

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

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**MICHAEL HERSHBERGER**  
Claimant

**APPEAL 22A-UI-08820-DH-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**REINHART FOODSERVICE LLC**  
Employer

**OC: 02/27/22  
Claimant: Appellant (2)**

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Iowa Code § 96.5(1) - Voluntary Quit  
Iowa Code § 96.5(2)a - Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(1)a - Discharge for Misconduct

**STATEMENT OF THE CASE:**

On April 6, 2022, Michael Hershberger, claimant/appellant, appealed the March 31, 2022, (reference 01) unemployment insurance decision that denied benefits due to a 02/27/22 discharge for misconduct, finding claimant failed to perform satisfactory work even though capable of so performing. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for May 19, 2022, at 11:00AM. Claimant personally participated. Employer, Reinhart Foodservice, LLC, participated through Andrew Lawyer, human resources manager, and party representative, and Gregory Lee, vice president of sales. Employer Exhibits R-1, R-2, and R-3 were admitted without objection. Appeals 22A-UI-08820-DH-T; 22A-UI-11697-DH-T; and 22A-UI-09491-DH-T. Judicial notice was taken of the administrative record.

**ISSUE:**

Was the separation a layoff, discharge for misconduct or a voluntary quit without good cause?

**FINDINGS OF FACT:**

Having heard the testimony and reviewed the evidence in the record, the undersigned finds:

Claimant's first day of work with employer, was 02/22/21. Claimant was a fulltime area manager with a varied schedule. His last day of work was 03/04/22. He was separated from employment for unsatisfactory work performance on 03/04/22. Claimant was a salesperson in northwest Iowa that had territory including the Lake Okoboji area. Employer offers food and non-food supplies and equipment for sale. Claimant had an onboarding and training period where he was not making the targeted goals in the category areas tracked by employer. This was chalked up to claimant being onboarded and trained and not everyone takes to it right away. Claimant continued to struggle and continued to not meet the targeted goals. Claimant advised employer that he felt he was "floundering" in the position. Employer placed claimant on a performance improvement plan (PIP) on January 10, 2022. See R-3. The PIP required growth in cases sold, growth in new accounts and meeting target for talking to the decision maker or owner and getting a confirmed yes for sales. See R-3. At sixty days, the PIP was reviewed with employer and claimant. Target

for cases sold was 4860 but only 4006 were sold. Target for new accounts was three but only one new account was added. Goal was 100% noted for decision maker/owner and 60% certified yes but only 97% noted and 45% certified.

Employer advised claimant they were still not performing satisfactorily and if more time were given, the employer did not believe the performance would improve. No evidence was presented that claimant was ever able to satisfactorily perform the position. Claimant asserts he was doing the best he could and there was no evidence to support the contention that claimant could do better but chose not to or otherwise had the capability of performing better.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment was for unsatisfactory performance, which is not job-related misconduct.

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. 871-24.1(113)c provides:

(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

c. *Discharge*. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

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 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).


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 focus of the administrative code definition of misconduct is on deliberate, intentional or culpable acts by the employee. *Id.*

It is undisputed claimant was let go for unsatisfactory work after continually failing to meet targeted goals. No misconduct is alleged nor proven. No allegation nor proof submitted that claimant ever did the work satisfactorily or that he could do so but chose not to perform satisfactorily. Per the definition of misconduct set forth above, unsatisfactory performance is not misconduct.

Because the claimant's separation was not disqualifying, any benefits denied on this basis shall be paid, so long as claimant is otherwise eligible.

**DECISION:**

The March 31, 2022, (reference 01) unemployment insurance decision that denied benefits due to a 02/27/22 discharge for misconduct is **REVERSED**. There was no misconduct. Any benefits denied on this basis shall be paid, so long as claimant is otherwise eligible.



Darrin T. Hamilton  
Administrative Law Judge

September 23, 2022  
Decision Dated and Mailed

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**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**

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.