

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

MCKENNA M. RICH
Claimant

IOWA STATE UNIVERSITY
Employer

APPEAL 23A-UI-11762-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/29/23
Claimant: Respondent (2)**

Iowa Code §96.5(2)a-Discharge/Misconduct
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 December 14, 2023, the employer/appellant filed an appeal from the December 4, 2023, (reference 01) unemployment insurance decision that allowed benefit based on claimant being dismissed on October 9, 2023. The Iowa Workforce Development representative determined there was no evidence of willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on January 5, 2024. Claimant participated. Union Steward, Kami Feld, represented claimant and also testified on behalf of claimant. Employer participated through hearing representative, Kii Elliott. Unemployment Insurance Consultatant, Tammy Morrow, and Employee and Labor Relations Specialist, Anna Rella, testified on behalf of the employer. Employer's exhibit 1 was admitted into the record. Administrative notice was taken of exhibit 2. Administrative notice was taken of claimant's unemployment insurance benefits records 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 December 17, 2021. Claimant last worked as a full-time police officer. Claimant was placed on administrative leave on October 9, 2023. Claimant was separated from employment on November 2, 2023, when she was discharged.

The employer has the following policies:

41.3 Patrol operations

- “41.3.5(a). “Officers shall not become involved in a pursuit initiated by another agency unless all of the following are present: assistance is requested by the pursuing agency, supervisor approval has been obtained, and an emergency exists which dictates immediate intervention.”
- 41.3.2.3(h). “When approaching intersections, especially those controlled by signs, signals or other traffic control devices, the pursuing officer shall reduce speed and prepared to stop, enter the intersection at a reduced speed, ensure that all operators of cross street vehicles are aware of his or her presence, and resume pursuit only when it is safe to do so.”
- 41.3.2.4(c). “No more than one secondary unit shall become actively involved in a pursuit unless specifically directed otherwise by supervisory personnel. The involvement of more than two patrol vehicles may add to the hazards of the pursuit.”
- 41.3.3(b). “An officer shall not cause deliberate physical contact between the patrol vehicle and the suspect’s vehicle. No attempt to force another vehicle off the road or into any obstacle shall be made except during extreme situation in which the use of deadly force is justified and necessary.”

41.4 Body and Vehicle Cameras.

- 41.4.1.f. “When available, body worn cameras shall be synchronized with vehicle audio-video recordings systems.”
- 41.4.2.b.1. “Officers shall activate the Body Worn Camera (BWC) when responding to an emergent call for service or at the initiation of any other law enforcement or investigative encounter between a police officer and a member of the public, except that when an immediate threat to the officer’s life makes activating the BWC impossible or dangerous. In these instance the officer shall activate the BWC at the first reasonable opportunity to do so.

Claimant was aware of these policies.

On April 24, 2023, claimant was involved in a vehicle pursuit. The employer determined claimant violated departmental directives and state law by not operating her patrol vehicle with due regard to public safety. This was primarily due to claimant traveling at high rates of speed. Claimant was required to meet with the lead driving instructor of the Iowa Law Enforcement Academy to discuss the state code and ISU directives that were violated. Claimant was not informed that her job was in jeopardy if she violated these policies again.

Claimant also received a citizen complaint stemming from a search of the individual on September 23, 2023. The investigation determined claimant conducted an unconstitutional detention of the individual and coerced them to produce evidence against themselves by threatening an unconstitutional search of the person and their effects. The investigation was still pending when the final incident occurred that lead to claimant’s separation.

On October 9, 2023, claimant was performing her duties as an officer when she heard on the radio there was a vehicle pursuit involving wrong way vehicle driving on Highway 30. The pursuit involved a Story County Deputy Massaro and a suspect and they were heading in the direction of Boone. Claimant's Captain radioed and instructed all ISU officers not to assist in the pursuit unless requested. Dispatch asked if she was in the area and claimant reported she was. Claimant informed dispatch that she was going to stage (wait) at the corner of the streets of University and Lincoln in the event the pursuit started going into Ames into a high volume of citizens.

On her way to stage she observes the suspect's vehicle driving recklessly and the Deputy Massaro pursuing the suspect. Claimant contacted Story County dispatch to see if the deputy needed assistance since she was behind the pursuit. Claimant heard the Deputy get on the radio and request another car to assist him in blocking in the suspect. Claimant put on her lights and began assisting the deputy. Story County Deputy Kester also arrived to assist, however, claimant's patrol vehicle was in between the two deputies.

During the pursuit the suspect conducted a U-turn and the deputy and claimant followed. Deputy Massaro attempted to execute a PIT maneuver but was unsuccessful. This caused the suspect's car and Deputy Massaro's car to stop in the intersection. Claimant approached the vehicles at a high rate of speed and had to switch lanes to the outside lane to avoid the vehicles. When claimant did this she was unable to stop and collided with an uninvolved vehicle.

Deputy Kester was behind claimant and activated his air horn to attempt to get her to move so he could get past and assist Deputy Massaro. Claimant interpreted the horn to mean that she needed to continue with the pursuit. Claimant left the vehicle she struck and did not provide instructions to the uninvolved vehicle.

Claimant continued on with the pursuit and was between Deputy Massaro and Deputy Kester. Deputy Massaro attempted another PIT maneuver and it was unsuccessful. Deputy Massaro's vehicle left the roadway and claimant was leading the pursuit. The pursuit was heading towards Campus Ave. and was traveling at 55 mph. The speed limit in that area was 25 mph. The suspect ran a stop sign and claimant followed the suspect without stopping. Claimant tapped her brake and decreased her speed down to 53 mph.

The suspect stopped his vehicle for a pedestrian at another intersection. When the suspect did this claimant had to swerve her vehicle to avoid hitting the subject. The subject's vehicle continued on. The subject then continued through another intersection without stopping. Claimant followed the subject through the intersection and in the process claimant hit another uninvolved vehicle. This caused the uninvolved vehicle to hit a nearby apartment building. At that time claimant removed herself from the pursuit. Claimant's participation in the pursuit lasted approximately three minutes.

The employer conducted an investigation and determined claimant violated direct orders not to engage in the pursuit, exercised extreme lack of judgment, acting recklessly without due regard for public safety by way of striking two uninvolved vehicles during the pursuit. It was also determined claimant's BWC did not activate when she activated her vehicle's emergency equipment. Claimant's BWC was not properly synchronized with the system.

Claimant was discharged for violating employer's 41.3 and 41.4 policies when she violated the direct orders, proceeded through the intersections with a red light before activating her lights and sirens, not checking intersections before entering them, forcing vehicles from their lanes,

traveling at high rates of speed without slowing to make sure intersections were clear, and colliding with two uninvolved vehicles.

Claimant filed for benefits with an effective date of October 29, 2023. Claimant's gross weekly benefit amount is \$582.00. Claimant began receiving benefits October 29, 2023. Claimant has received four weeks of benefits worth a gross total of \$2,328.00.

The employer participated in the fact-finding interview through Ms. Rella's participation and through submitting exhibit 1.

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.

Iowa Code section 96.5(2)a 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:

a. The disqualification shall continue 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.

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.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the

employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy. 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee.

In this case claimant believed that she was asked to assist in the vehicle pursuit with Deputy Massaro. According to both parties the Captain instructed all ISU officers not to assist in the pursuit unless requested. It is reasonable to conclude that claimant had permission to engage if the other agency requested it. Deputy Massaro did request assistance.

However, claimant was aware that she needed to follow the employer's policies on speeding during pursuits. This is to protect claimant and the general public. Claimant received corrective counselling and additional training with the lead driving instructor of the Iowa Law Enforcement academy for this exact issue. The employer is entitled to establish reasonable work rules and expect employees to abide by them. Claimant's behavior in speeding, entering intersections without ensuring all cross street vehicles were clear of the intersection, and entering an intersection without lights and sirens put the general public in harms way on October 9, 2023. The fact that claimant hit a car when she entered the intersection and it hit a nearby building demonstrates that the general public was put in danger due to claimant's actions. Claimant's decision not to slow down or stop were intentional and deliberate actions.

The employer has presented substantial and credible evidence that claimant was aware of the policies and received corrective training to address the issues. Despite the additional trainings claimant continued to engage in similar behavior. This is disqualifying misconduct. Benefits are denied.

Because claimant's separation is disqualifying, benefits were paid to claimant which claimant is not entitled. Claimant received \$2,328.00 in unemployment benefits beginning October 29, 2023 through December 9, 2023. Next it must be determined if the employer participated in the fact-finding interview and if claimant must 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 un rebutted 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.

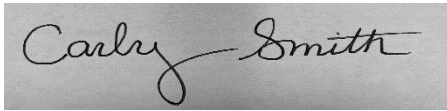
This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The employer did participate in the fact-finding interview with Iowa Workforce Development when they participated in the phone call. Since the employer did participate, claimant is required to repay the \$2,328.00 in unemployment benefits she received from October 29, 2023, through December 9, 2023. The employer's account shall not be charged.

DECISION:

The December 4, 2023, (reference 01) unemployment insurance decision is REVERSED. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Claimant is overpaid \$2,328.00 in unemployment benefits from October 29, 2023, through December 9, 2023. The employer did participate in the fact-finding interview. As a result, claimant is required to repay the benefits.

A handwritten signature in black ink that reads "Carly Smith". The signature is written in a cursive, flowing style. The "C" is large and loops around the "arly". The "Smith" is written in a similar cursive style. The signature is centered horizontally within a rectangular box.

Carly Smith
Administrative Law Judge

January 10, 2024
Decision Dated and Mailed

CS/jkb

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.