

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

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**MICHAEL L BROWN**  
Claimant

**APPEAL 24A-UI-02620-LJ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BARTON SOLVENTS INC**  
Employer

**OC: 02/11/24**

**Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge from Employment  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer Participation in Fact-Finding Interview

**STATEMENT OF THE CASE:**

On March 5, 2024, employer Barton Solvents filed an appeal from the February 27, 2024 (reference 03) unemployment insurance decision that allowed benefits to claimant Michael L. Brown after his separation from employment, determining the employer dismissed him on February 8, 2024 and did not establish willful or deliberate misconduct. The Unemployment Insurance Appeals Bureau mailed notice of the hearing on March 12, 2024. Administrative Law Judge Elizabeth A. Johnson held a telephonic hearing at 9:00 a.m. on Monday, April 1, 2024. Claimant Michael L. Brown participated. Employer Barton Solvents Inc. participated through Dan Milczski, Branch Manager; Eric Winkelman, Office Manager; and Dan Smith, Executive Vice President, Secretary, & Treasurer. Milczski acted as the employer's representative. The administrative law judge took official notice of the administrative record.

**ISSUES:**

Whether claimant was discharged from employment for disqualifying, job-related misconduct.  
Whether claimant was overpaid unemployment insurance benefits.  
Whether claimant been overpaid unemployment insurance benefits, and if so, whether repayment of those benefits can be waived.  
Whether charges to the employer's account can be waived.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for the employer on August 1, 2023. He worked full-time hours as a warehouseman. Claimant's employment ended on February 8, 2024, when the employer discharged him for physically assaulting one coworker and making unwanted sexual advances at another coworker during and after a company happy hour.

The employer held an after-work happy hour event for its employees on Wednesday, February 7 at 5:00 p.m. Approximately twelve employees attended, including claimant. As this was a work-sponsored event, the employer paid for food and both alcoholic and non-alcoholic

beverages for attendees. The employer would not purchase shots, and it expected all employees to consume alcohol responsibly and to behave respectfully and appropriately.

During the evening, claimant consumed between ten and twelve double-strength mixed drinks. Over the course of several hours, claimant became increasingly argumentative and combative. He continued trying to argue and pick fights with coworkers over matters such as who performed their job better. Sales manager Calvin tried to deescalate claimant after claimant accused him of thinking he was “special” for knowing about sales as the sales manager. Later in the evening, claimant got angry at DJ and began talking about wanting to fight him. He was making these statements while putting his hands on Calvin’s neck. Calvin told him to stop, but claimant would not and continued behaving aggressively toward Calvin. Calvin felt threatened and when claimant would not stop physically coming at him, Calvin tackled claimant onto the floor and they briefly scuffled. The bouncer then came over and removed both of them from the premises.

Claimant had gotten a ride to the happy hour from a coworker, so this coworker took claimant home. When they arrived at claimant’s home, claimant would not get out of the vehicle. After remaining in the car and acting “weird,” he commented that he needed more alcohol, so the coworker ran him to get more alcohol. They then arrived back at claimant’s home. At that point, claimant assaulted the coworker, touching him on his chest, leg, and crotch and putting his hands around the coworker’s neck. Claimant’s coworker told him to get out of his car but claimant would not leave the vehicle. The coworker then jumped out of the car, which caused claimant to respond by jumping out of the passenger side of the vehicle. The coworker then jumped back into the car and drove away.

The following day, the coworker who had been physically and sexually assaulted reported the assault to the operations manager. First, the coworker called and reported he did not feel comfortable coming to work if claimant would be there. When the operations manager inquired further, the coworker disclosed what had occurred. After receiving that report, Milczski and the operations manager called claimant and told him not to come into work. They conducted a brief investigation by collecting statements from the other employees present at the happy hour. Multiple employees said they did not feel comfortable around claimant, due to his behavior at the happy hour. While some employees said they did not feel comfortable working with claimant due to his aggression, other employees – specifically two office-side employees – said they did not feel comfortable attending any future happy hour events if claimant were to attend.

After concluding the investigation and determining claimant engaged in both physical violence and unwanted sexual behavior toward a coworker, the employer called claimant. When claimant was asked for his version of events, claimant remembered having some argumentative “conversations” with coworkers. He had no memory of being in a physical fight or making sexual advances toward a coworker. When Milczki told claimant he was discharged, claimant made a threat of violence over the phone.

The employer provided claimant with a copy of the employee handbook when he was hired. This handbook contains the employer’s workplace violence and sexual harassment policies; it also includes a discipline policy. The workplace violence policy prohibits physical assault and threatening behavior. The sexual harassment policy prohibits verbal and physical harassment, unwelcome advances, and any conduct that creates a hostile or offensive work environment. (Milczski testimony) The discipline policy allows the employer to discharge an employee for a single incident depending on the egregiousness of the occurrence.

Claimant had never been warned for any similar behavior in the past. The employer discharged him for this single incident due to the egregious nature of his conduct. It did not discharge the other party to the physical altercation. Based on the other party's written statement and management's conversation with that person, as well as other witness's statements, management concluded claimant was the aggressor and the "but-for" cause of that fight.

Claimant opened the claim for unemployment insurance benefits effective February 11, 2024. He has filed six consecutive weekly continued claims for benefits, beginning with the week ending February 17, 2024; and most recently for the week ending March 23, 2024. Claimant has received benefits in the gross amount of \$1,902.00. Iowa Workforce Development held a fact-finding interview on February 26, 2024. The employer did participate in the fact-finding interview.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

#### **Eligibility for Benefits**

Iowa Code section 96.5(2)(a) and (d) provide:

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 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 even 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.

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).

Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be “work-connected.” *Diggs v. Emp’t Appeal Bd.*, 478 N.W.2d 432 (Iowa Ct. App. 1991). The courts have concluded that off-duty conduct can have the requisite element of work connection. *Kleidosty v. Emp’t Appeal Bd.*, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, for an employer to show that an employee’s off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence that the employee’s conduct (1) had some nexus with the work; (2) resulted in some harm to the employer’s interest, and (3) was conduct which was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer’s image would suffer. See also *Dray v. Director*, 930 S.W. 2d 390 (Ark. Ct. App. 1996); *In re Kotrba*, 418 N.W. 2d 313 (SD 1988), quoting *Nelson v. Dept. of Emp’t Security*, 656 P.2d 242 (WA 1982); 76 *Am. Jur. 2d, Unemployment Compensation* §§77-78.

Claimant physically assaulted one coworker and sexually assaulted another coworker immediately following the employer-sponsored happy hour. The employer has established a nexus between claimant’s conduct and work. The employer’s interest suffered after claimant overconsumed alcohol to the point of blackout intoxication, started arguments with coworkers, physically assaulted the sales manager, got kicked out of the establishment where the employee had its happy hour, and then sexually assaulted his coworker and designated driver. Multiple employees reported they no longer felt comfortable around claimant and did not want to come to work at all if he were there.

Claimant explicitly agreed he would not physically or sexually assault his coworkers when he was hired and he signed off on the employee handbook. Even if claimant had not signed off on such policies, every employer has an expectation that each employee will come to work and conduct themselves in an appropriate, non-threatening way. This expectation reasonably extends to employee behavior at company-sponsored events: happy hours, holiday parties, company picnics, etc. Conversely, each employee knows that while at work and at work sponsored events, they must maintain a certain standard of behavior.

Finally, claimant may argue that he had no knowledge or intent that the employer’s interests would suffer because he was blacked out at the time all of his objectionable conduct occurred. This possible defense fails for multiple reasons. First, claimant intentionally drank at least ten double-shot cocktails, setting off an unpredictable chain of events that may have never occurred had claimant not become so intoxicated. Second, claimant knew that physically and sexually assaulting his coworkers was against the employer’s rules and he had signed the handbook agreeing to follow the employer’s rules. Any reasonable employee would know that physically assaulting the sales manager at the work happy hour and then sexually assaulting a coworker after the happy hour was over would harm the work environment and create problems for the employer.

The employer has presented substantial, credible evidence that claimant was discharged for disqualifying, job-related misconduct. Benefits must be withheld.

### **Overpayment, Repayment, Participation**

The next issues to be determined are whether claimant has been overpaid benefits, whether the claimant must repay those benefits, and whether the employer’s account will be charged. Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

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.

(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 unrebutted 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.

Unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for 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), Iowa Admin. Code r. 871-24.10.

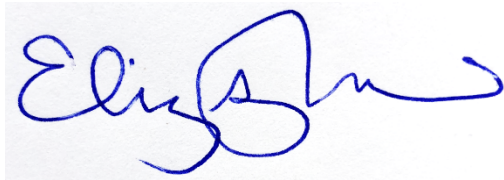
In this case, the decision allowing benefits has been reversed. Claimant has been overpaid benefits in the amount of \$1,902.00. Claimant did not receive benefits due to any fraud or misrepresentation. However, the employer did participate in the fact-finding interview held on

February 26, 2024. Claimant must repay the benefits he received to IWD. The employer's account will not be charged.

**DECISION:**

The February 27, 2024 (reference 03) unemployment insurance decision is reversed. The employer discharged claimant from employment due to disqualifying, job-related misconduct. Benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits in the amount of \$1,902.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.



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Elizabeth A. Johnson  
Administrative Law Judge

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April 4, 2024  
Decision Dated and Mailed

LJ/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 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.