

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

BRANDON J FORD
Claimant

COLLEGIATE HOTEL GROUP LLC
Employer

APPEAL 24A-UI-10113-PT-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/13/24
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Overpayment of Benefits
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-finding Interview

STATEMENT OF THE CASE:

The employer, Collegiate Hotel Group LLC, filed an appeal from a decision of a representative dated November 21, 2024, (reference 01) that held the claimant eligible for unemployment insurance benefits after a separation from employment. After due notice, a telephone hearing was held on December 18, 2024. The claimant, Brandon Ford, did not participate. The employer was represented by Hearing Representative Mary Kozlowski-Vought and participated through Hearing Representative Janice Willis and Regional Director of Human Resources Haley Gale. The administrative law judge took official notice of the administrative record.

ISSUES:

Was the claimant discharged for disqualifying, job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant began working as a full-time maintenance technician at Collegiate Hotel Group LLC on July 12, 2020. The claimant was separated from employment on October 18, 2024, when he was discharged.

As a maintenance technician, the claimant was responsible for receiving work orders and repairing, painting, and cleaning the employer's premises. The employer has a written employee manual that includes a code of conduct policy and a policy prohibiting unlawful and unwelcome harassment, sexual or otherwise. The harassment policy prohibits unwelcome sexual statements or advances that have the purpose or effect of interfering with an employee's work performance or creates an intimidating, hostile, or offensive work environment. The policy warns employees that violations of the policy will result in discipline, up to and including termination of employment. The claimant received copies of the employer's work rules and policies.

On October 10, 2024, two employees reported to the employer that while they were working the previous day, the claimant had walked up to them and showed them marijuana he was carrying in his pocket. After receiving the report, the employer initiated an investigation. The employer began its investigation by separately questioning each employee who had allegedly witnessed the claimant with marijuana. One employee told the employer that she had seen the purported marijuana, while the other employee said she had only smelled the purported marijuana. While questioning the employees about the alleged marijuana, both employees reported that the claimant frequently made inappropriate sexual remarks that made them uncomfortable. The employees provided the employer names of three other employees who had also been subjected to the claimant's inappropriate remarks.

After questioning the two employees, the employer separately interviewed the other three employees who had allegedly been subjected to the claimant's inappropriate conduct. All five employees reported that the claimant regularly made inappropriate remarks of a sexual nature to female employees. All five employees reported that the claimant regularly commented on their bodies by calling the employees "beautiful" and "sexy." One employee reported a recent incident wherein the claimant made a lewd gesture while holding a cucumber and then asked the employee, "How would you like to unwrap my cucumber." Additionally, multiple employees reported that the previous day, October 9, 2024, an employee came to work with a new haircut. While the employees were gathered talking, the claimant walked over and repeatedly told the employee, "your hair was sexier the other way, you looked so sexy with long hair." The claimant proceeded to tell the employee that he hated her fiance and that he would be with her if it was not for her fiance. Finally, each of the witnesses told the employer that on multiple occasions they had told the claimant to stop making the inappropriate remarks. However, the claimant refused to stop.

After interviewing the five employees, the employer called the claimant into a meeting and questioned him about the allegations. During the meeting, the claimant denied having made several of the specific comments attributed to him. However, the claimant acknowledged that sometimes he could be, "too friendly with others." After questioning with the claimant, the employer suspended the claimant pending the outcome of the investigation. After completing its investigation, on October 18, 2024, the employer called and informed the claimant that his employment was being terminated effective immediately due to repeated violations of the employer's code of conduct and harassment policies.

The claimant's administrative records indicate that the claimant filed his original claim for benefits with an effective date of October 13, 2024. Since filing his initial claim, the claimant has filed weekly claims for the eight weeks between October 13 and December 7, 2024, and has received total unemployment insurance benefits of \$3,512. The employer did participate in fact-finding by submitting a written statement explaining the grounds for the termination, as well as copies of the termination notice and the employer's work rules and policies.

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. Benefits are denied.

Iowa Code sections 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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) *Report required.* The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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. The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. Disqualification for a single misconduct incident must be a deliberate violation or disregard of standards of behavior which the employer has a right to expect. *Diggs v. Emp’t Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991).

Every employer is entitled to expect civility and decency from its employees, and an employee’s “use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct.” *Henecke v. Iowa Dep’t of Job Serv.*, 533 N.W.2d 573, 576 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. *Warrell v. Iowa Dept. of Job Service*, 356 N.W.2d 587 (Iowa Ct. App. 1984).

The employer has presented substantial and credible evidence that on October 9, 2024, the claimant made inappropriate remarks of a sexual nature to another employer. What is more, the employer has presented substantial evidence that the claimant’s conduct on October 9 was not an isolated incident, but rather, part of pattern of behavior, wherein the claimant regularly made inappropriate remarks of a sexual nature to at least five female coworkers and he persisted in this behavior even after being repeatedly told to stop. The claimant’s conduct was an intentional and substantial disregard for the emotional wellbeing of his coworkers and a violation of the employer’s sexual harassment policy. The employer has established it discharged the claimant for disqualifying, job-related misconduct. Benefits are withheld.

The next issues to be determined are whether the claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer’s account will be charged. For the reasons that follow, the administrative law judge concludes:

Iowa Code section 96.3(7) provides, in relevant part:

- 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.
- (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.

Iowa Admin. Code r. 871-24.10 provides, in relevant part:

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.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for those benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7).

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The administrative law judge concludes that the claimant has been overpaid unemployment insurance benefits in the amount of \$3,512 for the eight weeks between October 13 and December 7, 2024. There is no evidence that the claimant received these benefits due to fraud or willful misrepresentation. Because the employer did participate in fact-finding, the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The November 21, 2024, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to disqualifying, job-related misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times the claimant's weekly benefit amount after the October 18, 2024, separation date and provided the claimant is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of \$3,512 and is obligated to repay the agency those benefits. The employer did participate in fact-finding and its account shall not be charged.



Patrick B. Thomas
Administrative Law Judge

December 24 2024
Decision Dated and Mailed

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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 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.