

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

KIMBERLY A BROWNING
Claimant

APPEAL 23A-UI-10297-SN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAVERLY HEALTH CENTER
Employer

**OC: 10/08/23
Claimant: Respondent (2)**

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, Waverly Health Center, filed an appeal from the October 24, 2023, (reference 01) unemployment insurance decision that granted benefits effective September 25, 2023, based upon the conclusion she was discharged, but misconduct was not shown. The parties were properly notified of the hearing. A telephone hearing was held on November 20, 2023 at 1:00 p.m. The claimant did not participate. The employer participated through Human Resources Director Angie Tye, Ambulance Manager Nick Nedza, and Human Resources Specialist Megan Friedhof. 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 emergency medical technician from July 6, 2021, until she was separated from employment on September 28, 2023, when he was terminated. The claimant reported directly to Ambulance Manager Nick Nedza.

The employer has an anti-harassment, discrimination, and retaliation policy. The sexual harassment policy prohibits "offensive jokes and offensive language, threats, comments or suggestions of a sexual nature or demeaning comments of any type directed at a person because of his/her sex." The claimant acknowledged receipt of this policy on July 20, 2021.

In late August 2023, a coworker of the claimant's submitted a complaint that a coworker said she had been sitting on a chair because he "smelled salmon." This was a reference to this coworker's genitals.

On September 1, 2023, Mr. Nedza said during the weekly update for the department that statements of a sexual nature were not acceptable.

On September 6, 2023, Mr. Nedza repeated during a meeting that sexual comments were not acceptable.

After these messages, the claimant talked to a coworker about the way she was holding a pencil. She joked that it must be how she holds her boyfriend's genitalia. The claimant also encouraged another employee to take a quiz that asked about sexual preferences. The quiz asked participants if they preferred to make sexual decisions for the couple, if they enjoyed bondage and discipline, dominance and submission, sadism, and masochism roleplay, and finally whether they preferred multiple people at a time such as in an orgy. These coworkers reported these concerns to management.

On September 16, 2023, the coworker of the claimant's brought forth information that the claimant and two other employees had engaged in behavior she believed as defined as sexual harassment under the policy.

On September 25, 2023, Mr. Nedza and Human Resources Specialist Megan Friedhof met with the claimant. When the claimant was asked if there were sexual jokes made among, she and her coworkers, the claimant answered that this was because she was friends with these employees outside of work. The claimant acknowledged that these jokes could make someone feel uncomfortable. When the claimant was asked if she knew about the sex quiz, the claimant said, "Not that I can recall." The claimant claimed that the use of sexual jokes had "slowed down" and "now they are more sporadic" after Mr. Nedza sent a message to all staff about sexually charged language on September 1, 2023.

Later in the day on September 25, 2023, Mr. Nedza, Ms. Friedhof and Ms. Tye met again. Ms. Tye asked the claimant to give examples of some of the jokes she referenced in the meeting earlier that day. The claimant said that she did not recall. When she was asked about the sex quiz, the claimant said that she remembered a coworker sending it out. When she was asked if she asked another employee to take the quiz, the claimant offered that "they all talked about taking it."

On September 28, 2023, the employer completed its investigation. It terminated the claimant and two other employees who had engaged in similar behavior. Specifically, the employer terminated the claimant for engaging in the behavior and not being truthful during the investigation.

The following section of the findings of fact display the findings necessary to resolve the overpayment issue:

The claimant did not receive unemployment insurance benefits after separating from this employer.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. The overpayment issue need not be analyzed because the claimant has not received payment after the separation.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 is 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.

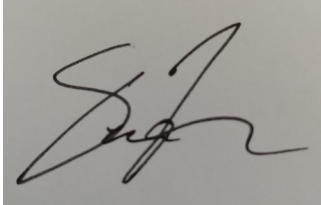
(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

The employer has the burden of proof in establishing disqualifying job misconduct. *Casper 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).

The claimant engaged in work-related misconduct in this case. The claimant made a sexually charged reference after being warned twice not to engage in sexually charged banter in the workplace. She encouraged another employee to take a quiz about sex positions. This is beneath the standard of conduct a reasonable employer can expect from its employees. Furthermore, the employer evenhandedly applied the rule resulting in three terminations for similar misconduct. Benefits are denied.

DECISION:

The October 24, 2023, (reference 01) unemployment insurance decision is REVERSED. The claimant was discharged from employment for disqualifying 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. The overpayment issue is moot because the claimant was not paid benefits after separating from employment.

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read 'Sean M. Nelson'.

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

November 27, 2023
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 adquiriera 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.