

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RACHAEL J DANKBAR**  
Claimant

**APPEAL NO: 13A-UI-10774-SWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KIMS FOODS INC- WENDY'S**  
Employer

**OC: 03/10/13**  
**Claimant: Respondent (2)**

Section 96.5-2-a – Discharge  
Section 96.6-2 – Timeliness of Protest

**STATEMENT OF THE CASE:**

The employer appealed an unemployment insurance decision dated September 13, 2013, reference 03, that concluded its protest could not be accepted because it was not filed timely. A telephone hearing was held on December 20, 2013. Proper notice of the hearing was given to the parties. The claimant participated in the hearing. Rich Carroll participated on behalf of the employer with witnesses, Susan Bishop and Kim Mikesell. Exhibit A-1 was admitted into evidence at the hearing.

**ISSUES:**

Did the employer file a timely protest of the claim?  
Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant worked for the employer from August 26, 2009, to March 15, 2013. For the last year of her employment she worked as a shift supervisor.

On March 12, 2013, the claimant was the supervisor in charge at the restaurant for the evening shift. About 7 p.m., the claimant was working with three other employees. Four employees were the minimum necessary for the shift in question. The claimant called the district manager, Rich Carroll, and told him that the restaurant was busy and they needed help. When Carroll informed the claimant that she had enough employees, the claimant said she going to walk out and hung up the phone. Carroll tried calling her back, but she would not answer the phone. The claimant decided to close the dining room and take orders through the drive-through only. She did this through the end of the shift. She did this based on advice she had received from a manager while she was working at a different Wendy's restaurant a couple of years earlier. She knew that closing the dining room was against the employer's work rules.

The employer discharged the claimant on March 15, 2013, based on her conduct in closing the dining room without permission before the end of her shift.

The claimant filed a new claim for unemployment insurance benefits effective March 10, 2013. She filed for and received a total of \$826 in unemployment insurance benefits for the weeks between March 10 and April 20, 2013, when she stopped filing claims.

A notice of claim was mailed to the employer's address of record on March 18, 2013, and was received by the employer within ten days. The notice of claim stated that any protest of the claim had to be faxed or postmarked by the due date of March 28, 2013. The employer's protest was faxed on March 28, 2013, and the employer has presented proof that the fax transmitted successfully.

#### **REASONING AND CONCLUSIONS OF LAW:**

The first issue in this case is whether the employer filed a timely protest of the claimant's claim for unemployment insurance benefits.

Iowa Code § 96.6-2 provides that an employer has ten days after the mailing of the notice of claim to protest a claim. In this case, the employer has presented proof that it faxed its protest timely. The protest was not received for some reason due to an Agency error, which under 871 IAC 24.35(2) would excuse the delay in filing the protest. The protest is deemed timely.

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

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. 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 conduct on March 12 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. The fact that a manager in a different restaurant suggested it was okay does not excuse the claimant's conduct. She was on the phone with the district manager who did not authorize closing the dining room. I believe Carroll's testimony that he tried calling the restaurant when he found out the dining room was closed and the claimant did not answer the phone. 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.

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. Iowa Code § 96.3-7. In this case, the claimant has received

benefits but was ineligible for those benefits. She was overpaid \$826. The benefits were awarded without any initial fact-finding interview so the part of the law that would not require the claimant to repay the overpayment does not apply in this case.

**DECISION:**

The unemployment insurance decision dated September 13, 2013, 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. She was overpaid \$826 in benefits, which she is required to repay.

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Steven A. Wise  
Administrative Law Judge

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Decision Dated and Mailed

saw/pjs