IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANTHONY J BELLER Claimant **PARKER-HANNIFIN CORPORATION** Employer	**APPEAL 19A-UI-05559-JC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/09/19** **Claimant: Respondent (2)**

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:

The employer/appellant, Parker-Hannifin Corporation, filed an appeal from the July 2, 2019 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision that allowed benefits. A first hearing was scheduled for August 6, 2019. The hearing was continued to allow the claimant to receive and review the proposed employer exhibits. The parties were properly notified about the second hearing. A telephone hearing was held on August 28, 2019. The claimant, Anthony J. Beller, participated personally. The employer participated through Sara Nelson. Bridget Wood also testified. Employer Exhibits 1-13 were admitted. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any 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 an auxiliary operator and was separated from employment on June 12, 2019, when he was discharged.

When he was hired, he was trained on the employer rules and procedures (Employer Exhibit 2), which require an employee notify the employer if unable to work 30 minutes prior to a shift start time. The employer uses a point system and designates a point value for attendance infractions. Upon receipt of 8 points in a rolling 12-month period, an employee is subject to

discharge. The claimant was made aware of the employer's policies at hire. He accumulated points based upon attendance infractions on December 2, 18, 2018, January 19, 23, 30, February 20, March 23, April 23, May 2 and 18, 2019. The claimant attributed the points to weather, his wife being in the hospital and tending to family matters.

The claimant worked the overnight shift, which began at 11:00 p.m. and ended in the morning around 7:00 a.m. He also has three children under the age of 10. The claimant was made aware that he would be required to occasionally work mandatory overtime as delegated by the employer. Mandatory overtime notice is provided to employees and would require the claimant to either come in 4 hours early or stay 4 hours over his stop time at 7:00 a.m. If an employee does not work a required overtime shift, they are subject to an attendance point. The claimant had specifically received an attendance point and subsequent warning for failing to work his mandatory overtime on December 18, 2018 (Employer Exhibit 3). He received a final warning on May 20, 2019 (Employer Exhibit 9) and decision making day on May 23, 2019 (Employer Exhibit 11-12) for his attendance. His warnings specifically stated his job was in jeopardy.

On June 6, 2019, the claimant did not stay and work his mandatory overtime. He knew he had to work the shift but did not stating he did not have childcare available. He subsequently pointed out and was discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2,996.00, since filing a claim with an effective date of June 9, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview. The employer intended to participate in the fact-finding interview and provided phone numbers for Sara Nelson and Bridget Wood to participate (see Administrative Records). The fact-finding interview was scheduled for 2:00 p.m. on June 28, 2019. The employer witnesses were not contacted until 2:51 and 3:52 p.m. (see Administrative Records). This is outside of the usual window that a party is allowed to participate if they would miss a call from a fact-finder. By the time the employer was contacted, it was unavailable due to other obligations.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for disqualifying job-related misconduct.

Iowa unemployment insurance law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*.

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 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).

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*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). The task in question here was occasional overtime would be required. The evidence presented does not mitigate the claimant's refusal to work his required overtime shifts.

In the specific context of absenteeism, the administrative code provides:

Iowa Admin. Code r. 871-24.32(7) provides:

> (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.

871 IAC 24.32(7); *See Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)("rule [2]4.32(7)…accurately states the law").

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. 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.

As for reasonable grounds, "absenteeism arising from matters of purely personal responsibilities such as child care and transportation" are not excused. *Harlan v. IDJS*, 350 N.W.2d 192, 194 (Iowa 1984)(late bus)(emphasis added). Similarly, *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984) found unexcused "personal problems or predicaments other than sickness or injury. Those include oversleeping, delays caused by tardy babysitters, car trouble, and no excuse." *Higgins at 191*; see also *Spragg v. Becker-Underwood, Inc*. 2003 WL 22339237*3 (Iowa App. 2003)(in case of continued absence for sick child court rules "under Iowa Code section 96.5(2), 'Discharge for Misconduct,' there are no exceptions allowed for 'compelling personal reasons' and we cannot read an exception into the statute.") Thus in general the Employment Security Law expects workers to make appropriate arrangements for issues such as child care. Barring some sort of emergency "lack of child care" is not reasonable grounds for missing work or leaving work early.

In this case, the claimant had 10 attendance infractions between December 2, 2018 and May 18, 2019 which resulted in him receiving points and disciplinary warnings. He acknowledged his attendance points were mostly due to weather, family matters and a time his wife had been hospitalized. In addition, the claimant had been previously warned specifically for failing to work his overtime shift. He had also been given notice that his job was in jeopardy due to attendance on May 23, 2019. Based on the claimant knowing in advance of his overtime shifts, the claimant had had plenty of opportunity to make appropriate arrangements and simply didn't do so. In the end, then, this is a non-emergency issue of "personal responsibility" which does not constitute good cause for missing work. The claimant was discharged after he refused to work his June 6, 2019 overtime shift, citing to childcare issues. This was not an excused absence.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). The administrative law judge is persuaded the claimant's ten absences before he did not work his June 6, 2019 overtime shift were unexcused.

The employer has credibly established that claimant was warned that further refusal to work overtime would result attendance points and would lead to his discharge. The employer has met its burden of proof to establish the claimant was discharged for disqualifying misconduct. Benefits are denied.

The next issues to resolve are the overpayment and employer's relief from charges.

Iowa Code § 96.3(7)a-b provides:

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 § 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 § 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.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to § 602.10101.

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.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The claimant has been overpaid benefits in the amount of $2,996.00. 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. 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. The employer will not be charged for benefits if it is determined that it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

Here, the employer representative credibly testified that she faxed in contact information in advance of the scheduled fact-finding interview to participate but was not called. The employer was not called for over 50 minutes after the start time. By this time, the employer was no longer available to participate. Benefits were not allowed because the employer failed to respond timely or adequately to IWD's request for information relating to the payment of benefits. Instead, benefits were allowed because the employer did not receive phone call to participate in

the fact-finding interview. The employer thus cannot be charged. Since neither party is to be charged, any potential charges for this claim should be absorbed by the fund.

Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay the benefits he received.

DECISION:

The July 2, 2019, (reference 01) decision is reversed. The claimant was discharged for disqualifying job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid benefits in the amount of $2,996.00. He is not required to repay the benefits he received. The employer's account is relieved of charges.

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Jennifer L. Beckman
Administrative Law Judge

_____
Decision Dated and Mailed

jlb/scn