IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

TAMI L MORTON Claimant **KRAFT HEINZ FOODS COMPANY** Employer	**APPEAL 18A-UI-06582-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/20/18** **Claimant: Respondent (4R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
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:

Kraft Heinz Food Company (employer) filed an appeal from the June 6, 2018, reference 01, unemployment insurance decision that allowed benefits based upon the determination Tami L. Morton (claimant) was not discharged for willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on July 11, 2018. The claimant participated. The employer participated through HR Generalist Sharon Bull. The Claimant's Exhibits A and B were admitted into the record without objection. The administrative law judge took official notice of the administrative record, specifically the fact-finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Production Team Member beginning on February 1, 2016, and was separated from employment on June 14, 2018, when she was discharged. At the time of her separation, the claimant earned $17.05 an hour.

The employer has an attendance policy that allows an employee to accrue fourteen attendance points before he or she will be subject to discharge. An employee who needs to report an absence calls a third-party vendor who records the reason given for the absence. These reasons can include, but are not limited to, personal, sick, or Family Medical Leave Act (FMLA) certified condition. However, if an employee has an absence it reports as related to leave under FMLA, he or she must also contact Aetna, another third-party vendor, to report the absence and obtain approval stating the absence is, in fact, covered by the FMLA certification. Aetna sends written communication stating the absence is covered. If an employee does not obtain that

certification from Aetna, the absence is not properly approved and the employee will accrue points.

The claimant had job-protected leave from March 2017 through March 2018 under FMLA related to her son who is 14 years old and has suffered from asthma his entire life. The claimant's son is capable of using his inhaler and giving himself nebulizer treatments without assistance. The claimant would go home or be home with him to give him his Prednisone as she does not allow him to administer his own medications. She would remain at home after administering the medication because she needed to make sure he did not go outside. While he is capable of being home by himself, he is a teenager and does not always follow her instructions. The claimant could not afford a childcare provider to ensure he was following her instructions.

The claimant had an extensive history of absenteeism. During the month of January 2018, the claimant had three absences: one was a partial absence with no reason given and two for FMLA certified condition that were not approved by Aetna. In February 2018, the claimant missed nine days: one day was due to her illness; three days were for personal reasons; and, five days were due to FMLA certified condition, which were not approved by Aetna. In March 2018, the claimant missed three partial days with no reason or notification provided and five days due to FMLA certified condition, which were not approved by Aetna. In April 2018, the claimant missed 16 days of work: two were for her illness; two were no-call/no-show absences; five were for personal reasons; and, seven were due to FMLA certified condition, which were not approved by Aetna.

In the beginning of May 2018, the claimant was absent four days, one was a no-call/no-show absence and the other three were for personal reasons. On May 14, 2018, the claimant was given a written warning and told that two more attendance points would result in her discharge.

The claimant worked the week of May 20, 2018, for approximately nine hours on May 21 and 22 before being placed on suspension pending investigation. She filed her claim for unemployment insurance benefits following the suspension. The claimant participated in a fact-finding interview on June 5, 2018 and reported to the fact-finder that she had been terminated. The employer responded to the fact-finding notice by providing the name and phone number of a first-hand witness to participate. The employer did not answer when called for the fact-finding because its phone lines were not working and it did not discover the issue until it tried to contact its third party representative to inquire about the lack of phone call. On June 6, the fact-finder issued a decision stating the claimant was eligible for unemployment insurance benefits based on her separation on May 22.

The employer's investigation did not result in a finding that the claimant engaged in the conduct of which she was accused and she was recalled to work. She returned to work on June 7 and worked eight hours. She worked on June 8 and June 11, each for seven and a half hours. The claimant continued to make weekly continued claims for benefits but did not report any wages earned after the week ending May 26. The claimant filed for and received unemployment insurance benefits in the amount of $1,095.00 between May 20 and June 9.

On June 12, the claimant left work after two and a half hours because she received a text message from her son stating he was having difficulty breathing. He had taken his inhaler and given himself two nebulizer treatments but was still having issues. The claimant went home to administer his Prednisone but did not return as she wanted to make sure he would not go outside. She did not take him to a doctor or seek other medical treatment that day.

On June 13, the claimant did not report to work or notify the employer she would be absent. She was discharged the following day for violation of the attendance policy and the written warning she received on May 14. The claimant filed for and received unemployment insurance benefits in the amount of $1,536.00 from June 10 through the week ending July 7.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was suspended on May 22, 2018 for no disqualifying reason. Benefits are allowed effective May 20, 2018, provided the claimant is otherwise eligible. The claimant was discharged from employment on June 14, 2018 for disqualifying misconduct. Benefits are denied effective June 10, 2018.

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:
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> 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 Admin. Code r. 871-24.32 provides, in relevant part:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.
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> …
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> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be

> established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.
>
> …
>
> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.
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> …
>
> (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification. This rule is intended to implement Iowa Code section 96.5 and Supreme Court of Iowa decision, *Sheryl A. Cosper vs. Iowa Department of Job Service and Blue Cross of Iowa*.

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 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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer. Iowa Admin. Code r. 871-24.32(7); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law."

The requirements for a finding of misconduct based on absences are twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

The claimant had two separations from this employer that must be considered when determining eligibility for unemployment insurance benefits. The first is the suspension that

occurred on May 22 which will be analyzed to determine if the suspension was for disqualifying misconduct. Iowa Admin. Code r. 871-24.32(4), (9). The employer conducted an investigation and determined the claimant had not engaged in any wrongdoing so it brought her back to work. The employer has not established that the claimant engaged in disqualifying misconduct with regard to the suspension. Benefits are allowed effective May 20 through June 9, provided the claimant is otherwise eligible.

The issue of whether the claimant was partially unemployed and able to and available for work rendering her eligible for benefits from May 20 through June 9 has not yet been investigated and adjudicated by the Benefits Bureau. Additionally, the issue of whether the claimant had unreported wages during claims made from May 27 through June 9 as delineated in the findings of fact may need to be remanded to Investigation and Recovery for an initial investigation and determination.

The claimant was separated on June 14, 2018 due to absenteeism. The decision on this separation rests, at least in part, upon the credibility of the parties. It is the duty of the administrative law judge as the 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 administrative law judge 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, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

The findings of fact show how the disputed factual issues were resolved. After assessing the credibility of the witnesses who testified during the hearing, the reliability of the evidence submitted, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge attributes more weight to the employer's version of events.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The claimant had three excused absences during 2018, one in February and two in April, related to her personal illness. The claimant's absences related to FMLA certified condition that were not approved by Aetna, are unexcused as they were not properly reported. Additionally, any no-call/no-show absences are unexcused as they were not properly reported. The claimant's absences related to personal reasons are unexcused as they are not for reasonable grounds.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence on June 13 was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld effective June 10, 2018.

Iowa Code section 96.3(7)a, b, as amended in 2008, provides:

> Payment – determination – duration – child support intercept.

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.

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.

As benefits are allowed from May 20 through June 9, provided the claimant is otherwise eligible, the charges to the employer's account for that time period cannot be waived.

Because the claimant's separation was disqualifying effective June 10, benefits were paid to which she was not entitled. The 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. Iowa Code § 96.3(7). 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. Iowa Admin. Code r. 871-24.10(1). 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.

The claimant has received benefits after June 10, 2018, but was not eligible for those benefits. The benefits were not received due to any fraud or willful misrepresentation by the claimant as she mistakenly believed she had been terminated at the time of the fact-finding interview. Additionally, the employer did not participate in the fact-finding interview. Thus, the claimant is not obligated to repay to the agency the benefits she received.

The law also states that an employer is to be charged if "the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. . ." Iowa Code § 96.3(7)(b)(1)(a). Here, the employer responded to the notice of a fact finding conference by providing a phone number at which it could be reached. Benefits were not paid because the employer failed to respond timely or adequately to IWD's request for information relating to the payment of benefits. Instead, benefits were paid because the employer's phone lines were not working which it did not know until after the interview when it attempted to find out why it had not been contacted. The employer did not answer when called through no fault of its own; therefore, it cannot be charged. Since neither party is to be charged then the overpayment is absorbed by the fund.

DECISION:

The June 6, 2018, reference 01, unemployment insurance decision is modified in favor of the employer. The claimant's suspension on May 22, 2018 was not for disqualifying misconduct. Benefits are allowed effective May 20 through June 9, provided the claimant is otherwise eligible.

The claimant was discharged from employment on June 14, due to excessive, unexcused absenteeism which is disqualifying misconduct. Benefits are withheld effective June 10, 2018 until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of $1,536.00 after her disqualifying separation effective June 10 and she is not obligated to repay the agency those benefits. The employer did not participate in the fact-finding interview through no fault of its own and its account shall not be charged. The overpayment must be charged to the fund.

REMAND:

The issue of whether the claimant was partially unemployed and able to and available for work rendering her eligible for benefits from May 20 through June 9, is remanded to the Benefits Bureau for an initial investigation and determination. Additionally, the issue of whether the claimant had unreported wages from May 27 through June 9 as delineated in the findings of fact is remanded to Investigation and Recovery for an initial investigation and determination, if necessary.

_____
Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

src/scn