

**BEFORE THE  
EMPLOYMENT APPEAL BOARD  
6200 Park Avenue, Suite 100  
Des Moines, Iowa 50321  
Website: eab.iowa.gov**

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**JOSHUA A LIFE**

Claimant

: **APPEAL NUMBER:** 24B-UI-00609

: **ALJ HEARING NUMBER:** 24A-UI-00609

:

and

:

**EMPLOYMENT APPEAL BOARD  
DECISION**

:

**10 ROADS EXPRESS LLC**

:

:

Employer

:

**NOTICE**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION:** 96.5-2 96.3-7

**DECISION**

**UNEMPLOYMENT BENEFITS ARE DENIED**

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The Claimant began working for employer on November 1, 2022, and he last worked as a full-time safety specialist. The Employer discharged the Claimant on December 14, 2023. The Claimant worked in an area with two female coworkers and they worked during a time when the building was not fully staffed.

On December 8, 2023, the Employer received a complaint from one of the Claimant's coworkers that he had said inappropriate things to her and that he had touched her without her permission. Specifically, the complaint alleged that the Claimant told her that she smelled nice and tried to touch and poke her. She also alleged that the Claimant put his hands on her shoulders to massage her and rubbed his groin area on her back. She further alleged that while this was the first time the Claimant had touched her, he had been making comments to her of a sexual nature since her hire in May 2023. She asserted that he told her things about having a threesome with him and his girlfriend. She would sometimes tell him to stop or "no," and she attempted to avoid him.

The Employer took the Claimant's and a witness' statements as part of its investigation. The witness corroborated the coworker's assertions. During the Claimant's interview, he acknowledged joking about doing sexual things on one occasion and made a comment about a threesome to his coworker. He also acknowledged touching her shoulder on the night in question, but denied that he tried to touch her.

The Claimant also told the Employer that it was the coworker who had initiated the flirting and denied that she expressed discomfort with their interactions; however, he acknowledged she would tell him "no," but he believed it was in a coy, flirty manner. The Claimant reported that the coworker had inquired whether he was single upon meeting him and, thereafter, called him a pet name and was generally flirty with him. The Claimant considered reporting this conduct to HR because, at times, it made him uncomfortable, but he did not do so until the investigatory interview. The Employer asked the Claimant for specific instances of the coworker's flirting and he was unable to do so.

The Employer determined the Claimant had been engaging in the conduct of which he was accused, and discharged him for violating the Employer's work safe policy that prohibits sexual harassment. The Claimant had not received prior warnings related to similar conduct or for violating the same rule.

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

Iowa Code section 96.5(2)a provides:

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 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.

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 of misconduct 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). 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). The issue is not whether the employer made a correct decision in separating the 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).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). We also note that the three Members of this Board each listens to the digital recording of this hearing and each has equal access to factors such as tone of voice, hesitancy in responding, etc. as the Administrative Law Judge.

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We have found the Claimant's denials are not credible because he essentially admits to all the accusations during his testimony but implies they were made in a lesser or joking or manner. He admitted touching her shoulder but denies he rubbed against her. He admitted he raised the idea of a threesome by stating he participated in one, but denied he specifically asked her to participate. He testified that his girlfriend suggested he offer to pay the coworker's bills in exchange for participating in a threesome. He admitted the coworker told him to stop, but that he did not take it seriously because she did so in a playful way. The Claimant also told the Employer that the coworker initiated the flirting, but he couldn't provide any specific examples or statements she made. The Employer's investigation uncovered another coworker who corroborated the report that the Claimant made suggestive comments on a number of occasions, the other coworker would tell him "no" or just walk away, and that the Claimant told the coworker that he would pay her bills if she participated in a threesome with him and his girlfriend. Based on the foregoing, we find the Employer to be more credible.

The Employer has met the burden of proof to establish that the Claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. The Employer has an interest and legal obligation to provide a safe, harassment-free work environment. The Claimant acted against the Employer's best interest by engaging in harassing conduct toward a coworker. Whether or not he received the Employer's policy, the Claimant knew or should have known that this conduct is unacceptable in the workplace, especially after his coworker told him "no." The Claimant's conduct is disqualifying even without prior warning. Accordingly, benefits are denied.

Finally, since the Administrative Law Judge allowed benefits and affirmed a decision of the Benefits Bureau's representative, the Claimant falls under the double affirmance rule:

871 IAC 23.43(3) Rule of two affirmances.

a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.

b. However, if the decision is subsequently reversed by higher authority:

(1) The protesting employer involved shall have all charges removed for all payments made on such claim.

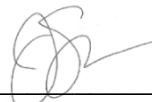
(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.

(3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

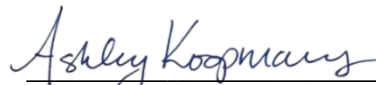
Thus, the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, and the Claimant will not be required to repay benefits already received.

**DECISION:**

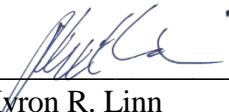
The administrative law judge's decision dated February 5, 2024, is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, benefits are denied until the Claimant requalifies by earning ten times his weekly benefit amount in insured wages. This decision results in an overpayment of benefits; however, as there have been two decisions granting benefits, the Claimant is not required to repay the benefits received to date and the Employer's account shall not be charged.



James M. Strohman



Ashley R. Koopmans



Myron R. Linn

SRC/fnv

**DATED AND MAILED: MARCH 01 2024**