

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS  
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

**CHRISTINA K PONCIN**  
Claimant

**CASEYS MARKETING COMPANY**  
Employer

**APPEAL 22A-UI-10839-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/20/22  
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer, Casey's Marketing Company, filed an appeal from the April 18, 2022, (reference 01) unemployment insurance decision that granted benefits based upon the conclusion the claimant was discharged for non-disqualifying conduct. The parties were properly notified of the hearing. A telephone hearing was held on June 14, 2022. The claimant did not participate. The employer participated through District Manager Julie Burke. Official notice was taken of the administrative file. No exhibits were received.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant is overpaid benefits? Whether she is excused from repaying the benefits received due to the employer's inadequate participation at factfinding?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant worked for the employer in various roles and locations from September 25, 2017, until her employment ended on March 2, 2022, when she was terminated. The claimant most recently worked as an assistant manager. The claimant reported to the store manager (name unknown).

The employer has a policy requiring its employees to perform cigarette counts each day. The employer's policy requires employees to perform a second count, if the first count is off by five packs of cigarettes. If the count does not match, employees are to immediately inform a supervisor to see if further action is to be taken. This practice is reviewed in the manager training that the claimant took before receiving her assistant manager role. The representative's notes from the factfinding interview indicate the claimant acknowledged the existence of this

practice. The employer also has an Honesty and Integrity policy indicating actions violating the employer's trust can result in disciplinary action including termination.

On March 22, 2022, District Manager Julie Burke noticed that the employer's inventory on cigarettes was off by approximately 130 cigarette packs, with an approximate value of \$60.00, on March 21, 2022. Ms. Burke spoke with the store manager and the claimant. Both said that they had been falsifying the counts by zeroing out the difference in the count rather than reporting the discrepancy up to a supervisor according to the employer's policy. Ms. Burke terminated both employees that day after speaking with Asset Protection Manager Mike Supe and Human Resources Partner Maureen McCarthy. Ms. Burke felt her investigation revealed a violation of trust such that immediate termination was warranted under its Honesty and Integrity policy.

The following section of the findings of facts describes facts necessary to resolve the overpayment issue:

The claimant filed for an received \$3,672.00 in regular unemployment insurance benefits after her separation from the employer.

On March 31, 2022, Iowa Workforce Development Department mailed a notice of factfinding to the parties announcing a date for a factfinding interview to occur on April 7, 2022 at 10:10 a.m. The representative's factfinding notes indicate the employer's registered number, (515) 446-6448, at 10:15 a.m. The representative left a voicemail at the registered number to return the call within 30 minutes. The employer did not return the call. The representative's notes indicate the claimant participated at factfinding. The representative's notes state the claimant's separation was determined not to be disqualifying because the employer did not provide a copy of the policy the claimant violated. The only information the representative had received from the employer was from the State Information Data Exchange Database ("SIDES") stating the claimant had been discharged for "violation of a company policy, specifically due to falsification of records."

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

On June 16, 2022, Gov. Reynolds signed into law House File 2355, which among other things amended Iowa Code 96.5(2) to further define misconduct and to enumerate specific acts that constitute misconduct. The bill did not include an effective date and so took effect on July 1, 2022. See Iowa Const. art. III, § 26; Iowa Code § 3.7(1).

There is a strong presumption in American jurisprudence against legislation being applied retroactively. "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (SCALIA, J. concurring). This is in part because "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly...." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994).

The Iowa Supreme Court has held that determining whether a statute should have retrospective or prospective effective is determined based on two considerations. First, whether the law amendment specifically states it is to have retrospective application. Second, whether the

change in the law is substantive rather than merely remedial in scope. If no expressed retrospective application is stated, and the change is deemed substantive, then it is to have prospective effect. See *Dindinger v. All Steel Inc.*, 860 N.W.2d 557 (Iowa 2015). The Iowa Supreme Court determined the statute in that case was prospective due to the differences in the burden of proof and the prospects of recovery for the parties regarding pay discrimination claims in the Iowa Civil Rights Act when the legislature amended Iowa Code §216.6A(3)(d) to add a separate claim for wage discrimination. The Iowa Supreme Court found this was a substantive change because it altered the ability of the parties to succeed on wage claims by creating a new means of bringing them that changed the burdens of proof and the amount of money that would be recovered if successful. *Id.* House File 2355 fits this description of a substantive change. It makes significant changes to the burden of proof and the amount of money that can be recovered. Furthermore, the law also changes the manner in which decisions from this level can be appealed.

Given the Iowa Supreme Court's instruction in *Dindinger* and the substantive nature of House File 2355, the administrative law judge will not apply it to the conduct at issue in this case, which occurred prior to the law becoming effective on July 1, 2022. As such, the administrative law judge finds the amended Iowa Code 96.5(2) effective July 1, 2022 should not be applied to the conduct at issue here and instead Iowa Code 96.5(2) as it existed at the time of the conduct will be applied.

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 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). 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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer has established that it had a policy requiring employees to conduct cigarette audits. Indeed, the claimant acknowledged the existence of such a policy during the factfinding interview. The record reflects the claimant was aware of the reason for conducting cigarette audits and was falsifying records. The record further reflects that the claimant engaged in this practice on more than one occasion. The administrative law judge finds such a course of conduct a wanton disregard for the employer's interests and disqualifying.

The next issue is whether claimant has been overpaid benefits. Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) (a) 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 employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award

benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. **If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation.** At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. **The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy.** In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

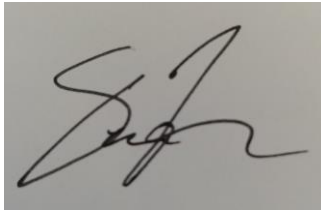
Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The benefits were not received due to any fraud or willful misrepresentation by claimant. Additionally, the employer did not participate in the fact-finding interview. Thus, claimant is not obligated to repay to the agency the benefits she received.

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ." Iowa Code § 96.3(7)(b)(1)(a). In this case, the representative made the determination that the claimant's termination was not disqualifying because the employer had not provided a copy of its policy. The administrative law judge disagrees with this determination because the claimant acknowledged the existence of the policy during the factfinding interview. However, the administrative law judge finds the employer did not adequately participate at the factfinding interview due to its own internal processes. The claimant was arguing she complied with the policy. Rebuttal testimony was necessary, but the employer has not demonstrated it provided a reliable number for it to be contacted by the representative. It did not even provide specific information leading up to the discharge in its written SIDES information. The claimant is excused from repaying the benefits due to the employer's inadequate participation.

**DECISION:**

The April 18, 2022, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for disqualifying misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of \$3,672.00 but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview due to its own internal processes. As a result, the employer is subject to charge for the overpayment.

A handwritten signature in black ink, appearing to read 'Sean M. Nelson', is written over a light gray rectangular background.

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Sean M. Nelson  
Administrative Law Judge

September 9, 2022  
Decision Dated and Mailed

smn/ar

**APPEAL RIGHTS.** If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board  
4<sup>th</sup> Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
Online: [eab.iowa.gov](http://eab.iowa.gov)**

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.

**AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

**Note to Parties:** YOU MAY REPRESENT yourself in the appeal or 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.

**Note to Claimant:** It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.



**DERECHOS DE APELACIÓN.** Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board  
4th Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
En línea: [eab.iowa.gov](http://eab.iowa.gov)**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

**UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:**

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

**Nota para las partes:** USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

**Nota para el reclamante:** es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

**SERVICIO DE INFORMACIÓN:**

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.