BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
Website: eab.iowa.gov

DAVID BERNAL

Claimant

and

CITY OF DES MOINES PAYROLL

Employer

APPEAL NUMBER: 23B-UI-08046
ALJ HEARING NUMBER: 23A-UI-08046

EMPLOYMENT APPEAL BOARD DECISION

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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

We write additionally to address some of the arguments made on appeal.

In general, "[t]he disqualification statute does not mandate misconduct be committed on the employer's time or property…." *Galey v. EAB*, No. 17-1199 (Iowa App. 7/18/2018). Indeed one of the specified illustrative examples of misconduct include lying in the job application – thus encompassing conduct by someone who is not even an employee. Iowa Code §96.5(2)(d)(1). Where an employee commits acts that impair the employee's ability to function on the job this can be misconduct even if the acts do not occur at work or during work hours. *See Cook v. IDJS*, 299 N.W.2d 698, 702 (Iowa 1980)("While he received most of his driving citations during non-work hours and in his personal car, they all bore directly on his ability to work for Hawkeye."). Further, the rule has long been that where an employer has a policy governing off duty

behavior and the employee intentionally violates it, then this may be misconduct. This means that conduct that is contrary to established policies of the employer may be disqualifying even if the conduct is away from work and has no effect on the business. *Kleidosty v. Employment Appeal Board*, 482 N.W.2d 416 (Iowa 1992)(drug offense). In *Kleidosty* there was "a company rule that prohibited 'illegal, immoral, or indecent' conduct by its employees." *Kleidosty* at 417. This was sufficient to impose a disqualification based on a drug offense committed by Mr. Kleidosty. The key in *Kleidosty* is that the employer had provided notice by its policy that off work conduct would be contrary to the employer's policies, and would result in discipline. Here there is little question that the Claimant was on notice that comments of the kind he made on that final day would be forbidden. And besides they were made about a subordinate, while on state time. Even more than with *Kleidosty* the Claimant's behavior was work-connected. This is confirmed, moreover, by the nature of the work in question.

In discussing a correctional officer's job, and disqualification from benefits, the Court of Appeals has observed:

> [The Claimant] could reasonably be expected to maintain the highest standard of conduct and effectively carry out his responsibilities. By the very nature of the employment setting, it would be necessary to require strict compliance with rules and regulations.

Ross v. Iowa State Penitentiary, 376 N.W.2d 642, 644 (Iowa App. 1985); *see also Huntoon v.* IDJS, 275 N.W.2d 445 (Iowa 1979)(disqualification of deputy for taking two trustees to bar on his day off). The highest standards of conduct are thus a known expectation of a law enforcement officer. After 30 years, promotion to Fire Captain, and previous disciplinary action it is no surprise to this Claimant that a Fire Captain has similarly high expectations as part and parcel of the job. We hardly have to tell this Claimant that working as a Fire Captain is not a 9-to-5 punch the time clock job. The Employer's reasonable expectations of its Fire Captains are thus a good deal different than its expectations of its office staff. The Claimant's infractions are exactly the sort of thing the public, and therefore the Employer, has a right to expect a Fire Captain <u>not</u> to do. *Ross v. Iowa State Penitentiary*, 376 N.W.2d 642, 644 (Iowa App., 1985)(finding misconduct and noting that with a correctional officer "by the very nature of the employment setting, it would be necessary to require strict compliance with rules and regulations.") *Huntoon v.* IDJS, 275 N.W.2d 445 (Iowa 1979)(disqualification of deputy for taking two trustees to bar on his day off) *accord e.g. Burmeister v. Muscatine County Civil Service Com'n*, 538 N.W.2d 877, 878-79 (Iowa App. 1995)("judgment and discretion" required and "discipline must be strictly enforced"); *City of Fort Dodge v. Civil Service Com'n of the City of Fort Dodge*, 562 N.W.2d 438, 440 (Iowa App. 1997)(same for police officer); *Eilers v. Civil Serv. Comm'n*, 544 N.W.2d 463, 466 (Iowa App.1995)(same); *Sieg v. Civil Serv. Comm'n of the City of W. Des Moines*, 342 N.W.2d 824, 829 (Iowa 1983) ("Police departments are akin to paramilitary organizations, and discipline must be strictly enforced."); *Milligan v. Ottumwa Civil Service*, No. 18-1810 (Iowa App. 11/6/2019) (Affirming termination where officer lies in internal investigation). Clearly, the Claimant's remark was job related. If it were a private joke, it should have been kept private. Once the Claimant makes a public statement, about a co-worker, concerning a work-related switching of shifts, while on public time, this is work-related. The statement had sexual content. And since it referred to a fascination with pornography that content would be seen by a reasonable person as derogatory. *C.f.* Iowa Code s96.5(2)(d)(12) (non-limiting example of misconduct includes "Conduct that is libelous or slanderous toward an employer or an employee of the employer…"). Indeed, it hardly seems necessary to observe that any person in authority

commenting on the sexual conduct of a subordinate is inappropriate. Even more so for a Fire Captain on work time. As set out by the Administrative Law Judge the Claimant's disregard of the Employer's work rules, after being warned, was a deliberate disregard of the standard of behavior the Employer had a right to expect of the Claimant.

Finally, we note for the edification of the parties that "[a] finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States." Iowa Code §96.6(4). This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have **no effect** otherwise. See also Iowa Code §96.11(6)(b)(3)("Information obtained from an employing unit or individual in the course of administering this chapter and an initial determination made by a representative of the department under section 96.6, subsection 2, as to benefit rights of an individual shall not be used in any action or proceeding, except in a contested case proceeding or judicial review under chapter 17A…)

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RRA/fnv
DATED AND MAILED: OCT 31 2023

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