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

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| **MACKENZIE R HUMMEL** | : | |
| | : | **HEARING NUMBER:** 17BUI-03297 |
| Claimant | : | |
| and | : | **EMPLOYMENT APPEAL BOARD DECISION** |
| **THE UNIVERSITY OF IOWA** | : | |
| Employer | | |

## N O T I C E

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

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

**SECTION:** 96.5-2-A, 96.5-1

## D E C I S I O N

**UNEMPLOYMENT BENEFITS ARE DENIED**

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

**FINDINGS OF FACT:**

MacKenzie Hummel (Claimant) worked for the University of Iowa (Employer) as a full time animal caretaker from November 26, 2012 until February 23, 2017.

On February 23, 2017 the Claimant resigned for reasons which the Administrative Law Judge found were not good cause attributable to the Employer. The Claimant did not appeal that determination and so we do not address the quit. Disqualification for quitting stands because it was not appealed. The quit was to be effective on March 4, 2017.

Several hours after the Claimant quit on February 23 it came to the Employer's attention that Claimant had previously posted a picture of a research animal on social media. The Employer has a policy in place which prohibits the release of confidential information and another policy

which prohibits the personal use of images captured in the research labs.



The Employer fired the Claimant on February 23, prior to the end of her notice period, because of the image she had posted on social media.

The Claimant filed a new claim for unemployment insurance benefits with an effective date of February 26, 2017. The claimant filed for and received a total of $2,474.00 in unemployment insurance benefits for the weeks between February 26 and April 15, 2017.

The Employer was not able to participate in the fact finding interview regarding the separation on March 15, 2017 because Workforce had double scheduled the person at the Employer responsible for such matters. Workforce was advised of this but made no accommodation. The fact finder determined the Claimant was qualified for benefits.

**REASONING AND CONCLUSIONS OF LAW:**

*The Week from February 26 Through March 4:*

Iowa Code Section 96.5(2)(a) (2016) provides:

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

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(a):

> *Misconduct* is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in the carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct



precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

The record established that the Employer is a research facility with very clear rules about taking photographs. No exceptions are allowed by the policy. The fact that the Claimant was understandably upset does not excuse her intentional disregard of this policy. We find that the Employer did prove that the Claimant committed misconduct when she posted a photograph of a research animal. She is accordingly disqualified based on a misconduct theory for the one week ending March 4, 2017. Thereafter she remains disqualified for her quit as a result of the Administrative Law Judge's decision which the Claimant did not appeal.

Since the Administrative Law Judge allowed benefits for this week and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
>
> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
>
> b. However, if the decision is subsequently reversed by higher authority:
>
> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid during the week of February 26 through March 4, 2017, but the Claimant will not be required to repay benefits already received for that week. This is because of the double affirmance rule.

*Participation and The Remainder of the Overpayment*

As we have ruled in the past when an Employer fails to participate in the fact finding, but this is because of an error of Iowa Workforce then the fund is charged for the resulting overpayment. Here the Employer was unavailable during the fact finding because the *agency* had double scheduled the Employer. The Employer notified the agency of this and no accommodation was made. We thus do not fault the Employer for the failure to participate.

The Claimant cannot be charged. Unless fraud or misrepresentation is shown, "benefits shall not

be recovered" from a claimant if the employer does not participate in fact finding. We take the provision at its literal word. Finding no fraud we cannot charge the overpayment to the Claimant.

As for the Employer the Code 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). Here we cannot say that benefits were paid because the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. The Employer thus cannot be charged for the overpayment. Since neither party is to be charged then the overpayment is absorbed by the balancing fund – as was the case between 2008 and 2013.

*Explanation:* The upshot of today's decision is complicated in process but simple in result. The end result of our decision is to relieve both the Employer and the Claimant of the obligation of paying for the overpayment. The overpayment is being charged to the balancing fund and not to either party.

As far as benefits the Claimant remains disqualified for her quit because she never appealed that determination. On a termination theory she is disqualified by our decision for the one week from February 26 through March 4, but since she already collected for benefits for that week and does not have to pay that amount back she is not monetarily affected by this determination.

**DECISION:** The administrative law judge's decision dated April 21, 2017 is **REVERSED IN PART**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct during her notice period and thus is disqualified for the week ending March 4, 2017 based on this misconduct. She is denied benefits thereafter but not as a result of today's decision. She remains disqualified after March 4, 2017 because the Administrative Law Judge determined that she had voluntarily quit without good cause attributable to the Employer and the Claimant did not appeal that determination to the Board. As a result she continues to be disqualified, based on the Administrative Law Judge's decision, until such time as the Claimant has worked in and was paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(1)"g".

The Board also determines that neither party should be charged for the overpayment resulting from the Employer's failure to participate since that failure is attributable to the agency.

No remand for determination of overpayment need be made since the balancing fund will be charged with the entire overpayment in this case.

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Kim D. Schmett

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James M. Strohman

RAA/ss