

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**CHRISTINE A SMITH**  
Claimant

**APPEAL NO. 12A-UI-01740-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PILOT TRAVEL CENTERS LLC**  
Employer

**OC: 01/08/12**  
**Claimant: Respondent (2-R)**

Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer appealed from an unemployment insurance decision dated February 13, 2012, reference 01, that allowed benefits. A telephone hearing was scheduled for March 8, 2012. John Wahler represented the employer. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. The claimant contacted the Appeals Section approximately two and a half hours after the hearing record had closed and the employer had been dismissed. The claimant had received proper notice of the hearing, but had not followed the hearing notice instructions. The claimant failed to provide good cause to re-open the record. The administrative law judge advised the claimant of her appeal rights.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Christine Smith was employed by Pilot Travel Centers, L.L.C., as a part-time cashier at the employer's Brooklyn, Iowa, location until January 4, 2012, when Travel Center General Manager John Wahler discharged her for theft and dishonesty. During Ms. Smith's shift on January 3, 2012, Ms. Smith took a \$100.00 Bluetooth headset from the manager's office and hid it in her work area. On her break, Ms. Smith took the headset from the store and placed it on the floorboard of her car. The manager on duty noticed that the headset was missing and reviewed surveillance video that showed Ms. Smith removing the item from where she had hid it, concealing the item under her coat, and removing the item from the store. Another manager went to look in Ms. Smith's car and found the headset on the floorboard of Ms. Smith's car. When the manager on duty questioned Ms. Smith, she denied taking it. The manager asked Ms. Smith whether he could search her car. Ms. Smith said yes and then immediately said no.

The employer observed Ms. Smith during her next break. The manager saw Ms. Smith move her car to an adjacent parking lot and throw something out of her car. Ms. Smith then returned to the store and said the employer could now search her car. The other manager had retrieved the headset from where Ms. Smith had thrown it and brought it back into the store. The manager on duty contacted Mr. Wahler, alerted him to the theft, and alerted him to the surveillance record.

Mr. Wahler went to the store and questioned Ms. Smith. Ms. Smith declined the invitation to review the surveillance video. Ms. Smith offered to pay the employer for the item. The employer discharged her from the employment.

### REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power

to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record establishes that Ms. Smith was discharged because she stole from the employer and then lied about it. Ms. Smith was discharged for misconduct. Accordingly, Ms. Smith is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Smith.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

**DECISION:**

The Agency representative's February 13, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw