

**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**

**IRVIN L SCHWANTES
807 S 6TH ST
FAIRFIELD IA 52556**

**DUANE M SCHWANTES
D/B/A TIRE BUSTERS N MORE
PO BOX 164
BIRMINGHAM IA 52535-0164**

**J W MCGRATH
ATTORNEY AT LAW
PO BOX 498
KEOSAUQUA IA 52565-0498**

**Appeal Number: 04A-UI-11306-R
OC: 09-12-04 R: 04
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, Duane M. Schwantes, doing business as Tire Busters N More, filed a timely appeal from an unemployment insurance decision dated October 14, 2004 reference 02, allowing unemployment insurance benefits to the claimant, Irvin L. Schwantes. After due notice was issued, an in-person hearing was held in Ottumwa, Iowa at the employer's request with the claimant not participating. The claimant did not appear for the in-person hearing in Ottumwa, Iowa. Although the employer was to have been represented by an attorney and had an attorney, the employer and the attorney determined that the attorney's participation in the hearing was unnecessary. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Approximately five or six year ago the employer, Duane M. Schwantes, purchased a tire shop and set up the claimant, his son, to run it. The claimant, the employer's son, was to pay the employer rent. However, the claimant (son) only paid a few months of rent to the employer (father) and then the shop was closed in the fall of 2001. The employer, Duane M. Schwantes, fixed the shop up, established a line of credit, and reopened the shop in the spring of 2002, and placed his son back into the shop with the intention that his son would run the shop and the shop would be his son's. However, the son, who is the claimant, operated the business in the name of the employer, Duane M. Schwantes, without the knowledge of Duane M. Schwantes. The son again ran the shop "into the ground." All the money that the employer, Duane M. Schwantes, had provided to the son as a start-up was gone. The son did not pay the creditors. The shop was called Tire Busters N More. The son also took all of the tools from the shop, even though the employer, Duane M. Schwantes, had paid for the tools. Mr. Duane M. Schwantes reported a loss on his own income taxes. Because of the state of affairs, Mr. Duane M. Schwantes forced his son, the claimant, out on July 8, 2004. Mr. Duane M. Schwantes then sold the building and his equipment to a new owner, who is still running the shop as a tire shop. Pursuant to his claim for unemployment insurance benefits filed effective September 12, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,269.00 as follows: \$141.00 per week for nine weeks from benefit week ending September 18, 2004 to benefit week ending November 13, 2004. Workforce Development records show that the claimant had earnings from Duane M. Schwantes in the second, third and fourth quarters of 2003 and the first and second quarters of 2004. That is the only earnings the claimant had in his base period.

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.

For the purposes of this decision, the administrative law judge assumes that the claimant was an employee of the employer. The evidence establishes that the employer, Duane M. Schwantes, doing business as Tire Busters N More, set his son, the claimant up in a business in the spring of 2002, anticipating that the son would be the manager and operator of the business. Mr. Schwantes was unaware that his son, and the claimant here, was working as if he were an employee of Mr. Schwantes. Workforce Development records show earnings reported for the claimant from Duane M. Schwantes in the second, third, and fourth quarters of 2003 and the first and second quarters of 2004, and these are the only earnings reported by the claimant in his base period. Mr. Schwantes reported the loss from the business on his taxes. The administrative law judge has no jurisdiction or authority to decide whether the claimant was an independent contractor and owner of a business, or an employee. However, for the purposes of this decision, the administrative law judge assumes, without deciding, that the claimant was an employee. If the claimant were an independent contractor or an owner, the claimant would not be entitled to unemployment insurance benefits.

Assuming, as noted above, that the claimant was an employee, the witness, Duane M. Schwantes, doing business as Tire Busters N More, testified that he told his son, the claimant, to leave the business and basically ejected or evicted him from the business on July 8, 2004. The administrative law judge concludes that the claimant was, in effect, discharged on that date, July 8, 2004.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer, Duane M. Schwantes, credibly testified that he set up the claimant in the business in the spring of 2002, but the claimant "ran it into the ground." The claimant, the son of the employer, Duane M. Schwantes, took all of the money that the business had generated and/or that Duane M. Schwantes had provided to the business as start-up money. Further, the claimant failed to pay his suppliers and took tools that Duane M. Schwantes had paid for. In the absence of any evidence to the contrary, the administrative law judge concludes that the actions of the claimant, the son of the employer, are deliberate acts or omissions constituting a material breach of his duties and obligations arising out of any worker's contract of employment between the claimant and Duane M. Schwantes and further, evinces a willful or wanton disregard of the employer's interest and, at the very least, is carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct. Accordingly, the administrative law judge concludes, under the assumption that the claimant, the son of the employer, Duane M. Schwantes, was an employee, that he was discharged for disqualifying misconduct and is disqualified to receive unemployment insurance benefits. Further, should the claimant, the son of the employer, be either an independent contractor or a sole proprietorship owner, he would still not be entitled to 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 \$1,269.00 since separating from his employment herein, and filing for such benefits effective September 12, 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 Iowa law.

DECISION:

The representative's decision dated October 14, 2004, reference 02, is reversed. The claimant, Irvin L. Schwantes, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct or is otherwise not entitled to such benefits. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,269.00.

b/tjc