

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS  
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

**STEPHANIE L. JOHNSON**  
Claimant

**IOWA STATE UNIVERSITY**  
Employer

**APPEAL 23A-UI-03692-CS-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/12/23  
Claimant: Respondent (1)**

Iowa Code §96.5(2)a-Discharge/Misconduct  
Iowa Code §96.5(1)- Voluntary Quit  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

On April 10, 2023, the employer/appellant filed an appeal from the March 31, 2023, (reference 01) unemployment insurance decision that allowed benefits based on claimant being dismissed on March 6, 2023. The Iowa Workforce Development representative found no willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on April 24, 2023. Claimant participated. Employer participated through general counsel, Payton Cler, Employee and Labor Relations Specialist, Anna Rella, testified on behalf of the employer. Employer's Exhibits 1 and 2 were admitted into the record. Administrative notice was taken of claimant's unemployment insurance benefits records, including DBRO.

**ISSUES:**

- I. Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?
- II. Should claimant repay benefits?
- III. Should the employer be charged due to employer participation in fact finding?
- IV. Is the claimant overpaid benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on January 4, 2021. Claimant last worked as a full-time administrative assistant III. Claimant was separated from employment on March 6, 2023, when she was discharged.

On December 13, 2022, claimant reported to the Iowa State University Department of Public Safety (DPS) that a graduate student had entered her office on two separate occasions and

exposed his penis to her and ejaculated on the floor of her office. During DPS's investigation they found that claimant's version of events was inconsistent with the evidence.

On December 16, 2022, claimant declined to pursue the investigation with DPS and DPS referred the matter to Iowa State University's Office of Equal Opportunity (OEO). Claimant also declined to pursue the allegations with OEO. On January 4, 2023, the matter was referred to Iowa State University's Employee and Labor Relations and the University Human Resources (UHR) due to concerns about claimant's truthfulness regarding the incidents, the nature of her relationship with the graduate student, and whether claimant engaged in sexual activities in her office during work hours.

The employer contacted claimant on January 31, 2023, to notify her she was being investigated and that they wanted to interview her regarding the incidents as part of their investigation. On February 2, 2023, employer interviewed claimant regarding the investigation. During the interview claimant was notified she could be subject to disciplinary action, up to, and including termination.

The employer performed their investigation and concluded claimant misrepresented to DPS the nature of her relationship with the graduate student and the incidents that occurred. The employer also concluded claimant engaged in consensual, physical, sexual conduct with the graduate student in her on-campus office during working hours in violation of the employer's policy. (Exhibit 2).

On March 6, 2023, the employer discharged claimant for violating the employer's Code of Business and Fiduciary Conduct and statement of Ethics policies. (Exhibit 2). These policies state:

"The Code sets forth the fundamental expectations of employees when carrying out their duties, including conducting responsibilities with fairness, integrity, and respect, promoting and protecting the institution's best interests, and complying with applicable laws and policies." The Statement of Ethics provides: P&S staff members avoid any personal involvement that might compromise their professional responsibilities. In the event a personal relationship exists develops, or has existed between a P&S staff member and a student, colleague or clients that goes beyond the professional role, it is the responsibility of the P&S staff member to take appropriate actions to avoid any conflict, or apparent conflict of interest between personal and professional concerns." (Exhibit 1, pg. 8).

The claimant was aware of these policies. Claimant has no prior verbal or written warnings. Claimant denies she engaged in consensual sexual activities in her office during work hours.

On March 12, 2023, claimant filed a claim for unemployment insurance benefits. (DBRO). Claimant's gross weekly benefit amount is \$572.00. (DBRO). Claimant had filed for three weeks of benefits beginning March 12, 2023. Claimant has not received any benefits because her reported wages and vacation pay exceed her weekly benefit amount. (DBRO).

The employer participated in the fact-finding interview with Iowa Workforce Development.

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

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

Iowa Code section 96.5(2) d 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:

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:

(1) Material falsification of the individual's employment application.

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

(3) Intentional damage of an employer's property.

(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.

(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.

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

(7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.

(8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.

(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 licenses, 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 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 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). "Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy. If the employer fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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.

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 issue in this case is whether claimant's termination was based on a current act. The court in *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988) held that in order to determine whether conduct prompting the discharged constituted a "current act," the date on which the conduct came to the employer's attention and the date on which the employer notified the claimant that said conduct subjected the claimant to possible termination must be considered to determine if the termination is disqualifying. The court in *Milligan v. Employment Appeal Board*, 802 N.W.2d 238 (Iowa App. 2011), held that it is reasonable to allow a company time for its human resources department to assess the situation once the Employer learned of the misconduct, and

notified the Claimant that his job was in jeopardy pending the outcome of the investigation. [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).

Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. \_\_\_, (Iowa Ct. App. filed \_\_\_, 1986).

Human Resources for the employer became aware of the incidents involving the claimant on January 4, 2023. Claimant was not notified until January 31, 2023, that she was being investigated. Claimant was not aware until February 2, 2023, that she could be discharged pending the results of the investigation. The employer knew about the incidents for twenty-seven days before they notified claimant she was being investigated. The twenty-seven days before notifying the claimant is excessive and the incidents that occurred in December 2022 are no longer considered a “current act” under Iowa law. Since the acts for which the claimant was discharged were not current acts, the claimant may not be disqualified for unemployment insurance benefits. Accordingly benefits are allowed.

Since claimant is eligible for benefits the issues of whether claimant is overpaid benefits and whether the employer participated in the fact-finding interview is moot.

#### **DECISION:**

The March 31, 2023, (reference 01) unemployment insurance decision is AFFIRMED. Claimant was discharged from employment on March 6, 2023 for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The employer's account is subject to charge.

Since claimant is eligible for benefits the issue of whether claimant is overpaid benefits and whether the employer participated in the fact-finding interview is moot.



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Carly Smith  
Administrative Law Judge

April 25, 2023  
Decision Dated and Mailed

**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:

**Employment Appeal Board  
4<sup>th</sup> Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
Online: [eab.iowa.gov](http://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  
4th Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
En línea: [eab.iowa.gov](http://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.