

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREW J HOTT
Claimant

APPEAL NO. 10A-UI-00986-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

KIMS FOODS INC—WENDY'S
Employer

OC: 12/13/09
Claimant: Respondent (2R)

Section 96.5-2-A – Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated January 7, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 25, 2010. Claimant participated. Employer participated by Linda Ramirez, General Manager - Wendy's Merle Hay Road, Des Moines, Iowa. The record consists of the testimony of Linda Ramirez; the testimony of Andrew Hott; and Employer's Exhibits 1-7.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a Wendy's restaurant located on Merle Hay Road in Des Moines, Iowa. The claimant was hired on June 17, 2008, as a crewmember. He was responsible for running the register; making sandwiches; and cooking on the grill. The claimant was friend of the son of Ms. Ramirez, who was the general manager of the restaurant.

The claimant's last day of work was November 17, 2009. He was schedule to work from 11:30 a.m. to 5:30 p.m. He called in at approximately noon to say that he had overslept and would be late. He was told not to come in because an inspection was ongoing. The claimant was scheduled to work on November 22, 2009, from noon until 4:00 p.m. He did not come to work nor did he call in to report his absence. Ms. Ramirez made the decision to terminate the claimant and told one of her other managers, Luis, to tell the claimant. She does not know what date the claimant was informed he was terminated.

The claimant was habitually late for work. Between August 6, 2009 and November 17, 2009, he was late a total of 27 times. He was given written warnings on September 15, 2009; September 21, 2009; and November 8, 2009 for tardiness.

REASONING AND CONCLUSIONS OF 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness. Absence due to matters of "personal responsibility", e.g., transportation problems and oversleeping is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). The employer has the burden of proof to show misconduct.

The evidence in this case established that the claimant was habitually late for work. He testified that he was probably late on all the occasions cited by Ms. Ramirez. When asked why he was late he said that there was not enough time in the day. The claimant's casual attitude about his arrival time at work may have been due to his friendship with Ms. Ramirez' son and Ms. Ramirez likely gave the claimant some slack for the same reason. The record does show, however, that the claimant was given three written warnings about tardiness and that the

problem persisted despite these warnings. The evidence shows that the claimant has excessive, unexcused absences. Benefits are denied.

The next issue is overpayment of benefits. Iowa Code section 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.

This matter is remanded to the Claims Section for a determination of the overpayment issue.

DECISION:

The decision of the representative dated January 7, 2010, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. This matter is remanded to the Claims Section for determination of the overpayment issue.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css