BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

RAMONE M WILLIAMS	:	
	:	**HEARING NUMBER:** 10B-UI-07372
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
KWIK TRIP INC	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.58-2A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Ramon M. Williams, was employed by Kwik Trip, Inc. from February 16, 2009 through April 23, 2010 as a part-time retail sales cashier. (Tr. 3-4, 11-12) The employer has a policy (Code of Conduct) that requires immediate termination for theft. (Tr. 8, Employer's Exhibit 1-unnumbered p. 8)

On April 7th, Nicole Lepsich from Loss Prevention (Tr. 5) observed the employer's video surveillance tape (Tr. 4) and contacted the employer that same day with a report (Tr. 6) that Mr. Williams had allowed a co-worker named Danielle to go through his line and not pay for several items. (Tr. 4, 5, 6, 7) The employer contacted Danielle "…after the fact…" to set up a meeting to discuss the incident, but she never showed. (Tr. 7, 11)

The employer did not immediately speak with Mr. Williams about the incident. (Tr. 11)

The employer waited until April 23rd when Brett Goodman (Loss Prevention Specialist) (Tr. 4, 5) could come down to the store to interview the claimant. When he arrived, he immediately took the video tape to the Waterloo Police Department (Tr. 5,) who determined that the claimant should be removed from the store. (Tr. 5) Mr. Williams denied the incident (Tr. 12, 14) and requested to see the video, which he was disallowed. (Tr. 12-13) The employer terminated Mr. Williams that same day for 'sweethearting,' i.e., giving away items for free. (Tr. 12) The claimant had never been disciplined for any infraction prior to this incident. (Tr. 7, 8, 9)

The employer then pressed charges against the claimant for which the court dismissed the charges. (Tr. 12-13)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to

misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The employer's case rests solely on hearsay statements based on a report made by the Loss Prevention assistant, Nicole Lepsich, regarding what she allegedly observed on the employer's video surveillance tape. While hearsay evidence is generally admissible in administrative proceedings and may constitute substantial evidence to uphold a decision of an administrative agency Gaskey v. Iowa Dept. of Transportation, 537 N.W.2d 695 (Iowa 1995), whether or not hearsay, an agency must have based its findings "upon the kind of evidence on which reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a jury trial". Iowa Code Section 17A.14(1); see also, McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234 (Iowa 1982). Here, the employer failed to present Ms. Lepsich or Mr. Goodman, employees who remain within their control, as witnesses or the videotape to corroborate their allegation. The court in Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976) held that, where, without satisfactory explanation, relevant evidence within control of party whose interests would naturally call for its production is not produced, it may be inferred that evidence would be unfavorable.

Additionally, 871 IAC 24.32(4) provides:

> *Report required*. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Even if misconduct occurred, there was no current act upon which the employer could base its termination. The final act occurred on April 7th, for which the employer admits having knowledge of the same on that very day. (Tr. 6) Yet, the employer waited until April 23rd to take action, and even then the employer admitted there was no discussion with the claimant regarding the incident. (Tr. 5) The court in Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988) held that in order to determine whether conduct prompting the discharged constituted a "current act," the date on which the conduct came to the employer's attention and the date on which the employer notified the claimant that said conduct subjected the claimant to possible termination must be considered to determine if the termination is disqualifying. Any delay in timing from the final act to the actual termination must have a reasonable basis. There was no reasonable basis for why the employer waited so long to take action. For all the foregoing reasons, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated August 10, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, the claimant is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/kk