

**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**

**MATT R LAPPE
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**KWIK SHOP INC
c/o EMPLOYERS UNITY INC
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ARVADA CO 80006-9000**

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**Appeal Number: 04A-UI-06163-RT
OC: 05-09-04 R: 02
Claimant: Respondent (2)**

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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Kwik Shop, Inc., filed a timely appeal from an unemployment insurance decision dated May 24, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Matt R. Lappe. After due notice was issued, a telephone hearing was held on June 28, 2004 with the claimant participating. Kimberly Davis, former Assistant Manager, testified for the claimant. The claimant was represented by Jay Kamath, Attorney at Law. Steve Uthe, Area Advisor for the Ames, Iowa, employer's locations and former manager for the store where the claimant was employed, participated in the hearing for the employer. The employer was represented by Lucie Hengen of Employers Unity, Inc. The administrative law judge takes

official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibits 1 and 2 were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 and 2, the administrative law judge finds: The claimant was employed by the employer as a full-time associate from September 26, 2002 until he was discharged on or about May 10, 2004. The claimant was discharged for a series of acts resulting in four warnings and then finally being short in his cash register \$132.30 from the night of May 2, 2004 into the morning of May 3, 2004. The claimant worked the night shift from 11:00 p.m. to 8:00 a.m. Throughout most of the night until 6:00 or 7:00 a.m., the claimant worked alone. During his shift from May 2, 2004 into May 3, 2004, the claimant's cash register was short \$132.30. During the night shift, the claimant is to have no more than \$40.00 of cash in his cash register at any one time. Further, a verified cash shortage of \$25.00 or more may result in discharge as shown by the employer's policies at Employer's Exhibit 1. The claimant received a copy of these policies, and signed an acknowledgement, and was aware of the policies. The shortage was not completely accounted for. When the claimant was confronted, he had no explanation about this shortage. The claimant had received other warnings and disciplines as shown at Employer's Exhibit 2, including a warning on December 21, 2003 for spending too much time visiting with friends and not enough time on his duties; and on September 22, 2003 for having \$141.00 in his cash drawer when the employer has a policy of no more than \$75.00 in the cash drawer during the day and \$40.00 at night. On this occasion, the claimant was working during the day. The claimant received a warning on July 27, 2003 for paying too much attention to a few teenage girls and not paying enough attention to the other customers. The claimant missed a secret shopper. A secret shopper is someone who comes into the store for the employer and shops to see if the employees are properly waiting on the shoppers. The claimant also received a similar warning for a low rating from a secret shopper on January 11, 2003.

Pursuant to his claim for unemployment insurance benefits filed effective May 9, 2004, the claimant has received unemployment insurance benefits in the amount of \$792.00 as follows: \$198.00 per week for four weeks from benefit week ending May 22, 2004 to benefit week ending June 12, 2004. For benefit week ending May 15, 2004, the claimant received no benefits showing vacation pay in an amount sufficient to nullify unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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 administrative law judge concludes that the claimant was discharged on or about May 10, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Although it is a close question, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct. The employer's witness, Steve Uthe, Area Advisor for the employer's Kwik Shops in the Ames, Iowa, area and the former manager of the location where the claimant worked, credibly testified that the claimant was short in his cash register \$132.30 on the night of May 2, 2004 into the early morning of May 3, 2004. The employer's policies at Employer's Exhibit 1 clearly show that a shortage of over \$25.00 can result in a discharge. There is not a preponderance of the evidence that the claimant was willfully or deliberately short that amount or that he took the cash. However, the administrative law judge is constrained to conclude that the claimant was negligent in being short that amount of money. A shortage of that amount of money is substantial. Mr. Uthe credibly testified that none of that money was ever accounted for. The claimant's witness, Kimberly Davis, Assistant Manager at the time, testified that most of the money was accounted for but she could not say how and she could not say how much. Her testimony was not as credible as that of Mr. Uthe. She was discharged recently for taking merchandise without paying for it. Further, Ms. Davis testified that it was common to have fluctuations in the cash amount of the cash drawer. It may be true that the amount fluctuates but that does not account for a shortage of \$132.30. The evidence establishes that at the end of each shift, the cash drawers are counted and then new cash drawers are issued to the new shift. The bottom line here is that the claimant was short \$132.30 and the monies cannot be accounted for. This shortage occurred after four warnings as set out in the findings of fact.

The claimant seems to concede that he did commit the offenses as set out in those warnings. The claimant concedes that he did have \$141.00 in his cash drawer during the day on September 22, 2003 when he should only have had a limit of \$75.00. The claimant's only explanation was that he must have "busted" a one hundred dollar bill but the administrative law judge does not understand why as soon as he did that he did not place the one hundred bill away so that the cash drawer would meet the employer's requirement of \$75.00. The claimant admitted to visiting with his friends and not paying attention to what he was supposed to be doing on December 21, 2003. The claimant also seems to concede that he may have overlooked a secret shopper on July 27, 2003 and agrees that a rating by a secret shopper on January 11, 2003 was below average. The claimant should have been aware, because of these warnings, that his conduct needed to be above reproach but nevertheless he was short \$132.30 on the day in question. Accordingly, although it is a close question, the administrative law judge concludes that the claimant was negligent on each of these occasions and that the combination was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Mr. Uthe testified that there was a videotape in the direction of the cash register but that he did not view the videotape from the night in question. The administrative law judge does admit that this seems strange but that does not change the fact that the claimant was short \$132.30 and could not account for it.

The administrative law judge also concludes that the "last straw doctrine" enunciated in Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983) is relevant here. In that case, the Iowa Court of Appeals held that past acts and warnings can be used to determine the magnitude of a current act of misconduct and a relatively minor infraction when viewed in the light of prior infractions may evidence sufficient disregard for the employer's interests to constitute misconduct. The fact that the prior acts were remote in time from the one for which the employee was discharged or are different in nature does not preclude a finding of misconduct. Here, the administrative law judge does not believe that the current act of being short \$132.30 was a minor infraction but even so, when viewed in the light of the other infractions, concludes that the claimant's acts were disqualifying misconduct.

Therefore, and for all reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$792.00 since separating from the employer herein on or about May 10, 2004 and filing for such benefits effective May 9, 2004, to which he is not entitled and for which he is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 24, 2004, reference 01, is reversed. The claimant, Matt R. Lappe, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He is overpaid unemployment insurance benefits in the amount of \$792.00.

tjc/tjc