

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA A MOEN
Claimant

APPEAL NO. 06A-UI-10581-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK SHOP INC
Employer

OC: 09/17/06 R: 03
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated October 23, 2006, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on November 14, 2006. The parties were properly notified about the hearing. The claimant called in and provided a telephone for the hearing but was not available at that number at the time of the hearing and did not participate in the hearing. Marcy Schneider participated in the hearing on behalf of the employer with a witness, Twila Evens.

ISSUE:

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 clerk from August 5, 2005, to August 22, 2006. The claimant was informed and understood that under the employer's work rules, regular attendance was required and employees were required to personally call and notify a manager if they were not able to work as scheduled. The claimant had a history of being late or absent from work and had received warnings about her excessive unexcused absenteeism. She was warned that her job was in jeopardy due to her attendance. On one occasion, the claimant had called in sick for work, but she later admitted that she had missed work because she was out partying.

On the claimant's last scheduled day of work, she did not report to work and did not call in. At some point, the clerk on duty received a call from someone other than the claimant who said the claimant would not be in because her brother was in a car accident and abruptly hung up. This was not true, and the claimant missed work because she was out drinking the night before. Later that day a friend of the claimant came in the convenience store. She told them the real reason the claimant missed work was because she had been out drinking the night before and was intoxicated. She also stated the claimant's brother had not been in an accident, it was her brother's friend.

Later in the afternoon, the store manager spoke with the claimant and suspended her. The next day, the claimant admitted that what she did was wrong. The employer discharged her for her violation of the employer's attendance policy.

The claimant filed a new claim for unemployment insurance benefits with an effective date of September 17, 2006. The claimant filed for and received a total of \$1,582.00 in unemployment insurance benefits for the weeks between September 17 and November 4, 2006.

The claimant received proper notice of the hearing and called in and provided a number to call for the hearing. Parties are routinely instructed that if they have not received a call for the hearing within five minutes of the scheduled time of the hearing, they should call the appeal bureau to inquire about the status of the hearing. The claimant was called multiple times at the time of the hearing starting at 9:30 a.m. but was not available to take the call and did not return the message left for her. After the hearing had concluded, the claimant called at 10:23 a.m. She said that she was at home but her cell phone did not ring. When asked why she had waited to call, she said she was told to call in if she had not received a call within an hour, which is not believable.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the hearing should be reopened. The law provides that a hearing can be reopened for good cause. 871 IAC 26.14(7)b. The claimant knew she had a hearing scheduled at 9:30 a.m. but did nothing until over 50 minutes after the scheduled hearing time. She claimed it was a cellular service problem but called in using her cellular phone and received the return call without any problem. Her claim that she was told to wait an hour to call in is not credible.

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

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 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.

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).

The claimant's violation of a known work rule was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

The next issue in this case is whether the claimant was overpaid unemployment insurance 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.

As a result of this decision, the claimant is disqualified from receiving unemployment insurance benefits and was overpaid \$1,582.00 in unemployment insurance benefits for the weeks between September 17 and November 4, 2006.

DECISION:

The unemployment insurance decision dated October 23, 2006, reference 01, 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. The claimant was overpaid \$1,582.00 in unemployment insurance benefits, which must be repaid.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/kjw