IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BRETT A SCHUTT Claimant **IA VETERANS HOME – MARSHALLTOWN** Employer	**APPEAL 24A-UI-03371-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/03/24** **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, IA Veterans Home - Marshalltown, filed an appeal from the March 21, 2024, (reference 01) unemployment insurance decision granted benefits based upon the determination the claimant was discharged on February 29, 2024, but misconduct was not shown. The parties were properly notified of the hearing. A telephone hearing was held on April 19, 2024, at 10:00 a.m. The claimant participated and testified. The employer participated through Bureau Chief of Human Resources Melissa Sienknecht. Official notice was taken of the agency records.

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?

FINDINGS OF FACT:

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

The claimant worked as a full-time public service supervisor from May 2023, until he was separated from employment on February 29, 2024, when he was terminated.

The employer is an agency of the State of Iowa. The State of Iowa has a sexual harassment policy and an affirmative action / equal opportunity policy, which prohibit discrimination based on sex. The sexual harassment policy specifically prohibits sexual advances and other remarks of a sexual nature. The employer also has a workplace violence policy. The claimant most recently acknowledged receipt of these policies. He was trained on the sexual harassment policy annually during his employment.

The claimant had previously worked as an assistant food service director at the employer's facility from May 2, 2016, to June 2022. During this period, the claimant supervised a female employee, who in turn had supervisory functions. This complainant[1] would later file a sexual harassment complaint against him. They also had conversations and even fished together at a pond with their respective families. She previously lived out on the edge of town.

In 2022, while the claimant was still supervising the complainant, she told him, "I would cheat on my husband with you," in her office. The claimant was uncomfortable with the conversation, but they had to both go to a leadership meeting, and he did not want to get someone, he considered at the time to be a close friend, in trouble by reporting this behavior. He also knew her husband.

A few days later, the complainant approached the claimant in his office. The complainant did not have a bra on and caressed her breasts through her shirt to seduce him. The claimant did not report this incident either for the same rationale. He hoped the complainant would understand based on him ignoring her advances, and she did because this was the last time something like this occurred. Nevertheless, she continued to confide in the claimant about her frustrations with her marriage and her use of various illegal drugs in the final months of his employment.

In the late summer and early fall, the claimant moved into the role he would hold before his termination, public service supervisor. The claimant and the complainant had different opinions about her treatment of three different employees in three wholly separate personnel decisions. In all three cases, the claimant felt like she dismissed valid concerns of these employees and he felt as a member of the Morale Committee that he needed to provide them with a better work environment.

On September 25, 2023, the complainant moved to a new home to separate from her husband. This home was very close to the employer's premises.

On October 28, 2023, the complainant was working with a fellow supervisor on the night shift. She left early exclaiming, "I can't take it anymore."

On October 30, 2023, the claimant discussed what occurred on October 28, 2023, and discussed an investigation of an employee. They did not agree on what the resolution should be. The complainant said to the claimant, "Stop micromanaging me." The claimant said, "This is not how we treat people." In this conversation, the claimant confronted her about her use of illegal drugs and asked if that had played a part in her behavior recently. He noted that the frequency of her drug use was picking up and he was concerned.

On October 31, 2023, the complainant filed a sexual harassment complaint against the claimant. The claimant was placed on paid administrative leave, pending the results of the investigation. She alleged the following things.

- First, the complainant alleged the claimant had followed her in his car while she was driving home several times.
- Second, the complainant alleged the claimant requested to meet at a local park, Darwin L. Judge Park.
- Third, the claimant threatened to show pictures to the complainant's husband. Her complaint and the DAS report did not ever specify what these were pictures of, but the employer assumed they were pictures of her. Perhaps compromising ones.

[1] She is described in this way to preserve her anonymity.

- Fourth, the complainant alleged that he walked into her home on September 27, 2023, mere days after she had moved in there. No other detail was reported of this incident.
- Fifth, the complainant claimed that she told the claimant she would file a sexual harassment complaint. In response, she alleged the claimant essentially dared her to do so with the inference that management liked him, and nothing would be done.

On November 1, 2023, the claimant filed a formal complaint of sexual harassment. This complaint was transferred to the Iowa Department of Administrative Services ("DAS") to be investigated.

On February 22, 2024, a DAS investigator interviewed the claimant about the allegations. He denied all of them. He denied having any pictures and asked what the pictures were of.

DAS subsequently presented the findings of the investigation to the employer recommending termination of employment as a violation of its sexual harassment, equal opportunity / affirmative action, and workplace violence policies in a 31-page report. The employer did not provide this report. Instead, it read specific findings from it, which are summarized earlier in these findings of fact. Based on this recommendation, Ms. Sienknech and Mr. Wilson decided to terminate the claimant.

On February 28, 2024, the employer conducted a hearing regarding the termination of the claimant's employment. During that hearing, the claimant brought up the following things in response:

- First, the claimant recounted the times this woman had directed sexual behavior and statements to him, as described above in the findings of fact.
- Second, the claimant pointed out that there had been other individuals who engaged in confirmed incidents of sexual harassment that had been given five-day suspensions.
- Third, the claimant alleged that he heard from two subordinates that Ms. Sienknecht had been involved in spreading a rumor in approximately September 2022 about a woman sleeping with the commandant. These concerns had not been reported to management, but he believed the employer had reason to know they occurred.
- Fourth, the claimant alleged that Mr. Wilson made a comment about a woman's breasts in the preceding year in front of two employees. These allegations had not been reported to management by the claimant or anyone else, but he believed it should have been reasonably known.

On February 29, 2024, the claimant was terminated. He was never interviewed regarding allegations that he made against Ms. Sienknecht or Mr. Wilson. No investigation was conducted regarding either allegation.

Comparators
On March 26, 2023, an employee touched female Iowa Prison Industries contract laborers. This caused bruises to form on some of the laborers. This employee received a 5-day suspension for violating the workplace violence policy.

In October 2023, three employees made derisive comments and hand gestures about how a pregnant female employee's genitals would look after giving birth. These individuals also received a 5-day suspension upon confirmation of this violation of the sexual harassment policy.

The employer contends that these are not comparators because the claimant was a supervisory employee, and so the application of these policies is weightier. It notes that it has similarly

terminated a leadership employee due to egregious sexual harassment, but it declined to provide specifics due to confidentiality concerns.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the employer has not met its burden of proof that it terminated the claimant on February 29, 2024, for misconduct. Furthermore, even if it could, it cannot show that it applied the underlying rule in a reasonable and uniform way. The overpayment issue need not be analyzed because the claimant is entitled to benefits.

The decision in this case rests, at least in part, on the credibility of the witnesses. 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*.

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the claimant's version of events to be more credible than the employer's recollection of those events.

The claimant provided a plausible explanation to support his allegations that the complainant filed a false report of sexual harassment against him. He provided credible testimony that even if the behavior had occurred, it may have been welcomed. Finally, he provided comparators that the employer confirmed or was unwilling to provide evidence to discount.

The employer, on the other hand, relied on the findings of a report made by a third-party. It did not provide that report to the Appeals Bureau or the claimant in anticipation of its own appeal. The report lacks detail as to the intent and even the basic circumstances of otherwise significant events.

For instance, the complainant alleges the claimant walked into her house on September 27, 2023. No explanation is given in terms of how he got in. It is unclear whether he broke into the house and even if there was any interaction between the two people. Furthermore, it is not clear whether the investigators knew which house she was referring to, as this is close in time to when she moved.

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.

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 if 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. *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).

I find the report written by DAS, as relayed perhaps partially, by Sienknecht does not by its plain terms show a violation of the sexual harassment policy, the equal opportunity / affirmative action policy, or the workplace violence policy.

For there to be a violation of either the sexual harassment or equal opportunity policies, the claimant must have engaged in these various behaviors due to her sex either because of sexual interest or sexual antipathy. To be sure, several of the allegations allude to sexual interest, such as following her while she is driving home or arriving at her home. But without further context, it cannot be concluded that this was due to sexual interest. Notably, none of the allegations allege he touched her or said anything to her of a sexual nature. In one allegation, the claimant is accused of showing pictures to the husband, but Ms. Sienknecht confirmed that the investigation never even determined what these pictures were, let alone whether they were sexual in nature. As to the claimant requesting he meet her in the park, this could be consistent with being a confidant. Furthermore, the claimant explained that the complainant lived incredibly close to the employer's premises shortly before he was terminated, so it could have been both of them coincidentally taking the same route. The claimant also credibly denies any of these incidents occurred.

The claimant also raised a powerful inference that even if these vague allegations occurred and were based on sexual desire that the claimant may have welcomed them. I do acknowledge that the claimant's description of two incidents of her coming on to him were quite stale by the time these allegations surfaced that led to his termination. Nevertheless, it is the employer's burden to show the behavior was unwelcome and not the other way around.

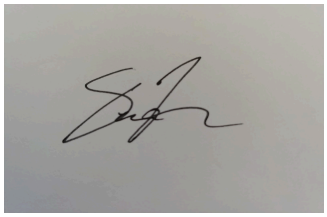
As to the workplace violence policy, hardly any of the allegations reference behavior in the workplace and none of them refer to acts of violence on the part of the claimant against the complainant or anyone else.

Finally, the claimant brought forth comparator evidence tending to show that even if all elements had been met, that other employees were not disciplined as harshly as he was under all of the policies applicable to this case. I acknowledge Ms. Sienknecht's allegation that since the claimant was in management he was perhaps held to a stricter application. Yet, she did not provide details regarding when she alleged a leadership employee was terminated for what she characterized as "egregious sexual harassment." Furthermore, the claimant raises an inference that investigations were not conducted at all in the wake of reasonably known incidents

allegedly involving management. For all these reasons, the employer cannot show that the claimant was terminated on February 29, 2024, due to a knowing violation of a uniform and reasonably enforced rule. Benefits are granted, provided he is otherwise eligible for benefits.

DECISION:

The March 21, 2024, (reference 01) unemployment insurance decision is AFFIRMED. The employer has not met its burden to show the claimant was discharged on February 29, 2024, due to a knowing violation of a reasonable and uniformly enforced rule. Benefits are granted, provided he is eligible for benefits. The overpayment issue need not be analyzed because he is entitled to benefits.



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

April 23, 2024
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
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:

Employment Appeal Board
6200 Park Avenue Suite 100
Des Moines, Iowa 50321
Fax: (515)281-7191
Online: 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.