

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**BRYAN V STREICH**  
Claimant

**KWIK TRIP INC**  
Employer

**APPEAL 22A-UI-07005-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/06/22**  
**Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer, Kwik Trip Inc., filed an appeal from the March 7, 2022, (reference 02) unemployment insurance decision that denied benefits based upon the conclusion he was terminated but his termination was not due to work-related misconduct. The parties were properly notified of the hearing. A telephone hearing was held on April 29, 2022. The claimant participated. The employer participated through Store Manager Bryon Enos. Exhibit 1 was received into the record.

**ISSUES:**

Whether the claimant was discharged due to job related misconduct?

Whether the claimant has been overpaid benefits? Whether the claimant is excused from repaying benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed part-time as a guest service coworker from October 22, 2021, until this employment ended on February 10, 2022, when he was terminated. The claimant's immediate supervisor was Store Manager Bryon Enos.

The employer has a code of conduct policy. It states inappropriate behavior the following inappropriate behavior can result in discipline, up to and including termination:

Sexual harassment / harassment.

Failure to abide by generally accepted notions of civility, including engaging in abusive threatening or violent behavior.

Inefficient performance of duties, incompetence, neglect of duty, loafing, or horseplay.

The employer provided a copy of its code of conduct policy. The claimant reviewed this code of conduct policy at orientation on October 25, 2021. The employer provided a tracking sheet verifying his orientation attendance.

On January 25, 2022, the claimant was working with a 17-year-old coworker on the sales floor. The claimant reached for a marker in the coworker's apron pocket as she was putting it on. When an employee is wearing the apron, the pocket is positioned slightly over the coworker's stomach. The claimant put the marker back in the same pocket shortly after taking it out and laughed. He did not touch her breasts while retrieving or replacing the marker to the apron pocket. The coworker said, "Um," in response. That same day, this coworker informed Mr. Enos of the incident. The coworker alleged "touched her breast for a quick second," during this interaction. The coworker reported two other alleged incidents of inappropriate behavior to Mr. Enos. One incident when the claimant told this coworker that he had previously worked with "underage girls." In the second incident, the claimant told this coworker a joke about "prostate examination" while he was putting on gloves. Mr. Enos reported this information to District Leader Alisha Edelman because he had never been presented with a situation such as this as a supervisor.

On January 28, 2022, Human Resources Director Shayna Moore informed Mr. Enos that a case had been opened. She gave Mr. Enos questions to ask the claimant. The claimant was not informed that an investigation had been initiated against him. However, the claimant was not on the schedule until February 7, 2022.

On February 5, 2022, Mr. Enos interviewed the claimant. The claimant stated he reached for the marker because he was going to write some information on a sandwich. The claimant said he did not think about where the marker was. Mr. Enos did not question the claimant about the other alleged incidents because the coworker seemed the most bothered by the last one. Mr. Enos alleges he viewed video footage of the incident prior to interviewing the claimant. Mr. Enos alleges that the claimant never entered the kitchen and seemingly had no purpose for reaching into her pocket for the marker. Mr. Enos also pointed out the claimant said the coworker did not say anything in response, but in fact she said, "Um." The employer did not provide the video or even still frames as evidence for this hearing. The claimant was not able to look at these pictures to refresh his memory or attempt discern whether he was in fact lying or just had a faulty memory.

On February 10, 2022, Mr. Enos terminated the claimant because he determined the claimant had not been truthful with him about the incident. The employer provided a copy of the termination notice. (Exhibit 1)

The following section describes the findings of facts necessary to resolve the overpayment issue:

On February 25, 2021, a notice of factfinding was sent to the parties informing them of an interview occurring on March 4, 2022 at 3:00 p.m. The claimant was on the call. The employer provided the termination notice, code of conduct policy and acknowledgements with a written statement describing its position.

The claimant made weekly claims for the weeks ending February 26, 2022 through March 19, 2022. He received his full weekly benefit amount of \$192.00 for each of those weeks for a total of \$768.00.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Since the claimant was discharged for a non-disqualifying reason, the overpayment issue is moot.

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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all,

part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant's description of events more credible than the employer's testimony.

The administrative law judge makes this credibility determination based on the employer's unwillingness to provide video and still frames, it claims it had and still has, of the incident in question. The entirety of its position rests on this one incident occurring on January 25, 2022. Yet it did not provide any of this evidence or any explanation for why it was not provided. Furthermore, the claimant credibly testified that he was not even shown these pictures at the time of his investigative interview. Again, the administrative law judge is puzzled as to why the claimant could not be provided with pictures contradicting his memory of the event, especially before the employer determined he was lying about the incident.

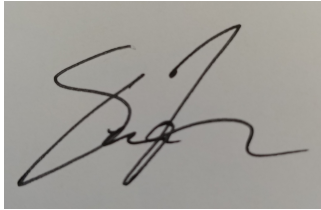
In that context, the administrative law judge finds the claimant's contention that he simply did not remember what occurred on the date of the investigative interview credible. In the absence of any video or pictures showing him where the apron pocket was positioned, the administrative law judge finds the claimant's firsthand account more credible than a secondhand account regarding whether he touched this coworker's breasts.

The administrative law judge finds the employer has not met its burden to show the claimant's termination was disqualifying. Mr. Enos states that the claimant's dishonesty during the investigation primarily caused his discharge. As stated above, the claimant was not even given the opportunity to be confronted with the evidence that the employer was contending demonstrated that he lied.

He also contends that the claimant's behavior violated the employer's rules discouraging horseplay and establishing an expectation of general notions of civility. Notably absent from the employer's position is any allegation the claimant was motivated by sexual intent or that he even incidentally touched her breasts. The administrative law judge understands the employer's responsibility to its female employees to provide a workplace free of harassment, especially for employees who are children. It is also free to terminate its employees for whatever reason it wants. In the absence of this contention, the administrative law judge does not find the incident on that day rises to the level of disqualifying misconduct. Benefits are granted, provided he is otherwise eligible.

**DECISION:**

The March 7, 2022, (reference 02) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. The overpayment issue is moot because the claimant is entitled to benefits.



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Sean M. Nelson  
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June 7, 2022  
Decision Dated and Mailed

smn/kmj