

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

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**THOMAS C DUMAIS**  
Claimant

**APPEAL 23A-UI-00927-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FEDERAL EXPRESS CORP**  
Employer

**OC: 01/01/23  
Claimant: Respondent (2)**

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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, Federal Express Corp, filed an appeal from the January 19, 2023, (reference 01) unemployment insurance decision that granted benefits effective December 21, 2022 based upon the conclusion the claimant was discharged but misconduct was not proven. The parties were properly notified of the hearing. A telephone hearing was held on February 14, 2023. The claimant was present. Senior Manager Julie Reeves, Operations Manager Ben Kies, and Unemployment Insurance Representative Kathleen Travers were on the line. The claimant requested and was granted a request to postpone the hearing because he had work. The parties exchanged contact information so that the employer could send exhibits to the claimant.

A hearing was scheduled for March 1, 2023. The claimant participated and testified. The employer participated through Operations Manager Ben Kies and Senior Manager Julie Reeves. The employer was represented by Unemployment Insurance Representative Kathleen Travers. Official notice was taken of the agency records. The employer's proposed exhibits were not admitted because they were not sent to the opposing party.<sup>1</sup>

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant has been overpaid benefits? Whether the claimant is excused from repayment of benefits due to the employer's non-participation?

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<sup>1</sup> Iowa Admin. Code r. 871-26.15 has been on the back of the hearing notice for years. It instructs parties to send all exhibits to the opposing party before the hearing date. If a party is uncertain if they have been delivered, they can take common sense measures such as confirming before the hearing date. Parties are reminded to organize their exhibits, so that they can be effectively entered into the record. In this case, the proposed exhibits were received with no markings and seemingly no attempt to organized them. The employer said the exhibits had been sent to the claimant but did not say to what email address or when in its packet. This information would have been vital to conducting the hearing in a much effective manner. There is no reason why this information could not have been provided.

## **FINDINGS OF FACT:**

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

The claimant worked as a full-time courier from November 27, 2021, until he was separated from employment on December 15, 2022, when he was discharged. The claimant's immediate supervisor was Operations Manager Ben Kies. The claimant's position requires him to maintain a driver's license. The employer does not allow courier employees to use restricted licenses.

The employer has an acceptable conduct policy. The policy requires employees who have received a speeding ticket citing them for driving 15 miles per hour or more over the posted speed limit or have had an accident in a company vehicle to report that to management within 24 hours of occurrence. The employer also forbids employees from exceeding the posted speed limit in an area. The claimant acknowledged receipt of the policy on November 30, 2021. Around that time, the claimant watched videos instructing him on the various policies.

On September 19, 2022, the claimant was traveling 65 miles per hour on an unpaved road near Rockford, Iowa. The claimant maintained that he did not see anything posted, but he acknowledged that the speed limit for such roads in his experience has been 55 miles per hour. The claimant lost control of the vehicle which resulted in a total loss of the vehicle. The local jurisdiction did not cite the claimant for this accident. The claimant reported the accident that same day to Mr. Kies. The claimant was issued a two-day unpaid suspension as a result. Mr. Kies told the claimant that additional incidents could lead to further discipline up to and including termination of employment.

On November 23, 2022, the claimant was traveling on a two-lane road southeast of Mason City in a company vehicle. The posted speed limit for this area was 55 miles per hour. The claimant was pulled over and cited for traveling at 95 miles per hour in this zone. The claimant said that he was at that speed for at least five minutes on that day. The claimant paid the citation because he was guilty.

On December 9, 2022, the claimant informed Mr. Kies that the State of Iowa that his license would be suspended due to the speeding infraction he received on November 23, 2022. The claimant wanted Mr. Kies to help him with an application to obtain a restricted license.

On December 15, 2022, the employer terminated the claimant. Mr. Kies explained that the employer found the two driving infractions above and the claimant's failure to report the final incident as warranting termination.

The following section of the findings of facts displays information necessary to resolve the factfinding issue:

The claimant filed for and received five weekly benefit amount payments of \$478.00 after his separation from employment for a total of \$2,390.00.<sup>2</sup>

On January 12, 2023, Iowa Workforce Development Department sent a notice of factfinding to the parties informing them of an interview on January 18, 2023 at 1:50 p.m. The registered number for the employer was to the employer's headquarters in Memphis. The representative

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<sup>2</sup> The claimant pointed out he received less than this. The administrative law judge points out that the gross amount of benefits is the number that matters because Iowa Workforce Development Department paid the claimant's state and federal taxes for this money.

was prompted to enter in an identification number before being routed to an agent of the employer. Ms. Travers testified that she did not know the registered number for the employer, despite her employer being an agent of the employer for some time. The claimant participated personally. The claimant acknowledged during the factfinding interview that he was terminated due to a speeding ticket.

**REASONING AND CONCLUSIONS OF LAW:**

The administrative law judge concludes the claimant was discharged from employment due to 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. 871-24.32(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. *Casper 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 administrative law judge was a bit confused by the lengthy line of questioning regarding whether the claimant was aware of the employer's policy. To be sure, this line of inquiry can make sense many cases. In this case, the claimant held a position that is directly tied to his ability to drive. The record reflects that the employer requires couriers to have a valid an unrestricted driver's license. This is clearly reasonable given his position. The record also reflects the claimant nevertheless vastly exceeded the posted speed limit for the final incident and exceeded the speed limit in an total loss accident occurring three months before. Are both parties really of the belief that an employer must instruct driving employees that they are not to blatantly violate the law for such behavior to be disqualifying? Maybe so. The administrative law judge does not find that to be an interesting argument because such behavior clearly violates Iowa Code section 96.5(2)b(11)(stating actions that the claimant took within his control to threaten a reasonable licensing requirement is disqualifying conduct).

Additionally, the administrative law judge finds driving 95 miles per hour on the Interstate is undeniably dangerous to the motoring public and the claimant. Of course, the claimant was driving on a road with a lower posted speed limit than even the Interstate. Especially given the fact the claimant acknowledged this speed was maintained for minutes on that day. Speed limits exist because as the speed of the vehicle rises, so too does the chance of serious injury or death. Given these circumstances, the administrative law judge finds this behavior disqualifying under Iowa Code section 96.5(2)b(6) (stating behavior that substantially and unjustifiably endangers coworkers or the public is disqualifying.)

Finally, the administrative law judge points out that even if these obvious theories of disqualification were not present here, the claimant explicitly acknowledged that the employer reasonably expected him to obey all posted speed limits. Despite this acknowledgment, the claimant repeatedly vastly exceeded the posted speed limit, even after receiving a suspension for a total loss of a vehicle. This is also enough to be disqualifying. See Iowa Code section 96.5(2)b (defining misconduct as a “deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees.”)<sup>3</sup>

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:

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<sup>3</sup> The administrative law judge notes that even if the above was not part of the record, the claimant had already answered questions eliciting answers about his knowledge of the relevant policies. While those answers may have been unsatisfactory to the employer, that does not justify repeatedly asking questions that have previously been answered.

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 unrebutted 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.

The claimant filed for and received five weekly benefit amount payments of \$478.00 after his separation from employment for a total of \$2,390.00.

Because the claimant’s separation was disqualifying, benefits were paid to which he 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 he received.

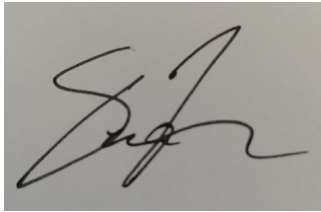
The law also states that an employer is to be charged if “the employer failed to respond timely or adequately to the department’s request for information relating to the payment of benefits. . .” Iowa Code § 96.3(7)(b)(1)(a). In this case, the employer was using a third-party unemployment insurance servicer that was not even aware of the number it had registered for factfinding. The representative called that number and was disconnected because he was unable to figure out the routing of the phones. The administrative law judge finds these circumstances to be dispositive on the issue against the employer. The employer’s fund will be charged due to its inadequate participation at factfinding.



**DECISION:**

The January 19, 2023, (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 \$2,390.00 but is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview due to its own fault. As a result, the employer will be charged for these benefits.



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Sean M. Nelson  
Administrative Law Judge II  
Iowa Department of Inspections & Appeals  
Administrative Hearings Division – UI Appeals Bureau

March 3, 2023  
Decision Dated and Mailed

smn/scn

**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.