

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**JENNICA E JAY**  
Claimant

**APPEAL 23A-UI-08057-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HARVEYS BR MANAGEMENT CO INC**  
Employer

**OC: 07/30/23  
Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The claimant, Jennica E. Jay, filed an appeal from the August 21, 2023, (reference 01) unemployment insurance decision that denied benefits based upon the conclusion the claimant was discharged due to violation of a known rule. The parties were properly notified of the hearing. An in-person hearing was held at the IowaWORKS offices at 300 West Broadway, Suite 13, in Council Bluffs, Iowa 51501 7611 on September 15, 2023. The claimant participated and testified. The employer participated through Human Resources Generalist Mitchell Parker.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

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

The claimant worked as a full-time beverage server bartender from July 30, 2019, until she was separated from employment on July 18, 2023, when she was terminated. The claimant's immediate supervisor was Assistant Casino Operations Manager Jamie Klippinger.

The employer has a meal break policy. Meal breaks are 35 minutes long. They must take the full 35 minutes. If staff has a meal break that lasts less than 30 minutes or a meal break longer than 40 minutes, then they are subject to coaching. The difference in the time is a sort of grace period of non-enforcement. If behavior does not change progressive discipline will be documented for performance. The first two times an employee has such an infraction, the employee receives a verbal coaching document, and a document called a "calendar issue." The third time an infraction of this kind occurs the associate is given an "informational coaching." Upon the fourth occurrence, the associate is disciplined again up to and including termination. The claimant acknowledged receipt of this policy on January 24, 2023.

The employer has the policy because it contends that failure to correct this behavior could lead it to either face liability for wage hour violations under the National Labor Relations Act or it must pay the associate more money to avoid a liability issue.

On March 27, 2023, the claimant clocked out for lunch, but only for 29 minutes.

On April 16, 2023, the claimant clocked out for lunch, but only for 29 minutes.

On April 18, 2023, The claimant clocked out on April 18, 2023, for only 28 minutes. The claimant received an informational coaching document regarding the infractions that had occurred on March 27, 2023, April 16, 2023, and April 18, 2023.

On June 16, 2023, the claimant clocked out only 29 minutes for her lunch on that day.

On June 23, 2023, the employer issued the claimant a final warning for the infraction occurring on June 16, 2023. The final written warning stated that if the infractions continued, she could face further discipline up to and including termination.

On July 15, 2023, the claimant had a panic attack at work. The claimant used her cell phone to determine what time it was to clock out for lunch. Realizing that she may be either coming back too soon or too late, the claimant asked Casino Services Supervisor Sandy Sexton what she should do. Ms. Sexton offered that it was better to return later than the allotted time than earlier than the 30-minute minimum window. Nevertheless, the claimant overstayed the grace period on the other side by one minute. Her lunch was 41 minutes long. Human Resources Generalist Mitchell Parker terminated the claimant after looking at the cameras and the time clock. Mr. Parker noted there is a difference in stated time between the camera images and the time clock in his notes. Mr. Parker did not interview the claimant regarding this infraction because her intent was not relevant to whether the claimant violated the employer's policy.

Dylan Davis, a barback has also been terminated for infractions of this policy. Ms. Davis had a similar history of non-compliance before termination.

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

The administrative law judge concludes the employer terminated the claimant for a non-disqualifying reason. Benefits are granted, provided she is otherwise eligible for benefits.

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.

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).

Iowa Code section 96.5(2)b, c and d provide:

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:

b. Provided further, if gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

c. Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act. Determinations regarding a benefit claim may be redetermined within five years from the effective date of the claim. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith.

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

- (1) Material falsification of the individual's employment application.
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- (3) Intentional damage of an employer's property.
- (4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.
- (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.
- (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
- (7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.
- (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
- (9) Excessive unexcused tardiness or absenteeism.
- (10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.
- (11) Failure to maintain any licenses, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.
- (12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.
- (13) Theft of an employer or coworker's funds or property.
- (14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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

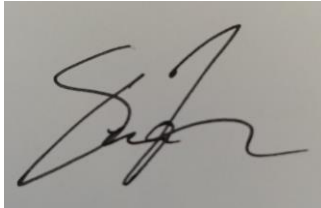
testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam 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 claimant was terminated for being off on her clock ins and clock outs during the relevant period were five minutes different than the employer's grace period. The administrative law judge wants to point out that this is not Iowa Code section 96.5(2)d(10) which states, "Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws." So even if the employer contends this could lead to liability under the National Labor Relations Act, this does not apply because the claimant did not falsify her records here. The record also shows clearly, she never attempted to steal from the company by deceit. See Iowa Code section 96.5(2)d(13) (stating theft is disqualifying per se.)

That leaves the employer arguing that she was terminated under a reasonable and uniformly applicable policy. See Iowa Code section 96.5(2)d(2). The administrative law judge finds the employer uniformly enforced the policy based on the record made in this case. However, he does not find the enforcement of the policy to be reasonable. The claimant's time records were within five minutes of the correct time per the policy over the relevant four-month period. The employer's stated reason for the policy is wildly disproportionate to its enforcement in this case. It is fanciful to think that it would be exposed to liability under the National Labor Relations Act for a five-minute difference in time over a four-month period. Similarly, assuming that the employee is not intentionally stealing time through deceit, it is wildly disproportionate to terminate someone for a few minutes difference in time clock readings over a four-month period. Disqualifying misconduct requires intentional or at least knowing violation of the rule. It is understood that Mr. Parker did not need this to find it a violation of the policy, but it is needed to be disqualified under unemployment law. The record shows in this case the claimant simply made a mistake. Benefits are granted, provided she is otherwise eligible.

**DECISION:**

The August 21, 2023, (reference 01) unemployment insurance decision is REVERSED. The claimant was discharged due to a non-disqualifying reason. Benefits are granted, provided she is otherwise eligible for benefits.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to read 'Sean M. Nelson'.

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Sean M. Nelson  
Administrative Law Judge II

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September 18, 2023  
Decision Dated and Mailed

SMN/jkb

**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**

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**

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 adquiriera 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.