

**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**

**DIANNE L SEELANDT  
3136 S 21<sup>ST</sup> ST  
COUNCIL BLUFFS IA 51501**

**PILOT TRAVEL CENTERS LLC  
C/O THOMAS AND THORNGREN INC  
PO BOX 280100  
NASHVILLE TN 37228-0100**

**Appeal Number: 04A-UI-05098-RT  
OC: 04-04-04 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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(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, Pilot Travel Centers LLC, filed a timely appeal from an unemployment insurance decision dated April 27, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Dianne L. Seelandt. After due notice was issued for a telephone hearing on May 25, 2004 at 10:00 a.m., the claimant did not call-in a telephone number prior to the hearing or 15 minutes after the time for the hearing as instructed in the notice of appeal. The employer had called in the name of a witness, Steve Olson, and a telephone number where he could be reached for the hearing. When the administrative law judge called that number at 10:00 a.m. Mr. Olson was not there. The person who answered the phone said he would not be there for approximately 30 minutes. The administrative law judge informed the person who answered

the phone that the hearing was scheduled at 10:00 and that he would wait 15 minutes for Mr. Olson to call and if he did not he would do a decision based upon the administrative file. As of 10:20 a.m., neither Mr. Olson nor anyone else on behalf of the employer had called or provided another telephone number where witnesses could be reached. Therefore, the administrative law judge will determine this matter based upon the administrative file. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

At approximately 10:50 a.m. on May 25, 2004, the Chief Judge of the Appeals Section received a call from the local Workforce Development office in Council Bluffs, Iowa, asking that the administrative law judge who heard the case call and speak to Larry Traywick who was there at the local office. The administrative law judge called Mr. Traywick at 10:57 a.m. on May 25, 2004. Mr. Traywick is the regional manager for the employer and had received a message that he was to go to the courthouse for a hearing. Mr. Traywick eventually ended up at the local Workforce Development office. The administrative law judge informed Mr. Traywick that he had a telephone number for the employer and the name of a witness, Steve Olson. Mr. Traywick confirmed that Mr. Olson was the general manager of the location involved. Mr. Traywick further conceded that Mr. Olson was the appropriate witness but he did not know whether Mr. Olson had forgotten about the hearing or the employer's representative, Thomas and Thorngren, Inc., had failed to inform him of the time for the hearing. Mr. Traywick asked the administrative law judge to take evidence at that time. The administrative law judge informed Mr. Traywick that he could not because the time for the hearing had long since expired. The administrative law judge informed Mr. Traywick that he would treat his phone call as a request to reschedule a hearing made after the time for the hearing was scheduled and it was too late to take evidence. Although not directly applicable, the administrative law judge believes that 871 IAC 26.14(7)(b) is applicable here. That rule provides that if a party responds to a notice of appeal and telephone hearing after the record has been closed the administrative law judge shall not take evidence of the late party but shall inquire as to why the party was late in responding. For good cause shown, the rule provides the administrative law judge shall reopen the record and cause further notice of hearing to be issued. The record shall not be reopened and not rescheduled if the administrative law judge does not find good cause to do so. Failure to read or follow the instructions on the notice of appeal and telephone hearing is not good cause for reopening the record and rescheduling the hearing. Here, the employer had called in a telephone number and provided the name of a witness in advance but the witness was not present when the administrative law judge called that number at 10:00 a.m., the time for the hearing. The administrative law judge concludes that the employer has failed to demonstrate good cause for rescheduling the hearing. From the record, it appears that the employer was aware that this was a telephone hearing because someone, either the employer or its representative, had called the Appeals Section with a telephone number and the name of the appropriate witness. The employer was aware of the time for the hearing and that it was a telephone hearing. The employer's witness was not present at the telephone number when called by the administrative law judge at 10:00 a.m. Mr. Traywick indicated that he did not know whether the employer's witness had forgotten the hearing or had never been given notice from the employer's representative. In either case, there is no fault of Iowa Workforce Development or the Appeals Section in failing to reach the employer for the hearing. Accordingly, the administrative law judge concludes that the employer has not demonstrated good cause to reschedule the hearing and the employer's request to reschedule the hearing is hereby denied.

#### FINDINGS OF FACT:

Having examined the record, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on April 27, 2004, reference 01, determining that the claimant was eligible to receive unemployment insurance benefits because Workforce Development records indicate she was dismissed from work on April 6, 2004 for alleged misconduct but the employer did not furnish sufficient evidence to show misconduct.

Pursuant to her claim for unemployment insurance benefits filed effective April 4, 2004, the claimant has received unemployment insurance benefits in the amount of \$591.00 as follows: \$202.00 per week for two weeks, benefit weeks ending April 10 and April 17, 2004; zero benefits for benefit week ending April 24, 2004 (shown as disqualified for not being able and available for work); and \$187.00 for benefit week ending May 1, 2004 (earnings \$65.00).

#### 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.

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. 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. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. In its protest the employer merely states that the claimant was discharged on April 6, 2004 for violation of policy, unauthorized removal of company property. The protest does not specify anything more. The employer did not participate in fact-finding. At fact-finding the claimant stated that she was discharged allegedly because of suspicious acts. However, after asking what, the employer would not tell her. The claimant stated she had never been written up and her cash drawer was never short and she had no idea what the employer meant. In its appeal, the employer's representative states merely that it wants to appeal the decision and will present additional testimony and evidence in support of their appeal.

Accordingly, the administrative law judge concludes that there is not a preponderance of the evidence of any acts on the part of the claimant rising to the level of disqualifying misconduct as noted above and, as a consequence, the claimant 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. 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 her 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 \$591.00 since separating from the employer herein on or about April 6, 2004 and filing for such benefits effective April 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 April 27, 2004, reference 01, is affirmed. The claimant, Dianne L. Seelandt, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

tjc/b