

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

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**KAIN W FOX**  
Claimant

**APPEAL 22A-UI-16229-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEYS MARKETING COMPANY**  
Employer

**OC: 07/17/22  
Claimant: Respondent (1)**

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 August 11, 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 September 14, 2022. The claimant participated and testified. The employer participated through District Manager Adam Badgley. No exhibits were admitted into the administrative record.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?

Whether the claimant is overpaid benefits? Whether he is excused from repaying the benefits he 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 as a full-time store manager from October 8, 2019, until he was separated from employment on July 15, 2022, when he was terminated. The claimant reported directly to District Manager Adam Badgley.

The employer has a team member guide which outlines its various policies. The team member guide expressly forbids theft of any personal items. Fountain drinks are allowed for staff to consume, but only when they are on their shift. The store does not have a policy expressly forbidding a store manager from ordering exotic alcohol to the store and then buying that item at a 10% markup from wholesale. It was a practice that was mentioned during the employer's store manager electronic chat conversations.

In early February 2022, the claimant made plans to order two exotic bottles of liquor at wholesale to the store and buy them at a 10% markup.

On February 24, 2022, the claimant accidentally only purchased one of the bottles. This purchase was clearly reflected on the claimant's bank statement for February 24, 2022.

On February 28, 2022, the claimant picked up both bottles of liquor and two fountain cups of ice at 12:23 p.m.

On March 9, 2022, the claimant realized his error regarding the other bottle and made that purchase. This purchase is reflected on the claimant's bank statement.

In late June or early July 2022, Mr. Badgley received a tip from an assistant manager that the claimant had stolen two bottles of liquor and two fountain drinks from the store during his shift beginning from 11:15 a.m. to 12:00 p.m. on February 28, 2022. In the weeks preceding the claimant's termination, Mr. Badgley brought this allegation to the employer's asset protection department. An asset protection officer searched that time frame for about an hour on the video camera recordings for that day. Asset protection was unable to find the incident. Mr. Badgley personally continued to search the video recording and expanded the search beyond the period given in the tip for an additional three hours. Mr. Badgley saw the claimant grab two liquor bottles from the store and two 32 once fountain drinks.

At 10:00 a.m. on July 15, 2022, Mr. Badgley terminated the claimant for the incident occurring on February 28, 2022. The claimant offered to show Mr. Badgley on the video that he did not steal the items. At 10:02 a.m., the claimant sent text messages to Mr. Badgley showing him his bank statements reflecting he purchased the bottles on the dates specified above. Mr. Badgley acknowledged receiving this information. Nevertheless, Mr. Badgley did not change his mind because he could not find where the claimant made the purchase on the video cameras.

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

The claimant filed for and received three full weekly benefit payments of \$593.00 for the weeks ending July 30, 2022, August 6, 2022 and August 13, 2022 for a total of \$1779.00.

On August 4, 2022, Iowa Workforce Development Department sent a notice of fact finding to the parties informing them of a factfinding interview on August 10, 2022 at 10:20 a.m. The employer's third-party unemployment servicer was listed as the number to call. The representative called and the employer's servicer did not answer the call. The claimant participated personally.

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

For the reasons that follow, the administrative law judge concludes the employer has not met its burden to show the claimant engaged in work-related misconduct. Since the claimant is entitled to benefits, the overpayment issue is moot.

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).

This administrative law judge interprets the law to be used to be based on when the separation that could disqualify the claimant took place. In this case, the claimant's separation occurred after July 1, 2022, so the new law applies to this case.

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 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 even 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 administrative law judge notes that he does not construe this list to be one that is all inclusive, but rather to codify existing common law principles regarding disqualifying misconduct into a non-inclusive list.

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).

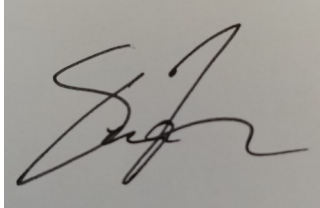
The administrative law judge finds the employer has failed to meet its burden. It is true that theft from an employer is generally disqualifying misconduct. *Ringland Johnson, Inc. v. Hunecke*, 585 N.W.2d 269, 272 (Iowa 1998). In *Ringland*, the Court found a single attempted theft to be misconduct as a matter of law. The problem for the employer here is that the record does not establish the claimant stole the items. Mr. Badgley acknowledges the claimant provided bank statements on the day of his termination. This information was provided within minutes of the allegation. Mr. Badgley testified he did not change his decision because he could not verify the transactions in the store. This decision does not weigh in on whether that was a wise business decision, but finds these circumstances fundamentally undermines the employer's theory of disqualifying conduct that the claimant took these items with the specific intent to deprive the store of its property under Iowa Code section 96.5(2)d(13). Mr. Badgley contends the fountain drinks should be considered as theft of items. The administrative law judge disagrees. The record establishes that at the very least there was an established practice of exempting ice and a policy exemption for employees taking fountain drinks during their shift. At a minimum, the claimant's purchase of much more expensive items in concert with the fountain drinks undermines the employer's theory this shows an intent to deprive the store of property with the knowledge this was impermissible.

Mr. Badgley then raised a post hoc rationalization for terminating the claimant. Mr. Badgley said he should have been terminated for ordering alcohol at wholesale and purchasing it with a 10% markup. The employer must present a case regarding its contemporaneous motivations for discharge; it is not sufficient to come up with one well after the fact. Even if it was, the administrative law judge is persuaded by the claimant's testimony that this practice existed and

was known by Mr. Badgley. Such a circumstance would undermine the employer's case regarding a violation of a known reasonable and uniformly enforced rule. See Iowa Code section 96.5(2)d(2). Benefits are granted, provided the claimant is otherwise eligible.

**DECISION:**

The August 11, 2022, (reference 01) unemployment insurance decision is AFFIRMED. The employer has not met its burden to show the claimant was discharged for work-related misconduct. Benefits are granted, provided the claimant is otherwise eligible.

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 II  
Iowa Department of Inspections & Appeals  
Administrative Hearings Division – UI Appeals Bureau

October 6, 2022  
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](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 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.