

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL PERKINS
Claimant

APPEAL NO. 17A-UI-11229-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PILOT TRAVEL CENTERS LLC
Employer

OC: 10/01/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Pilot Travel Centers (employer) appealed a representative's October 26, 2017, decision (reference 02) that concluded Michael Perkins (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 20, 2017. The claimant participated personally. The employer participated by Betty Hansen, Guest Service Manager. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on March 9, 2017 as a maintenance person and cashier working thirty-six to thirty-eight hours per week. The claimant signed for receipt of the employer's handbook on March 22, 2017. The policy requires employees to treat others with dignity, respect, and fairness. The employer has a progressive disciplinary policy but reserves the right to terminate without cause. It did not issue the claimant any warnings during his employment.

The claimant complained to the general manager and the guest service manager about another manager who sent him harassing text messages from May through July 2017. Nothing was done to stop the harassment.

On July 9, 2017, the claimant was working the cash register when a female driver came in. He said, "Swift, really?" The female driver complained to her co-driver who was male. The male driver was not present when the claimant and the female driver spoke. The male driver complained to the general manager that the claimant made fun of Swift drivers and said Swift drivers were less than intelligent. Another employee heard the conversation. The general

manager placed the claimant on immediate unpaid suspension. On July 11, 2017, the employer terminated the claimant for violating the employer's policy.

The claimant filed for unemployment insurance benefits with an effective date of October 1, 2017. The employer provided the name and number of Robert Bock as the person who would participate in the fact-finding interview on October 25, 2017. The fact finder called Mr. Bock but he was not available. Kevin Girsch told the fact finder that the employer had no statement to make and he would not participate in the scheduled interview. The employer provided some documents for the fact finding interview. The employer did not submit the specific rule or policy that the claimant violated which caused the separation. An employee's name with firsthand information was not provided.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer did not sufficient evidence to show misconduct.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The only witness to the final incident at the appeal hearing was the claimant. The claimant denied making an inappropriate comment.

The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's October 26, 2017, decision (reference 02) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs