IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

LASALLE WALDRIP Claimant **DES MOINES IND COMMUNITY SCH DIST** Employer	**APPEAL NO. 18A-UI-04420-B2** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/25/18** **Claimant: Appellant (2)**

Iowa Code § 96.5-1 – Voluntary Quit
Iowa Code § 96.3-7 – Recovery of Overpayment of Benefits
871 IA Admin. Code 24(10) – Employer Participation in Fact Finding

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated April 10, 2018, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held in-person on May 23, 2018. Claimant participated and had witness Rossi Frith. Employer participated by attorney Carrie Weber and witnesses LaShone Mosely, Naki Allen, Julie Kruse, Carlos Alonzo, Beverly Stack, Rhonda Wagoner, Rossi Frith and Sherry Bickett. Employer's Exhibits 1-7 were admitted into evidence.

ISSUES:

Whether claimant quit for good cause attributable to employer?
Whether claimant was overpaid benefits?
If claimant was overpaid benefits, should claimant repay benefits or should employer be charged due to employer's participation or lack thereof in fact finding?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on March 22, 2018. Claimant voluntarily quit his employment on March 23, 2018, after being at a hearing where multiple bus driving errors were brought forth.

Claimant worked as a bus driver for employer. On February 15, 2018, claimant was driving a bus picking up multiple students to take to multiple schools. One of the schools that claimant dropped student was Willard elementary school. Claimant was a few blocks away from the elementary school when he received word from dispatch that there were two children who were not picked up that were requesting a pickup. (Claimant stated that he'd gone to the pickup location in a timely manner and the students were not where they were supposed to be to be picked up.) Claimant went back a couple of miles to pick up the other students before dropping off the Willard students. When claimant went out of his way, one of the students repeatedly was asking where they were going. Claimant was bothered by this student and called dispatch to

say he needed to have a representative from school outside to meet claimant at his bus so claimant could find out the student's name.

The principal and a case worker met the bus when it arrived late to Willard. As claimant had chosen to go pick up the other students before dropping off the students at Willard, (and this took claimant a mile and a half out of the way), claimant was the last bus to arrive at Willard – five minutes before school was to start. Students still needed to have breakfast prior to classes. Claimant got out of the bus to try and find out about the name of the student who'd been loud in the back of the bus asking where they were going when the bus went to pick up the students who'd been left behind. Claimant knew that this was wrong to leave the bus.

Claimant met with the principal and a case manager outside of the bus. The distraught child was also in the vicinity of the meeting. Testimony received indicated that the principal told claimant of the child's name, and asked that in the future to please drop off the children at Willard before going miles out of the way to pick up others. Claimant was annoyed at this suggestion and told the principal to change the rules if she wanted him to do this. Claimant's voice was raised and he moved towards the principal when saying this. The case worker, standing off to the side, put his hand on claimant's arm and attempted to ease the situation. As claimant was still agitated, the case worker and the principal stated the case worker reached out his hand to shake the claimant's hand in another attempt to diffuse things. Claimant stated that before the case worker reached out his hand, the case worker had hit or pushed claimant. Both the case worker and the principal stated that this did not happen. Claimant refused the hand shake as he felt that the principal and case worker was taking the side of the child over him.

Claimant was distraught about this occurrence and went to the district office to speak with the new Director of Transportation for Des Moines Public Schools. She claimed that claimant wanted a suggestion on what he should do, but did not file a complaint. The Director told claimant that he could attempt to go back to the school to address the principal about why he felt disrespected that the principal would be lecturing to him in front of a young child. The Director stated that claimant never mentioned being pushed or hit by anyone. As claimant didn't request a complaint to be filed, the Director did not initiate one.

Claimant then went back to the school to talk with the principal. She was in a classroom and couldn't meet with the claimant. The principal did not call claimant at the number he left for her. Claimant stated that he mentioned the assault and that he believed occurred at the hands of the case manager. The principal stated that the email she received did not indicate any allegation of assault.

The Director of DMPS transportation attempted to contact the principal and the two exchanged messages back and forth until they were able to be in contact weeks later. Once they were in contact, it was related to the Director that claimant was confrontational during the meeting. An investigation was then launched by DMPS.

The investigation led to a long fact-finding hearing on May 8, 2018. The hearing took an extended period of time as there were many breaks used to explore statements by claimant and slow playing of video tapes taken from the bus. The videos showed that claimant was very annoyed by the questioning of the student on February 15, 2018. The student wanted to know why they were not taking their ordinary route to get to school.

As the hearing took an extended period of time, it was not able to be finished in one day as claimant had to drive his afternoon route. Claimant stated at the May 8, 2018 hearing that his

numerous traffic errors shown through the videos were one-time events. This caused employer to examine other dates claimant had driven more than just the February 15, 2018 date.

The time between the hearings encompassed an in-service day and Spring Break. Claimant was informed on March 22, 2018, that he was being put on unpaid leave after employer had the opportunity to examine more video of claimant's actions. On March 23, 2018, claimant had the second part of his hearing. At that hearing, claimant felt as though he was being very aggressively questioned by employer. He felt as though he was the person who'd initiated this action, and his concerns were being ignored. Instead, the district was focusing on claimant's misdeeds which had not even been brought up prior to claimant's raising his concern about the student being present while the principal was seemingly chastising claimant, and the claimant saying he was pushed by the case worker. Claimant had belatedly requested video of the encounter outside of Willard elementary, but the video is procedurally erased after a short period of time, and before claimant requested a copy of the video.

Claimant requested a break in the hearing after a contentious back and forth with the DMPS representative. After claimant met with his union representative and discussed the pros and cons of his choices, claimant chose to quit his employment. Employer stated that claimant's choice to quit occurred before claimant had been afforded the opportunity to offer up an explanation for his numerous violations, which were uncovered through employer's further exploration of claimant's driving videos. The observation of those videos showed claimant repeatedly failing to stop at railroad crossings, not coming to complete stops at stop signs, carrying a non-student to a place that was not a school and being dishonest when asked about this, and leaving a running bus. Employer stated that any decision as to action by DMPS is only made at the conclusion of the production of evidence by both sides. As claimant hadn't been afforded his opportunity to bring forth evidence and make his argument, there was no decision made as to what would happen with claimant at the time he decided to quit.

For the three years prior to claimant's quit, he had been given positive yearly reviews. Prior to claimant's most recent incidents, there had been no previous write ups in his personnel file.

Information shows that claimant has received $3,311.00 in unemployment benefits since the date of job separation. Employer did substantially participate in fact finding in this matter.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Code § 96.3(7)a-b, as amended in 2008, 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 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.

(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 state pursuant to section 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.

In this matter, it is recognized that the entire investigation as to claimant's driving history was instigated because claimant had complained about his treatment when he addressed a principal about a child allegedly acting up, while on his bus. That being said, employer was in the right to explore the issue in its entirety once it had been raised, and not simply focus on the portion of the issue claimant had brought up. As claimant did not bring a formal complaint, the process was initially handled informally, and was only moved to a formal process once it was discovered that claimant had multiple violations of his bus driving policy.

At the time of claimants quit, there was no decision made as to claimant's status with employer. Although the questioning was rugged and focused on claimant's multiple errors that had been discovered through examination of his bus's video history, said questioning is procedural and testimony did not indicate it was inappropriate. It was claimant's choice in the middle of this questioning to decide to quit prior to claimant being afforded the opportunity to present his argument. Until claimant is given the opportunity to present his argument, there can be no meeting to determine what punishment, if any, would be doled out to claimant for his indiscretions. As claimant chose to quit, this matter is looked at as a voluntary quit, the administrative law judge's next action is to determine whether the quit is with good cause attributable to employer.

The administrative law judge holds that the evidence has failed to establish that claimant voluntarily quit for good cause attributable to employer when claimant terminated the employment relationship because he was being ignored in his complaints and employer was focusing solely on claimant's improper actions as a driver.

Ordinarily "good cause" is derived from the facts of each case keeping in mind the public policy stated in Iowa Code Section 96.2. *O'Brien v. EAB* 494 N.W.2d 660, 662 (Iowa 1993) (citing *Wiese v. IA Dept. of Job Serv.,* 389 N.W.2d 676, 680 (Iowa 1986)). "The term encompasses real circumstances, adequate excuses that will bear the test of reason, just grounds for the action, and always the test of good faith." *Wiese v. IA Dept. of Job Serv.,* 389 N.W.2d 676, 680 (Iowa 1986). "Common sense and prudence must be exercised in evaluating all of the circumstances that led to an employee's quit in order to attribute the cause for the termination." *Id.* Various allegations will be discussed in showing that none constituted good cause to quit.

Claimant's three focuses on his causes to quit concerned a meeting with a supervisor where she told claimant that his manner of speech could be interpreted as intimidating to passengers. Claimant stated that he was told to not talk so low and to walk in a friendlier manner. Employer's witness testified that at the meeting, she was addressing a report a guardian had made about claimant. This did not enter claimant's personnel file and his supervisor was suggesting that claimant could be perceived as gruff when he got frustrated as he tended to talk aggressively and move in an aggressive manner. This discussion occurred many months before claimant's quit and in and of itself would not constitute good cause to quit.

Claimant additionally complained that he was chastised by the principal on February 15, 2018 with the offending child present, when claimant was attempting to get that child's name to file a report. When the principal heard the facts of the circumstance, with the child present, the principal asked for claimant, in the future, to drop off the children before going miles out of his way to pick up children who hadn't been ready to be picked up when claimant came by earlier. This statement, given in front of a child would not constitute, in and of itself, good cause to quit.

Claimant also stated that he was pushed or hit by the case manager when talking with the principal. The case manager and the principal denied this occurred. 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 Ct. 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. *State v. Holtz*, 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. *State v. Holtz*, Id. In this matter, it is determined that employer's testimony regarding this incident is more credible for a number of reasons. Initially, when claimant went to the head of transportation, he made no mention of an assault by any individual. When the principal received the email from her secretary later that day, the secretary made no mention that claimant said he was assaulted. Claimant didn't mention a possible assault publicly for weeks. By that time, it was too late for the school to produce a video of the event as the videos are erased after a short period of time after they are recorded, unless requested to be kept within that period. In this matter, no timely request was made. Additionally, common sense indicates a person standing to the side of two parties speaking face to face would not commonly be involved as it would have little effect, and in this instance would have been far outside the context of the discussion. Claimant did not show a good cause reason to quit in the handling of the alleged assault, as his claim was not made in a timely fashion and the others in the area denied it happening.

Claimant's last reason for his quit was the badgering questions and the looking into past events at the time of the hearings. It was reasonable for employer to explore past events once claimant stated that his actions were a one-time occurrence from February 15, 2018. The examination proved multiple claimants' statements to be false. The difficult questioning did not constitute good cause to quit.

The overpayment issue was researched. As claimant did not have good cause to quit in this matter, unemployment benefits received are overpayments and shall be repaid.

The issue of employer participation was addressed. As employer substantially participated in fact finding in this matter, employer's account will not be charged for benefits received by claimant.

DECISION:

The decision of the representative dated April 10, 2018, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. Payments received to date in this matter are overpayments and must be repaid. As employer substantially participated in fact finding in this matter, employer's account will not be charged for benefits received by claimant.

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Blair A. Bennett
Administrative Law Judge

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Decision Dated and Mailed

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