

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

GREGORY W PALM  
1910 – 15<sup>TH</sup> ST  
MOLINE IL 61265

KWIK SHOP INC  
C/O EMPLOYERS UNITY INC  
PO BOX 749000  
ARVADA CO 80006-9000

Appeal Number: 04A-UI-05738-H2T  
OC: 04-25-04 R: 12  
Claimant: Respondent (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a - Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 11, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 22, 2004. The claimant did participate. The employer did participate through Kai Brown, District Advisor, and was represented by Marcy Schneider of Employers Unity.

#### FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a store manager full time beginning June 26, 2002 through April 21, 2004 when he was discharged. Employer's Exhibit One was received. On April 5, 2004 while entering and completing his daily paperwork into the computer, the claimant incorrectly entered the amount of money orders that had been sold by the business for the day. The claimant alleges that he was distracted and did not intentionally enter the wrong dollar amount. On that day another clerk in the store stole a \$400.00 money order and used it to pay her rent. Because the claimant incorrectly entered the amount of money orders sold, the employer did not discover the theft until April 19, 2004. The delay in discovering the theft gave the dishonest clerk the opportunity to steal another money order for \$150.00 approximately one week later. The claimant admits that he knew how to properly fill out his daily paperwork and how to properly enter the information into the computer. The employer alleges that the claimant was intentionally entering incorrect information in an effort to force the books to balance. Had the claimant correctly entered the numbers, he would have discovered the missing money order. The claimant did not know that the clerk stole either of the money orders. The claimant had been previously disciplined for unacceptable bookwork. The claimant had signed off that he received the employer's handbook which provided that falsification of company records would result in termination. The claimant performed the job to the best of his ability.

#### REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986). Inasmuch as he did attempt to perform the job to the best of his ability but was unable to meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code Section 96.5-2-a is imposed.

The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner he knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). The claimant did not steal the money orders. If he had correctly entered the proper information into the computer, the employer would have discovered much more quickly that another employee was stealing. The evidence does not establish that the claimant intentionally entered the information incorrectly to cover up the theft. The claimant made a mistake. His mistake does not constitute substantial misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The May 11, 2004, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/tjc