

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

TYLER J. MCCLAIN
Claimant

AMAZON.COM SERVICES INC.
Employer

APPEAL 23A-UI-10349-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 07/24/22
Claimant: Respondent (2)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

On November 2, 2023, the employer/appellant filed an appeal from the October 24, 2023, (reference 07) unemployment insurance decision that allowed benefits based on claimant being dismissed on September 2, 2023. The Iowa Workforce Development representative determined there was no evidence of willful or deliberate misconduct. A telephone hearing was scheduled to be held on November 15, 2023. The hearing was postponed due to exhibit issues. The parties were properly notified about the rescheduled hearing. A telephone hearing was held on December 5, 2023. Claimant participated. Employer participated through hearing representative Frankie Patterson. Human Resources Business Partner, Miraldo Michel, testified on behalf of the employer. Employer's Exhibits 1, 2, 3, 4, and 5 were admitted into the record. Administrative notice was taken of claimant's unemployment insurance benefits including DBRO.

ISSUES:

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
- II. Should claimant repay benefits?
- III. Should the employer be charged due to employer participation in fact finding?
- IV. Is the claimant overpaid benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on October 1, 2022. Claimant worked as a full-time fulfillment associate. Claimant began work at 7:00 a.m. Claimant's break schedule gave him one unpaid break from 10:00 a.m. until 10:30 a.m. and a paid break from 2:00 p.m. until 2:30 p.m. At the time

of the separation claimant was on light duty due to an injury that occurred outside of work. The employer accommodated claimant's light duty requirement and assigned him as trash monitor in the break room.

As part of claimant's work restrictions, he is limited to working 40 hours a week and is prohibited from working overtime. In April the employer mistakenly changed claimant's schedule to a six day schedule that required him to work overtime. When claimant did not show up for the overtime the employer considered it unauthorized leave and discharged claimant. Claimant appealed the determination due to the system error and claimant was returned to his job. When claimant was mistakenly discharged from the employer's system it impacted claimant's benefits. Claimant attempted to fix the mistake and was having problems coordinating between the employer and the third-party administrators administering his health insurance, life insurance and 401k benefits.

Claimant attempted to fix these problems while he was clocked in working for the employer. Claimant sat in the breakroom while performing work as the trash monitor and attempted to call the third-party administrators. Claimant did not have privacy because other employees were in the breakroom while claimant was attempting to sort out the issues with his benefits. Claimant asked permission from the employer to go to his car to call the third-party administrators. Claimant was given permission to leave the premises and go to his car to conduct the calls.

On August 20, 2023, claimant clocked in for work. At 7:38 a.m. claimant left the building and returned at 7:53 am. Claimant left to call the health insurance and 401k administrators. Claimant again left at 1:28 p.m. and returned at 2:41 p.m. Claimant left for a phone call with his lawyer regarding his medical issues he was having in relation to a car accident he sustained outside of work.

On August 21, 2023, claimant clocked in for work. At 7:43 am claimant left the premises and returned at 8:03 a.m. Claimant called to speak with the 401k administrator. Claimant was clocked in and left at 11:50 a.m. and returned at 12:04 p.m. Claimant left the premises to call his car insurance company.

On August 22, 2023, claimant clocked in. At 6:56 a.m. claimant left the building and returned at 7:23 a.m. Claimant called the 401k administrator. Claimant then left at 8:42 a.m. and returned at 9:37 a.m. Claimant left the premises to speak with his lawyer regarding his car accident case. Claimant left the premises clocked in at 11:53 a.m. and returned at 12:24 p.m. Claimant left the premises to call his doctor regarding his injuries he sustained in a car accident. The car accident is not connected to his employment.

On August 23, 2023 claimant arrived at work and clocked in. At 6:56 a.m. claimant left the premises and returned at 7:30 a.m. Claimant left to call the 401k and life insurance administrators. At 10:10 a.m. claimant left the premises and returned at 11:53 a.m. Claimant was clocked in and had a phone call with his grandfather.

The employer has a time keeping policy. The employer also has a policy that states: "The following work conduct infractions are regarded as extremely serious, and termination of employment may result in following one infractions: theft or inappropriate removal or possession of property." (Exhibit 5). Claimant was aware of the employer's policies. (Exhibit 3).

The employer discovered claimant left the building during the workdays of August 20-23rd. Employer discharged Claimant on September 1, 2023 for falsifying his timecard when he did not clock out to take the phone calls. Claimant did not have any prior verbal or written warnings for violating the employer's time keeping policies.

Claimant filed a claim for benefits with an effective date of October 01, 2023. (DBRO). Claimant's gross weekly benefit amount is \$417.00. (DBRO). Claimant began receiving benefits October 15, 2023 and has received benefits each week through December 2, 2023. (DBRO). Claimant has received seven weeks of benefits worth a gross total of \$2,919.00. (DBRO).

The employer did not participate in the fact-finding interview with Iowa Workforce Development. The employer received the notice. (Exhibit 1). The employer provided a statement at the time of the hearing but there was no evidence provided the employer provided it to IWD as directed on the Notice of Fact-Finding interview notice. (Exhibit 4). The address on the employer's statement is not associated with Iowa Workforce Development.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

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)d provides:

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:

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:

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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). 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). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience I do find claimant's testimony credible that the employer gave him permission to make phone calls regarding fixing the issues surrounding his benefits being changed after he was mistakenly discharged in the employer's system. I do not find it credible the employer gave claimant blanket approval to leave the premises to have personal phone calls with his attorney, doctor, and grandfather regarding things not connected to his employment.

When the claimant left the premises to conduct phone calls with his attorney, doctor, and grandfather this was for personal reasons and was not connected to work. Even though claimant was on light duty and acting as the trash monitor, this does not allow him to conduct personal business on company time. Claimant's failure to clock out for the phone calls with his attorney, doctor and grandfather during the workday is time theft from the employer. 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. In this case, the claimant deliberately disregarded the employer's interest and knowingly violated a company policy. The claimant engaged in disqualifying misconduct even without previous warning. Benefits are denied.

Because claimant's separation was disqualifying, benefits were paid to him which he was not entitled. Next it must be determined if the employer participated in the fact finding interview and if claimant is required to repay the benefits.

Iowa Code section 96.3(7)a-b, as amended in 2008, provides, in pertinent part :

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. If the department determines that an employer's failure to respond timely or adequately was due to insufficient notification from the department, the employer's account shall not be charged for the overpayment.

(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:

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.

Claimant receive \$2,919.99 in benefits from October 15, 2023, through December 2, 2023. The employer did not participate in the fact-finding interview with Iowa Workforce Development. The evidence establishes the employer was aware of the interview however they did not participate in the phone call or submit a written statement to the fact finder. Since the employer did not participate in the fact-finding interview, claimant is not required to repay these benefits and the employer's account shall be charged.

DECISION:

The October 24, 2023, reference 07, decision is REVERSED. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Claimant has been overpaid unemployed insurance benefits in the amount of \$2,919.00 beginning October 15, 2023, through December 2, 2023. Claimant is not obligated to repay these benefits since the employer did not participate in the fact-finding interview. The employer's account shall be charged.



Carly Smith
Administrative Law Judge

December 6, 2023
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:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
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:

**Iowa Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
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.