

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TYRONE E WRIGHT
Claimant

APPEAL NO: 08A-UI-07970-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KWIK TRIP INC
Employer

OC: 08/10/08 R: 03
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Tyrone E. Wright (claimant) appealed a representative's September 2, 2008 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Kwik Trip, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 23, 2008. The claimant participated in the hearing. Amanda Cervantes appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on or about November 14, 2007. He worked part time (approximately 32 hours per week) as a retail coworker at the employer's Waterloo, Iowa store. His last day of work was August 6, 2008. The employer discharged him on that date. The reason asserted for the discharge was not meeting the employer's performance standards after a 60-day review.

On May 14, 2008 the employer gave the claimant a negative performance appraisal. Part of the concerns was cash handling problems such as having too much cash in his drawer. The employer was also concerned that the claimant was not staying on task and keeping busy without direction. He also had problems keeping his shirt tucked in and wearing his name tag.

The employer did a reevaluation and determined to discharge him on August 6. The employer noted that since the May 14 performance appraisal the claimant had two incidences of gas no-pay drive offs where he had failed to get the license plate or driver description; these occurred in June. The employer asserted there were continued cash handling problems; however, while the claimant maintained that he had not had a cash handling issue since late June, the employer indicated that his last cash handling problem had probably been about two

weeks prior to the discharge, but no details were provided. The employer asserted that the claimant had continued to not be on task in unloading the truck; however, while the claimant avered that he had not had truck unloading responsibilities since April, the employer suggested that he had last had truck unloading issues about two weeks prior to his discharge, but again no details were provided. The employer claimed that about two weeks prior to his discharge the claimant had not been keeping busy doing stocking during slow times at the register, but again no details were provided, and the claimant denied that there was any "down time" when he was at the register that he had not kept busy.

The employer continually had to remind the claimant about having his shirt tucked in and to have on a name tag; this occurred frequently, at least within the two weeks prior to the discharge, but again no specific details were provided. The claimant acknowledged that when he was lifting or doing other work his shirt had become untucked on occasion and acknowledged that for a period of time he had lost his name tag, but he denied there had been any recent problem with these in the days immediately prior to his discharge.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the unsatisfactory performance reevaluation. Conduct asserted to be disqualifying misconduct must be both specific and current. Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988); West v. Employment Appeal Board, 489 N.W.2d 731 (Iowa 1992); 871 IAC 24.32(8). The employer has provided very little in terms of specifics as to the claimant's alleged misconduct, and as a whole

there were no specifics of anything substantial more recent than two weeks prior to the discharge. This is insufficient to establish a substantial "current act" of misconduct as required to establish work-connected misconduct.; Greene, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 2, 2008 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs