

**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**

**ELIZABETH L KERNS
20178 BONNIE LN
COUNCIL BLUFFS IA 51501**

**PILOT TRAVEL CENTERS LLC
c/o THOMAS AND THORNGREN INC
PO BOX 280100
NASHVILLE TN 37228**

**Appeal Number: 04A-UI-10673-DT
OC: 09/05/04 R: 01
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, 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

STATEMENT OF THE CASE:

Pilot Travel Centers, L.L.C. (employer) appealed a representative's September 22, 2004 decision (reference 01) that concluded Elizabeth L. Kerns (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 25, 2004. The claimant participated in the hearing. Jamie Cunningham appeared on the employer's behalf and presented testimony from one other witness, Larry Trawick. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE: Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on December 8, 1997 at its Council Bluffs, Iowa, travel center/truck stop. Her last day of work was September 7, 2004. At that time she was working full time as an assistant or co-manager. The employer discharged her on September 7, 2004. The reason asserted for the discharge was unsatisfactory performance, specifically in the areas of customer and employee communications and with regard to cash handling.

Mr. Cunningham became the center's general manager on or about July 15, 2004. He was aware that the claimant had been previously verbally counseled regarding the customer and employee communications issue. On August 20, 2004, he met with the claimant and showed her a corrective action form that a prior general manager had written up regarding a customer complaint about the claimant but had never given to the claimant. Mr. Cunningham told the claimant he was using the prior corrective action form as a tool for discussion, and advised the claimant that he had the same concerns regarding the claimant's manner of communication with coworkers, superiors, and customers, and that she needed to work on her communication skills.

On or about August 31, the employer received a customer complaint about how the claimant had handled a concern about a price difference, asserting that the claimant had been rude. On that day, a customer, related to an employee the claimant had recently disciplined, had been in the store and had been yelling at a clerk about the price on a case of pop running up different than marked. The claimant intervened and told the clerk to give the customer the pop at the priced she wanted. When the customer continued to complain, the claimant explained in a neutral manner that she was getting the pop at the price she wanted.

On September 4, the claimant was working the 3:00 p.m. to close shift (1:00 a.m.) As manager on duty for that shift, she was responsible not only for ensuring that the registers balanced for the third shift, but that the aggregate daily balance for all three shifts balanced. The claimant was working training a shift lead that night, and they did go through the balance procedure for the entire day. The only irregularity was a couple of transactions totaling about \$300.00 from the second shift. They were charges from a particular customer, and the claimant noted that the transactions lacked approval. Consistent with how she had been instructed to handle such situations in the past, she withheld those transactions for the administrative assistant to confirm the following day. Without those transactions, the cash records for the day did balance; however, it was subsequently discovered that the transactions had been processed, and by failing to include the amount of the transactions in the daily reconciliation, the claimant had failed to detect that there had been an offsetting cash loss on the second shift.

On September 6, the employer gave the claimant a written corrective action form for the customer complaint and the cash handling discrepancy. On September 7, after a review of the fact that the claimant had previously received several verbal counselings regarding complaints and communication issues, she was discharged.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or

- b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is unsatisfactory job performance, specifically the final customer complaint and the cash handling discrepancy. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. However, the claimant denied being rude to the customer that made the final complaint. No first-hand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second-hand account from the customer; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the customer is credible. Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible. The evidence does not support a conclusion that the claimant was rude to the customer.

As to the cash handling discrepancy, the claimant believed she was handling the issue with the transactions correctly. She had not previously been warned that her manner of handling that type of transaction as to the daily reconciliation was incorrect. Under the circumstances of this case, the claimant's handling of the transactions in the daily balancing was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 22, 2004 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/tjc