

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**HAROLD J HARPER  
3220 IOLA AVE  
DES MOINES IA 50312-3620**

**2<sup>ND</sup> WIND EXERCISE EQUIPMENT INC  
7585 EQUITABLE DR  
EDEN PRAIRIE MN 55344**

**Appeal Number: 06A-UI-03778-C  
OC: 03/12/06 R: 02  
Claimant: Appellant (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Harold Harper filed an appeal from a representative's decision dated March 30, 2006, reference 01, which denied benefits based on his separation from 2nd Wind Exercise Equipment, Inc. After due notice was issued, a hearing was held on April 24, 2006 in Des Moines, Iowa. Mr. Harper participated personally. The employer participated by Don Alliss, Service Manager.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Harper was employed by 2nd Wind Exercise

Equipment, Inc. from March 21, 2005 until March 14, 2006 as a full-time service technician. He was discharged because of his job performance and because of his attendance.

Mr. Harper was absent on eight occasions due to his own illness between May of 2005 and February of 2006. He provided doctor's statements when requested. He was absent to attend funerals on two days in January and two days in February of 2006. The final absence was on March 13, 2006 when he was absent because his child was sick. Mr. Harper had received a written warning concerning his attendance on December 12, 2005.

Mr. Harper received a verbal warning on January 11, 2006 because of his job performance. He did not always designate the shipping charges on customer invoices. He did not always order parts in a timely fashion. Mr. Harper, as well as other technicians, sometimes had difficulty diagnosing problems with equipment. The final performance issue came to the employer's attention on March 6, 2006 when it was learned that Mr. Harper had misdiagnosed the problem with three treadmills. Other technicians had worked on the equipment and were likewise unable to determine the problem. Mr. Harper was notified of his discharge on March 14, 2006.

#### REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Harper was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Part of the reason for Mr. Harper's discharge was his attendance. An individual who was discharged because of attendance is disqualified from receiving benefits if he was excessively absent on an unexcused basis. Absences that are for reasonable cause and are properly reported are considered excused absences. All of the absences that contributed to Mr. Harper's discharge are excused. They were all due to his own illness, illness of a child, or his attendance at a funeral. All of his absences were properly reported to the employer. Excused absences may not form the basis of a misconduct disqualification, regardless of how excessive.

The other reason for Mr. Harper's discharge concerned his job performance. He conceded that he sometimes misdiagnosed problems with equipment. However, he was not the only technician who had such difficulties. Others working on the same equipment also had trouble diagnosing the problem. The evidence failed to establish that Mr. Harper had the ability to correctly identify problems but chose not to. The evidence failed to establish that the problem resulted from misconduct rather than a lack of skill and knowledge. The employer also identified occasional problems with Mr. Harper's failure to designate shipping charges and the failure to order parts timely. He was negligent on those occasions. However, the evidence failed to establish that Mr. Harper was repeatedly negligent to such an extent that it constituted a deliberate disregard for the employer's standards.

The administrative law judge has considered the evidence and the contentions of the parties. It is concluded that the employer has failed to establish disqualifying misconduct. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983). Although Mr. Harper may have been an unsatisfactory employee, the evidence failed to establish a basis on which to disqualify him from receiving job insurance benefits.

DECISION:

The representative's decision dated March 30, 2006, reference 01, is hereby reversed. Mr. Harper was discharged but disqualifying misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

cfc/tjc