

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

MARK S LUX
Claimant

APPEAL 23A-UI-10682-DZ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAUKEE COMMUNITY SCHOOL DISTRICT
Employer

**OC: 10/22/23
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Waukee Community School District, the employer/appellant,¹ appealed the Iowa Workforce Development (IWD) November 9, 2023 (reference 01) unemployment insurance (UI) decision. IWD found Mr. Lux eligible for REGULAR (state) UI benefits because IWD concluded the employer dismissed him from work on October 23, 2023 for a reason that did not disqualify him from receiving UI benefits. On November 17, 2023 the Iowa Department of Inspections, Appeals, and Licensing (DIAL), UI Appeals Bureau mailed a notice of hearing to the employer and Mr. Lux for a telephone hearing scheduled for December 1, 2023.

The undersigned administrative law judge held a telephone hearing on December 1, 2023. The employer participated through Maggie Holton, human resources (HR) manager. Mr. Lux participated in the hearing personally. The administrative law judge took official notice of the administrative record and admitted Employer's Exhibits 1-6 as evidence.

ISSUES:

Did the employer discharge Mr. Lux from employment for disqualifying job-related misconduct?
Did IWD overpay Mr. Lux UI benefits?
If so, should he repay the benefits?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: Mr. Lux began working for the employer in May 2022. He worked as a full-time custodian. His employment ended on October 23, 2023.

On August 29, 2023, the employer gave Mr. Lux a verbal warning for incidents on August 10, 11 and 25. On August 10, Mr. Lux referred to an employee who is Black as "Black" and another employee who is Bosnian as "Bosnian." The employer warned Mr. Lux that it is better to not refer to employees by their skin color or ethnicity. On August 11, Mr. Lux told a teacher who had dressed down for a professional development day something to the effect of "You know we have a dress code, right?" Mr. Lux intended his comment to be banter. The employer warned

¹ Appellant is the person or employer who appealed.

Mr. Lux that he is not to enforce the employer's dress code but should report his concerns about dress code violations to the employer's human resources department. On August 25, Mr. Lux told the teacher he made the comment about the dress code that she should not be scared to ride an elevator, but she should be scared of what he would do to her in the elevator. Mr. Lux intended his comment to be banter and he considered his comment not bad because students were not around when he made it. The employer warned Mr. Lux to not make such comments in the future and suggested that he take a break from talking with this teacher.

On Monday, October 9, the employer gave Mr. Lux another warning for incidents of October 2 and 3. On October 2 and 3 Mr. Lux brought pocketknives to work and used the knives to help students open food packages at lunch. The employer's policy prohibits employees from bringing weapons on school grounds. The employer considered Mr. Lux's pocketknives as weapons. On October 3, the school principal told Mr. Lux that he could not use his personal knives at school. The principal then reported the incidents to HR staff. On October 9, Ms. Holton warned Mr. Lux that he was not allowed to bring any weapons, including knives, on school grounds. Ms. Holton also warned Mr. Lux that if he violated the weapons policy or any other policy, the employer could discipline him up to, and including, terminating his employment.

On Friday, October 13, HR staff received a complaint that the previous week Mr. Lux told a teacher that when she smiled while looking at her computer, he thought she was looking at soft pornography. The employer put Mr. Lux on administrative leave as of Monday, October 16.

On Wednesday, October 18, HR staff asked Mr. Lux about the allegation. Mr. Lux admitted to making the statement but said he intended his comment to be banter. The employer's standard of conduct provides that employees must maintain high standards of conduct at all times. The employer concluded that Mr. Lux continued to violate this policy. The employer told Mr. Lux that he could either resign by 8:00 a.m. on Monday, October 23 or the employer would recommend that the school board terminate his employment as the board's October 23 meeting. Mr. Lux chose not to resign. The employer terminated Mr. Lux's employment on October 23.

IWD paid Mr. Lux REGULAR (state) UI benefits in the total gross amount of \$1,468.00 for four weeks between October 29, 2023 and November 25, 2023. The employer received notice of the fact-finding interview in which IWD stated that it would call the employer. Ms. Holton waited for the call at the scheduled time, but IWD did not call.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer discharged Mr. Lux from employment for disqualifying, job-related misconduct.

Iowa Code section 96.5(2)(a) and (d) provide, in relevant part:

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.

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.

The employer has the burden of proof in establishing disqualifying job misconduct.² The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.³ Misconduct must be "substantial" to warrant a denial of job insurance benefits.⁴

The employer may establish reasonable work rules and expect employees to abide by them. The employer has presented credible evidence that Mr. Lux continued to violate the employer's policies, even after the employer warned him. The employer has established disqualifying, job-related misconduct. Mr. Lux is not eligible for UI benefits.

The administrative law judge further concludes IWD overpaid Mr. Lux REGULAR (state) UI benefits in the total gross amount of \$1,468.00.

Iowa Code §96.3(7) provides, in relevant 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.

² *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

³ *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

⁴ *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

(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:

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.

Since Mr. Lux is not eligible for UI benefits based on how his job ended with the employer, he is not eligible for the UI benefits IWD already sent him. IWD overpaid Mr. Lux REGULAR (state) UI benefits in the total gross amount of \$1,468.00 for four weeks between October 29, 2023 and November 25, 2023. Since the employer did not participate in the fact-finding interview, but through no fault of the employer, Mr. Lux is not required to repay these UI benefits and the employer's account must not be charged.

DECISION:

The November 9, 2023 (reference 01) UI decision is REVERSED. The employer discharged Mr. Lux from employment for job-related misconduct. Mr. Lux is not eligible for UI benefits until he has worked in and been paid wages for insured work equal to ten times his weekly UI benefit amount, as long as no other decision denies him UI benefits.

IWD overpaid Mr. Lux REGULAR (state) UI benefits in the gross amount of \$1,468.00 for four weeks between October 29, 2023 and November 25, 2023. Since the employer did not participate in the fact-finding interview through no fault of the employer, Mr. Lux is not required to repay these UI benefits and the employer's account is relieved of charges.



Daniel Zeno
Administrative Law Judge

December 6, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with this 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
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.