk prepared a schedule without Ms. Weeks because she had been absent three days, because he did not know whether she would return, and because shifts needed to be covered. Both schedules were posted at the restaurant. Before Mr. Van Scoyk departed, he instructed the other managers that if Ms. Weeks appeared at the restaurant, she needed to contact him. Before Mr. Van Scoyk departed on September 26, he had the locks to the restaurant's doors changed. The employer's policy is to change the locks whenever a manager separates from employment.

Ms. Weeks did not appear at the restaurant until October 7, 2007, the day paychecks were received at the restaurant. On that day, Ms. Weeks collected her check and left a uniform.

Ms. Weeks established a claim for benefits during the week that began with Sunday, October 7, 2007. The claim was deemed effective October 7, 2007. The Agency's records reflect that at the time Ms. Weeks established her claim, she told the Agency she had been laid off for lack of work. The Agency's records indicate that Ms. Weeks did not tell the Agency at that juncture that she had been discharged from the employment. The records suggest that the claim was not established in connection with a discharge on September 25, but after Ms. Weeks' trip to restaurant on October 7. Ms. Weeks has received unemployment insurance benefits in connection with the claim.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether Ms. Weeks voluntarily quit or was discharged from the employment. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). 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.

After hearing and carefully weighing the evidence, the administrative law judge concludes that Ms. Weeks' testimony is not credible. Ms. Weeks' testimony is internally inconsistent. A good example of this is Ms. Weeks' testimony about her telephone. Ms. Weeks testified that she had her cell phone with her in Ms. Fast's car on September 24 between 10:30 and 11:00 a.m. as she was heading to work. Ms. Weeks testified that she used her phone later the same day to speak with Ms. Brittain and to "text" Ms. Brittain. However, Ms. Weeks also testified that she had to borrow a phone to call the employer because she did not have her telephone with her. In addition, Ms. Weeks testified that she did not receive or respond to Mr. Van Scoyk's multiple messages over multiple days because she did not have her phone.

The weight of the evidence indicates that Mr. Van Scoyk was physically present at the restaurant on the mornings of September 25 and 26. The weight of the evidence indicates that Mr. Van Scoyk would have readily known if Ms. Weeks had come to the restaurant on the morning of September 25 or 26. The weight of the evidence indicates that Ms. Weeks did not in fact go to the restaurant on either day. Ms. Weeks testified that she had "personal things" that prevented her from coming to work and that these were related to the breakup with a boyfriend. The evidence indicates that it is likely that Ms. Weeks learned of the changed locks through Ms. Fast and the information Ms. Fast received from her daughter, who continued to be an employee at the restaurant. The evidence indicates that the employer did not change the locks until after Ms. Weeks had been absent three days, two of which were "no-call, no-show" absences. The evidence indicates that Ms. Weeks knew full well that she needed to contact Mr. Van Scoyk and that she purposely avoided that contact. The weight of the evidence indicates that Ms. Weeks simply ceased appearing for work after her September 22 shift. The weight of the evidence indicates that Ms. Weeks did not again appear at the restaurant until October 7, when she went to collect her final check. The evidence in the record persuades the administrative law judge that Ms. Weeks voluntarily quit and was not discharged.

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.

The evidence further indicates that Ms. Weeks' voluntary quit was without good cause attributable to the employer. Accordingly, Ms. Weeks 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 for benefits paid to Ms. Weeks.

If the weight of the evidence had established a discharge, the weight of the evidence would also have established a discharge for misconduct. See Iowa Code section 96.5(2)(a), 871 IAC 24.32(1)(a) and 871 IAC 24.32(7). The evidence would have established excessive unexcused absences. The evidence would have established recurrent negligence that indicated a willful and wanton disregard of the interests of the 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.

Because Ms. Weeks has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Weeks must repay. Ms. Weeks is overpaid \$2,240.00.

DECISION:

The Agency representative's November 5, 2007, reference 01, decision is reversed. The claimant voluntarily quit without good cause attributable to the employer. The claimant is disqualified for unemployment benefits until she has worked in and been 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. The claimant is overpaid \$2,240.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs