

**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**

**AMY J HUBERTS  
14100 – 112<sup>TH</sup> AVE #152  
DAVENPORT IA 52804**

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

**Appeal Number: 05A-UI-05481-RT  
OC: 05/01/05 R: 04  
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 May 16, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Amy J. Huberts. After due notice was issued, a telephone hearing was held on June 10, 2005, with the claimant participating. The employer did not participate in the hearing. Although the employer had called in a telephone number where a witness, Edwin Doran, could purportedly be reached for the hearing, when the administrative law judge called that number at 9:00 a.m., the person who answered indicated that Mr. Doran would not be at work until 10:30 a.m. The administrative law judge asked if there was anyone else that could do the

hearing, that it was the time for the hearing and that the employer must have been aware of the hearing because somebody had called in a telephone number, which was the right number, and gave the name of Mr. Doran as the witness. The person who answered indicated that there was no one else who could do the hearing. The administrative law judge told the person who answered to give the message to Mr. Doran, when he arrived, that he had been called for the hearing. The hearing began when the record was opened at 9:04 a.m. and ended when the record was closed at 9:14 a.m., and no one for the employer, including Mr. Doran, had called during that time. The employer appears to be represented by Thomas and Thorngren, Inc., which is well aware of the need to call in a telephone number in advance of the hearing and have the witnesses at that number at the time of the hearing if the employer wishes to participate in hearing. 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 witness, and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time cashier and cook from May of 2004 until she was discharged on March 16, 2005. The claimant averaged approximately 32 hours per week. The claimant was discharged for violation of employer's policy. The employer's policy on employee discounts allows employee discounts to employees who are on duty, but apparently prohibits discounts to friends of employees and to employees who are not on duty. The claimant made a sale to an off-duty employee who was purchasing items for himself and his friends at one time. The claimant gave the off-duty employee a discount. At that time, the claimant did not know either that friends could not get discounts or that off-duty employees could not get discounts. She has subsequently learned that those are probably prohibited. The claimant did not intentionally violate the employer's policy and simply made a mistake. This was the first time the claimant had done this and she had received no relevant warnings or disciplines. Pursuant to her claim for unemployment insurance benefits filed effective May 1, 2005, the claimant has received unemployment insurance benefits in the amount of \$303.00 as follows: \$101.00 per week for three weeks from benefit week ending May 7, 2005 to benefit week ending May 21, 2005.

#### 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.

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).

The claimant credibly testified, and the administrative law judge concludes, that she was discharged on March 16, 2005. 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 an employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant credibly testified that she made a sale to a co-worker when the co-worker was off-duty, and included in the sale purchases by the co-worker's friends. Co-workers are entitled to a discount if they are on duty. However, at the time, the claimant truly believed that the employee was entitled to the discount, as was his friends, since the purchase was made all at one time. The claimant gave the employee the discount and then was discharged. The claimant subsequently learned that friends were not entitled to discounts and that perhaps off-duty employees were not either. However, at the time of the sale, the claimant was unaware of this. This was the first time the claimant had violated the employer's policy in such a way and the claimant had never received any relevant warnings or disciplines for similar matters.

On the record here, and in the absence of any evidence to the contrary, the administrative law judge concludes that the claimant's acts were not a deliberate act or omission constituting a material breach of her duties nor did it evince a willful or wanton disregard of the employer's interests nor was it carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Rather, the administrative law judge concludes that the claimant's act

was ordinary negligence in an isolated instance or a good-faith error in judgment or discretion and is not disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, she 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, including the evidence therefore. 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 \$303.00 since separating from the employer herein on, or about, March 16, 2005, and filing for such benefits effective May 1, 2005. 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 May 16, 2005, reference 01, is affirmed. The claimant, Amy J. Huberts, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged, but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out her separation from the employer herein.

kjw/pjs