

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA J MORISET
Claimant

APPEAL NO. 10A-UI-13729-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ARBY'S
Employer

OC: 09/05/10
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated October 1, 2010, reference 03, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on November 15, 2010. The parties were properly notified about the hearing. The claimant failed to participate in the hearing. Tom Kuiper participated in the hearing on behalf of the employer with a witness, Dan Lamgo. Exhibit One was admitted into evidence at the hearing. This is a duplicate decision to the decision issued in Appeal 10A-UI-13728-SWT because the claimant had wages reported for the employer under two locations.

ISSUES:

Was the claimant discharged for work-connected misconduct?
Was the claimant overpaid unemployment insurance benefits?

FINDINGS OF FACT:

The claimant worked for the employer as a crew member from September 13, 2009, to September 2, 2010. The claimant was informed and understood that under the employer's work rules, employees were required to notify the employer if they were not able to work as scheduled and could be considered to have quit employment if they were absent without notice.

The claimant had been verbally warned about absences from work without notice three times before September 2010. She provided no legitimate reason for her unreported absences. Because of these problems, the store director had posted and had employees, including the claimant, sign the employer's attendance policy. They were told the policy was going to be strictly enforced.

The claimant was scheduled to work on Friday, September 3, 2010, but had Saturday, September 4 off. She was absent without notice to the employer on September 9. On September 4 she came to the store and talked to the director. She said she got her days mixed up and believed that Friday, September 3 was actually Saturday, her day off. The director

informed her that she was no longer employed, as he was enforcing the policy that a unreported absence was a quit.

The claimant filed for and received a total of \$715.00 in unemployment insurance benefits for the weeks between September 5 and October 9, 2010.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code § 96.5-1 and 96.5-2-a. To voluntarily quit means a claimant exercises a voluntary choice between remaining employed or discontinuing the employment relationship and chooses to leave employment. To establish a voluntary quit requires that a claimant must intend to terminate employment. Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989); Peck v. Employment Appeal Board, 492 N.W.2d 438, 440 (Iowa App. 1992).

An employer cannot turn one day of absence into a quit by adopting a rule that an absence without notice is a quit. The unemployment insurance rules state that a claimant absent for three days without giving notice to employer in violation of company rule is presumed to have quit employment without good cause attributable to the employer. 871 IAC 24.25(4). Even under the unemployment insurance rules, three days of absence without notice only creates a **presumption** that can be rebutted by evidence that the claimant did not intend to quit. The claimant was absent one day and then reported to work the next day to explain her absence. While her explanation about why she was absent was not very plausible, there is no way she intended to quit her job when she missed work on September 3. The separation must be treated as a discharge.

The issue then is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The claimant's repeated absences without proper notice to the employer—even after verbal warnings and a warning that the employer intended to strictly enforce its attendance policy—amounts to work-connected misconduct under the law.

The unemployment insurance law requires benefits to 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. But the overpayment will not be recovered when an initial determination to award benefits is reversed on appeal on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of deciding the amount of the

overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The unemployment insurance decision dated October 1, 2010, reference 03, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until she has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css