

**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**

**MICHELE C MOORE
2022 N 40TH
OMAHA NE 68111**

**PILOT TRAVEL CENTERS LLC
c/o THOMAS AND THORNGREN INC
P O BOX 280100
NASHVILLE TN 37228-0100**

**Appeal Number: 04A-UI-05099-RT
OC: 04-11-04 R: 12
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, 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, Michele C. Moore. After due notice was issued, a telephone hearing was held on May 25, 2004 with the claimant participating. Russell Hester, Retail Manager, participated in the hearing for the employer. 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, the administrative law judge finds: The claimant was employed by the employer as a full-time diesel cashier from May 10, 2003 until she was discharged on April 8, 2004. The claimant was discharged for misconduct arising out of an incident on or about April 4, 2004 by which the claimant purchased two Cobra CB radios from the employer using a customer's driver payback card. When a customer purchases fuel from the employer, they get a credit of one cent per gallon towards a purchase of other merchandise. One particular customer had a large credit. On April 4, 2004, the claimant purchased two Cobra CB radios from the employer using a driver payback slip for the driver who was, at that time, out of state. Each driver or customer has his or her own card and number. Payback card credits are added whenever fuel is purchased. The driver in question noticed that his credits in his payback card had dropped dramatically after purchasing fuel at another of the employer's locations out of state and contacted the corporate office. The corporate office contacted the Council Bluffs location where the claimant was employed and where the large credits had been used. The employer checked the cash register journal, the electronic slip and the payback receipts and also videotape. The claimant purchased the two Cobra CB radios using the driver's payback slip. The payback slips are manually entered using the number on the card carried by the driver. The claimant used that number and generated a payback slip and used that to purchase the two CB radios. The claimant purchased the radios from her shift supervisor, Edie Schultz. Each radio cost \$49.99 plus \$3.50 tax or \$53.49. Two radios would cost, including tax, \$106.98 which was the amount of the deduction from the driver's payback card. The claimant attempted to give one of the CB radios to Alma Hayes so that each would have one. The one given by the claimant to Ms. Hayes was still new in its box. Since it was improper, Ms. Hayes returned the CB to the employer. After reviewing the videotape and the other documents noted above, the claimant was discharged. The claimant had purchased the radios using the first name of her boyfriend, Chris, and her last name, Moore. The claimant had not been charged with any similar behavior but had had two written warnings for shortages in her cash drawer, one on August 31, 2003 and another on September 23, 2003.

Pursuant to her claim for unemployment insurance benefits filed effective April 11, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,125.00 as follows: \$188.00 per week for five weeks from benefit week ending April 17, 2004 to benefit week ending May 22, 2004 and \$185.00 for benefit week ending May 15, 2004 (earnings \$50.00). Of that amount \$229.00 was offset against an overpayment from 1991.

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. She is.

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).

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 the 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's witness, Russell Hester, Retail Manager, credibly testified that he personally observed from video tape the claimant purchase two Cobra CB radios from the employer using a driver payback slip for another driver. Mr. Hester further testified credibly that he also checked the cash register journal, the electronic slips and the payback receipts and this further confirmed that the claimant had made the purchase on or about April 4, 2004. The claimant adamantly denied purchasing any CB radios from the employer but on a question from Mr. Hester about whether she had given one CB radio to a coworker, Alma Hayes, the claimant finally did concede that she had, in fact, bought one CB radio one week earlier. The claimant's denial is not credible because she changed her testimony after being confronted with the gift of one of the new CB radios. The CB radio that the claimant gave Ms. Hayes was a Cobra CB radio. Mr. Hester also credibly testified that the cost of one radio, including tax, was \$53.49 and that two radios would cost \$106.98 which was the exact amount reduced from a driver or customer's payback card. All of the employer's documents concerning this transaction indicate that the claimant was the one who purchased the two CB radios using the first name of her boyfriend, and her last name, Moore. The claimant's initial denial is also not credible because eventually the claimant conceded that she had also purchased a CB radio for herself from a friend and wanted Ms. Hayes to have a CB radio as well. Mr. Hester credibly testified that he personally observed the videotape and personally observed the transaction and that it was

confirmed by all of the employer's other documentation. This purchase followed two written warnings received by the claimant for cash drawer shortages.

Accordingly, the administrative law judge concludes that the claimant did, in fact, purchase two Cobra CB radios from the employer using a customer's driver payback card wrongfully. The administrative law judge further concludes that this act was a deliberate act constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she 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 \$1,125.00 since separating from the employer herein on or about April 8, 2004 and filing for such benefits effective April 11, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of April 27, 2004, reference 01, is reversed. The claimant, Michele C. Moore, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,125.00.

tjc/b