BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

STEPHEN W BAKER	:	
	:	**HEARING NUMBER:** 15B-UI-01156
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
CASEY'S MARKETING COMPANY	:	
Employer		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Stephen Baker (Claimant) worked as a part-time pizza maker for Casey's (Employer). He started work for the Employer in May 7, 2014 and was fired on October 28, 2014. The store manager over the Claimant was Jean Yamagata. The Claimant worked 20 to 24 hours a week making pizzas. The Employer's policy requires its employees to pay for any food before it is eaten at work. The Employer's policy specifically applies even if the food item is going to be tossed out.

On October 24, the Claimant was one of three employees working. The Employer received a customer complaint that their pizza order was late and mixed up. The customer asked for a discount. When Ms. Yamagata tried to give the Claimant a warning for problems that occurred on October 24, he asked her to review the video from that night.

On October 28 Ms. Yamagata reviewed the video from the 24th and saw the Claimant and others eating pizza that no one had paid for. A customer had ordered that pizza and not picked it up. The cashier, the acting manager on that shift, told the Claimant the pizza could not be sold by the slice because of the tomatoes and lettuce on it. She said the pizza was garbage and told him to throw it away. Rather than throw the pizza away, the Claimant ate a slice and offered slices to co-workers. No one paid any money to eat that pizza. The Employer charged $2.16 a slice so the Employer would have charged the employees $1.08 a slice.

The Employer fired the Claimant on October 28 for eating the Employer's food without paying for it. The other employee whom the Employer saw eating pizza was not discharged after the Employer concluded the Claimant was training that employee that shift, and that the Claimant encouraged that employee to violate policy by eating the pizza.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2015) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. 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 Board*, 616 NW2d 661 (Iowa 2000).

Waste food cases are sometimes puzzling to those who don't see retail or food service cases regularly. We thus explain the manifest purpose behind this very common policy. Those unfamiliar with retail sales – including sales of food – might think that items which are being thrown away are fair game. A moments thought, apparent to even the slightly experienced in the field, shows why this is not the case. It is very common to see policies from restaurants and groceries banning employees from taking home food that would otherwise be trashed. These policies are intended to assure that employees do not overproduce, or undersell, and supplement their income with the employer's food. Similarly, taking items deemed "junk" (broken) items in retail stores is regulated else the employer may well face a precipitous rise in its inventory of "junk". Compliance with an employer's waste policy is not a trivial manner, even if the value of the waste in question may be relatively trivial in isolation.

This case is similar to the case of *Tompkins-Kutcher v. EAB*, No. 11-0149 (Iowa App. 2011). In that case a claimant, who also worked for Casey's, took home for her use some wasted soup and was disqualified for it. The soup was out of date and could not be sold. She was instructed to take the soup to the dumpster and instead she took it to her car. On appeal she argued that this was no great loss to Casey's, and that what she was doing made common sense, yet she lost. The reason was that Ms. Tompkins-Kutcher violated Casey's policy: "However, the agency's decision did not turn on whether or not the soup was garbage. The agency's decision was based on Tompkins-Kutcher's violation of the company's policy that all items removed from the store, regardless of whether the item is outdated, must be paid for." *Tompkins-Kutcher*, slip op. at 6. Just so the Claimant here engaged in similar intentional infractions, and so we disqualify him for misconduct. As in *Thompkins-Kutcher* we do not base our decision on whether or not the pizza was to be trashed, rather we base our decision on the Claimant's knowing violation of the company's policy. The Claimant further was training at least one other worker whom he encouraged to also eat the pizza without paying, in violation of policy. The Claimant is accordingly disqualified.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.

(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
(3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but **the Claimant will not be required to repay benefits** already received.

DECISION:

The administrative law judge's decision dated March 19, 2015 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Kim D. Schmett

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Ashley R. Koopmans

DISSENTING OPINION OF JAMES M STROHMAN:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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James M. Strohman

RRA/fnv