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

TINA L FOOTE
314 ADRIAN AVE
COUNCIL BLUFFS IA 51503

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

Appeal Number: 04A-UI-08495-RT
OC: 07-04-04 R: 01
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.

_____
(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 July 28, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Tina L. Foote. After due notice was issued, a telephone hearing was held on August 31, 2004, with the claimant participating. Deb K. Pecha testified for the claimant. Barb Molczyk, Human Resources Specialist, participated in the hearing for the employer. The employer was represented by Anna Marie Gonzalez of Employers Unity, Inc. Employer's Exhibits 1 through 4 were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

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 through 4, the administrative law judge finds: The claimant was employed by the employer as a full-time store manager at Store #527 in Council Bluffs, Iowa, from July 20, 2003 until she was discharged on July 7, 2004. The claimant was discharged for violating various employer's policies. The relevant employer's policies appear at Employer's Exhibit 1. Among the policies that the claimant is alleged to have violated concern bank deposits. The employer requires that bank deposits be made daily either by a pick up by an armored car or by regular deposit. The claimant was accused of failing to make bank deposits for five days during the week ending May 27, 2004. The claimant was informed by her supervisor, Deb K. Pecha, and the claimant's witness, that deposits were to be made when the armored car came by daily to pick up the deposits. However, the armored car was often late and would stop after the claimant had left. Under these circumstances, when the claimant left before the armored car arrived, the claimant was informed by Ms. Pecha to call her and that Ms. Pecha would attempt to make the deposit herself. Ms. Pecha informed the claimant that the claimant was not, herself, to make the deposit. Ms. Pecha also informed the claimant to place her deposit bag in the safe and lock it until such time as it could be deposited. The claimant was following this procedure for the days in question when the armored car was late and the claimant was placing the deposits in the safe and they were not being deposited by Ms. Pecha because she was otherwise busy at other stores. For this, the claimant received a written warning as shown at Employer's Exhibit 2. After the claimant's warning, she had no further violations of this policy.

Other policy violations alleged by the employer were not doing daily cigarette counts so as to protect from inventory shrink or inventory loss. There were times when the claimant was unable to do a daily cigarette count. The claimant was facing staff shortages and often was busy herself running the cash register and did not have time to do the cigarette count. The employer had no particular days when the claimant failed to make the daily cigarette count. The claimant received a verbal warning about the cigarette count towards the end of May or the first of June and shortly before her discharge. The claimant had received no prior warnings.

The claimant was also alleged to have violated the employer's policy requiring a daily shift analysis. This shift analysis is posted at the employer's location. At the time of the claimant's discharge, her shift analysis was caught up. The claimant was also accused of violating the employer's excessive shrink policy. The months and amount of shrink in the claimant's store was uncertain. However, the claimant did have some significant shrinkage in some of the months prior to her discharge. The claimant received a warning for excess shrinkage as shown at Employer's Exhibit 3 on May 11, 2004. This was the first warning for violating the employer's shrink policy. Whether the claimant violated the shrink policy thereafter by having excess shrinkage or inventory loss is uncertain.

After the warnings as noted above for the alleged violations, the claimant was discharged as shown at Employer's Exhibit 4. Pursuant to her claim for unemployment insurance benefits filed effective July 4, 2004, the claimant has received unemployment insurance benefits in the amount of $1,494.00 as follows: $249.00 per week for six weeks from benefit week ending July 17, 2004 to benefit week ending August 21, 2004. For benefit week ending July 10, 2004, the claimant had earnings sufficient to cancel benefits for that week.

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 not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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 parties testified and the administrative law judge concludes that the claimant was discharged on July 7, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for

disqualifying misconduct. At the outset, the administrative law judge concludes that the employer has failed to demonstrate by a preponderance of the evidence that the claimant's breaches of the employer's policies were either willful or deliberate. The claimant credibly testified concerning the bank deposit policy that she followed the instructions of her supervisor and her witness, Deb K. Pecha, as set out in the Findings of Fact. Ms. Pecha confirmed that the claimant was so instructed and that the claimant followed her instructions. Because the claimant followed her instructions and on occasions when Ms. Pecha was unable to make the deposit when the armored car was late and arrived after the claimant had left work, the deposit was not made. The claimant was attempting to follow the instructions of her supervisor even though it may have violated the employer's policies. The claimant was not aware at the time, however, that it did violate the employer's policies. Concerning the failure to make a daily cigarette count, the claimant credibly testified that she was often too busy to make the daily cigarette count, having to run the cash register. Ms. Pecha confirmed that the claimant was short-staffed and was often busy. The evidence does not establish that the claimant actually failed to do a daily shift analysis. The claimant credibly testified that her shift analyses were caught up. Concerning the excess shrink policy, the evidence is unclear as to what months and how much the claimant's shrink was but the evidence does establish that the claimant had substantial shrinkage in some months. The parties disagreed as to whether the claimant had shrinkage or loss of inventory in the amount of $10,000.00 for July or for June. There is also some evidence that the claimant may have had shrinkage in May. The claimant was discharged on July 7, 2004 and would really not be responsible for shrinkage in the month of July. The claimant received a warning for a violation of the shrink policy on May 11, 2004 and had little time, if any, to improve before her discharge. Accordingly, for these reasons, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's violations were willful or deliberate.

The more difficult question is whether the claimant's violations or alleged violations were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Although this is a close question, the administrative law judge concludes that the claimant's behavior was not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. For each of the violations, the claimant received a warning. She received a written warning for bank deposits on May 27, 2004 and thereafter the claimant had no violations. The claimant received an oral warning for cigarette count shortly before her discharge and there is no real evidence that the claimant violated the cigarette count policy thereafter. The employer's witness, Barb Molczyk, Human Resources Specialist, had no particular dates or details as to when the claimant failed to do her daily cigarette count. The claimant testified that she did occasionally fail to do such a cigarette count because she was too busy. Ms. Pecha confirmed that the claimant was short-staffed. Concerning the excess shrink policy, the claimant received her first warning, which was a written warning on May 11, 2004, but it is not clear whether the claimant violated the shrink policy thereafter except perhaps for one month. The administrative law judge does not believe that the employer really gave the claimant an ample opportunity to correct any problems associated with the shrink or loss of inventory. In order to establish recurring carelessness or negligence, the administrative law judge concludes that the employer must show sufficient warnings to put the claimant on notice with an opportunity to address those warnings and here, although it is a close question, the administrative law judge concludes that such notice is missing. Accordingly, the administrative law judge concludes that the claimant's behavior was not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Rather, the administrative law judge concludes that the claimant's behaviors here were unsatisfactory conduct or failure in good performance as a result of inability or incapacity or ordinary negligence in isolated instances and not disqualifying misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant a disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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 $1,494.00 since separating from the employer herein on or about July 7, 2004 and filing for such benefits effective July 4, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of July 28, 2004, reference 01, is affirmed. The claimant, Tina L. Foote, is entitled to receive unemployment insurance benefits, providing she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

pjs/pjs