

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DERRICK N FOSTER
Claimant

APPEAL NO. 100-UI-16333-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**"J S VENTURES INC
c/o TALX UCM SVCS
APPLEBEE'S NEIGHBORHOOD GRILL &
Employer**

**OC: 06/27/10
Claimant: Respondent (2-R)**

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

STATEMENT OF THE CASE:

J S Ventures, Inc. d/b/a Applebee's Neighborhood Grill & Bar appealed a representative's July 27, 2010, reference 01, decision that held claimant qualified to receive unemployment insurance benefits. An initial hearing was held on September 23, 2010. By administrative law judge decision dated September 27, 2010, Mr. Foster was denied benefits. An appeal was filed with the Employment Appeal Board. The matter was remanded for another hearing. After due notice, a telephone hearing was held on January 11, 2011. The claimant participated personally. The employer participated by Tom Kuiper, Hearing Representative and witness, Lori Eckrich, General Manager. Exhibits One through Three were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Derrick Foster was most recently employed by Applebee's Neighborhood Grill & Bar from April 4, 2009 until June 22, 2010 when he was discharged for failure to report or provide required notification to the employer of his impending absence. Mr. Foster held the position of full-time server.

Mr. Foster was discharged after he failed to report for scheduled work on June 22, 2010. Mr. Foster did not provide direct notification to company management of his impending absence that day as required by company policy. A decision was made to terminate Mr. Foster as his failure to report or provide required notification on June 22, 2010 was his third "no-call/no-show."

Under company policy employees are subject to discharge if they accumulate three no-call/no-shows during the course of their employment. Prior to being discharged the claimant had been warned by the employer for failure to report or provide required notification.

Mr. Foster had not provided direct notification to his manager for his final attendance infraction as the claimant felt that the manager would not be sympathetic to the claimant's reason for being absent. Mr. Foster elected to have another hourly employee report the claimant's impending absence for this reason.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

Iowa Code § 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 provides:

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.

The record in the evidence establishes that the employee has a set procedure requiring employees to personally notify company management before the beginning of their work shift of any impending absences. The record further establishes that Mr. Foster was aware of the policy and had been warned prior to being discharged. The claimant was discharged when he accumulated his third "no-call/no-show" on or about June 22, 2010. The claimant did not follow the required procedure notifying his supervisor personally prior to the beginning of the work shift and elected to have another employee inform the company because Mr. Foster did not want to be confronted by the manager about the reason he was going to be absent.

In order to constitute disqualifying job misconduct absences must both be excessive and unexcused. Claimant's final absence was not excused as he had not called in as required having previously been warned for the same conduct and his failure to provide required notification to the employer's management personally prior to the beginning of his work shift showed a disregard for the employer's interests and standards of behavior and was disqualifying under the provisions of the Iowa Employment Security Law.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

DECISION:

The representative's decision dated July 27, 2010, reference 01, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in

and been paid wages for insured work equal to ten times his weekly benefit amount, and meets all other eligibility requirements of Iowa law. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs