IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KIMBERLY K POSEY Claimant **PILOT TRAVEL CENTERS LLC** Employer	**APPEAL 20A-UI-01005-AW-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/05/20** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Employer filed an appeal from the January 29, 2020 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified of the hearing. A telephone hearing was held on February 19, 2020, at 9:00 a.m. Claimant did not participate. Employer participated through William Hook, General Manager. Employer's Exhibit 1 was admitted. Official notice was taken of the administrative record.

ISSUES:

Whether claimant's separation was a discharge for disqualifying job-related misconduct.
Whether claimant was overpaid benefits.
Whether claimant should repay those benefits and/or whether employer should be charged based upon its participation in the fact-finding interview.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time Retail Specialist from February 11, 2019 until her employment with Pilot Travel Centers, LLC ended on January 9, 2020. Claimant worked Monday through Friday from 7:00 a.m. until 3:00 p.m. Claimant's direct supervisor was William Hook, General Manager. Claimant's job duties included ordering and pricing inventory.

On July 1, 2019, claimant received a written warning for failure to adhere to company policy by not finalizing a necessary count. (Exhibit 1, p. 15) On August 18, 2019, claimant was coached on her attendance. (Exhibit 1, p. 14) On October 21, 2019, claimant received a final warning for negligent conduct for failing to verify information before completing a transaction. (Exhibit 1, p. 12) On December 24, 2019, claimant was coached on her work performance for failing to remove expired merchandise. (Exhibit 1, p. 11) On December 24, 2019, December 26, 2019 and January 7, 2020, claimant was coached on her attendance. (Exhibit 1, pp. 8-10) On January 7, 2020, claimant was coached for failing to perform her duties in a positive and respectful manner for interrupting her coworkers. (Exhibit 1, p. 7) On January 9, 2020, claimant

was issued a written warning for unsatisfactory work performance for failing to wear a radio and being able to help when called on the radio. (Exhibit 1, p. 5) Also on January 9, 2020, claimant received a final warning for unsatisfactory work performance for failing to complete pricing and overstocking inventory. (Exhibit 1, p. 3) Also on January 9, 2020, claimant was discharged for unsatisfactory work performance for yelling at delivery drivers. (Exhibit 1, p. 1) Claimant had no prior warnings for yelling at delivery drivers or her coworkers. Employer considered the prior warnings for "job performance" in deciding to terminate claimant's employment. (Hook Testimony)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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 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:

> 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 of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or

> disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) *Past acts of misconduct*. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra; *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Employer discharged claimant for the sum of multiple issues over the course of claimant's employment. Employer cited poor job performance as the reason for claimant's discharge; however, claimant was issued a final written warning for the final incident of poor job performance. Claimant was discharged for yelling at delivery drivers. Claimant received no prior warnings for this type of behavior. Claimant received warnings for attendance, interrupting co-workers, failing to price merchandise in a timely manner or overstocking products. However, these warnings are not similar to a warning for yelling at delivery drivers. Employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits. Employer has not met its burden of proving disqualifying, job-related misconduct. Therefore, claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Because claimant's separation was not disqualifying, the issues of overpayment, repayment and chargeability are moot.

DECISION:

The January 29, 2020 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The issues of overpayment, repayment and chargeability are moot.

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Adrienne C. Williamson
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Decision Dated and Mailed

acw/scn