BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
Website: eab.iowa.gov

STEPHANIE L JOHNSON

Claimant

and

IOWA STATE UNIVERSITY

Employer

APPEAL NUMBER: 23B-UI-03692
ALJ HEARING NUMBER: 23A-UI-03692

EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

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-A, 96.5-1

D E C I S I O N

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. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Administrative Law Judge's findings of fact are adopted by the Board as its own. In addition, the Board finds that Human Resources for the employer became aware of the incidents involving the Claimant on January 4, 2023, and that Claimant was notified by January 31, 2023, that she was being investigated. We find further that the Employer has proven that any sexual conduct that did occur during the complained-of incidents was consensual and the Employer has proven that the Claimant lied about any such sexual conduct being nonconsensual, and about her relationship with the other individual involved.

REASONING AND CONCLUSIONS OF LAW:

Misconduct: Iowa Code Section 96.5 provides:

Discharge for Misconduct. If the department finds 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 been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.
>
> ….
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> 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:
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> (1) Material falsification of the individual's employment application.
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> (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
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> (3) Intentional damage of an employer's property.
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> (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.
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> (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.
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> (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
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> (7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.
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> (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
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> (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 license, 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982); Iowa Code §96.6(1). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

Misconduct: 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 Members of this Board each listen 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. We note further that the Administrative Law Judge resolved this case on the issue of current act and that the Administrative Law Judge did not expressly draw a conclusion regarding credibility.

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 credible the version of events appearing in the Employer's exhibits, and testified to by the Employer's witness. The analysis set out in the Employer's exhibits bolsters our conclusion on credibility. First, we find credible that the experts in forensic evidence were unable to find any evidence of semen despite the Claimant's report that semen was ejaculated on the floor on two separate occasions. We also find credible the report that when the Claimant was confronted with this fact she changed her story. We have considered the effect of vulnerability, and of stress, on a victim's ability to report criminal actions. But the Claimant initially reported seeing semen being ejaculated on the floor on two separate occasions. When she found out about the negative forensic results she altered her story to say that the semen was wiped up on one occasion, and that the alleged perpetrator had his back to her and may not have ejaculated the second time. This double change casts doubt on the Claimant's credibility. Likewise, the assertion that she did not know the alleged perpetrator's name is contradicted by their earlier communications. The missing text messages also gives reason to discredit the Claimant, and also is it questionable that a Pakistani would use the adjective "Indian" to describe himself. Suggestive, though less so than these factors, is the alleged perpetrator's knowledge of the layout of the Claimant's abode, and of the Claimant's jewelry business. We emphasize that we do not give much weight to the fact that an unreported ejaculation, followed a few days later by an ordinary conversation about guitars and a second ejaculation does not, *on its face*, make a lot of sense. We do not make much of this because although it is consistent with not telling the truth, we do understand and appreciate that victims often can react to trauma with silence and by acting as if nothing happened. Nevertheless, placing all the various factors together we find that the Employer proved by the greater weight of the evidence that the Claimant did not tell the truth about the sex incidents in December of 2022.

As we have found, the Claimant was terminated for misrepresenting to ISU's department of public safety what had occurred, and also for consensual sexual contact on the Employer's property during work time. We find that either one of these incidents was sufficient to bring about the discharge. We thus do not at this time decide *exactly* what happened in the Claimant's office during the incidents in question. We do find that the Employer has proven that any sexual conduct that did occur during these incidents was consensual and the Employer has proven that the Claimant lied about any such sexual conduct being nonconsensual, and about her relationship with the other individual involved.

In general, lying to an employer can constitute misconduct. *See Larson v. Employment Appeal Board*, 474 N.W.2d 570 (Iowa 1991)(misconduct based on dishonesty in employment application); *Sallis v. Employment Appeal Bd.* 437 N.W.2d 895, 897 (Iowa 1989)(dishonesty regarding absences is exacerbating factor). Notably in *White v EAB* 448 N.W.2d 691 (Iowa App. 1989) a nurse made a charting error, a matter of simple negligence that ordinarily is not misconduct. When she was questioned about it the employee "denied the situation and provided misinformation." *White* at 692. The Iowa Court of Appeals found substantial evidence to support disqualification based on "claimant's lack of candor when questioned about the incident." *White* at 692. The same thing happened here with the exception that it was the Claimant who initiated the false report in the first place. Furthermore, as set out by the termination letter, the Claimant's repeated false statements violated the Employer's policies on ethics and integrity. The statute, in addition, as an example of misconduct includes "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." While the Claimant's conduct was towards a student, not an employee, the Code specifies that the specifics listed are examples only. The Claimant's conduct fits within the general description of "misconduct" in the statute, and further is sufficiently similar to the listed example that we are confident in finding it to be misconduct.

Current Act: The law limits disqualification to current acts of misconduct:

> Past acts of misconduct. While past acts and warning 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.

871 IAC 24.32(8); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985). Even when we find that allegations made by an employer would establish misconduct, there remains, however, whether the alleged acts were current in terms of the discharge. In determining whether a discharge is for a current act we apply a rule of reason. We determine the issue of "current act" by looking to the date of the termination and comparing this to the date the misconduct first came to the attention of the Employer. *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988)(using date notice of disciplinary meeting first given). If an Employer acts as soon as it reasonably could have found out about the infraction under the circumstances then the action is for a current act.

"[T]he purpose of [the current act] rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. For example, an employer may not convert a lay off into a termination for misconduct by relying on past acts." *Milligan v. EAB*, 10-2098, slip op. at 8 (Iowa App. June 15, 2011). The current act rule also assures that the termination is the result of intentional action. For example, the doctrine assures that an employee who gets sick is not denied benefits simply because he has exceeded the allowable absences under a "point system" for attendance. In determining whether a discharge is for a current act we apply a rule of reason. We determine the issue of "current act" by looking to the date of the termination, or at least of notice to the employee of possible disciplinary action, and comparing this to the date the misconduct first came to the attention of the Employer. *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988)(using date notice of disciplinary meeting first given); *Milligan v. EAB*, 10-2098 (Iowa App. June 15, 2011).

A requirement of immediate termination does nothing to further the legitimate purposes of the current act rule. Such an approach treats the current act doctrine as some sort of trap for even the moderately thoughtful employer. In *White v. Employment Appeal Board* 487 N.W.2d 342 (Iowa 1992) the Court emphasize that in unemployment cases the goal of policy is to "strike a proper balance between the underlying policy of the Iowa Employment Security Law, which is to provide benefits for 'persons unemployed through no fault of their own,' Iowa Code Sec. 96.2, and fundamental fairness to the employer, who must ultimately shoulder the financial burden of any benefits paid. See Iowa Code Sec. 96.7." *White* at 345. Under such a balancing, the most that could be expected of any employer is to act in a reasonably prudent fashion and to not terminate precipitously. The Employer was not delaying to exploit the Petitioner nor trying to save up misconduct to use in the future. It delayed while it conducted a fair investigation and considered the matter through the usual channels. An employer should be allowed a reasonable amount of time for such actions. A contrary approach punishes employers - especially large ones with multiple decision-making layers - for taking termination seriously. The delay here was complicated by the nature of the allegations, as well as the misinformation supplied by the Claimant. Also, we find it appropriate that the Employer separates its handling

of the pending performance issues from conduct issue. That way the Employer attempts to isolate the decision regarding conduct from an unrelated judgment concerning the quality of the work done. On balance, we find that the delay here is not too long. The current act doctrine is not a statute of limitations on misconduct, and it does not require precipitous decisions. We think a current act of misconduct has been shown by the Employer in this case.

No Overpayment

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> 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.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (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, but the Claimant will not be required to repay benefits already received.

DECISION:

The administrative law judge's decision dated April 25, 2023 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)(a).

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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James M. Strohman

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Myron R. Linn

DISSENTING OPINION OF ASHLEY R. KOOPMANS:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety. In addition to agreeing that the discharge was not for a current act, I also find that the Employer failed to prove misconduct. As for a current act, the delay was caused in part by a holiday break, and also to deal with a disciplinary matter related to performance, not conduct. I do not find these to be reasonable reasons for delay. As for credibility, it is one thing to show some inconsistency in the Claimant's versions of events, and another to conclude that she was lying to the Employer. Inconsistency can be expected in cases of trauma, and no motive for lying appears in this record. I also found the Claimant's testimony to be credible and genuine. I recognize that it was a close call, but as the Employer had the burden of proving misconduct, I would find that the Claimant should be allowed benefits.

_____
Ashley R. Koopmans

RRA/fnv