

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**NICOLE N NESBY**  
Claimant

**CBE COMPANIES INC**  
Employer

**APPEAL 15A-UI-10606-SC-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/30/15**  
**Claimant: Respondent (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
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 filed an appeal from the September 17, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon the determination the claimant did not voluntarily quit but was discharged and the employer failed to furnish sufficient information to show she was discharged for willful or deliberate conduct. The parties were properly notified about the hearing. A telephone hearing was held on October 6, 2015. Claimant Nicole Nesby participated on her own behalf. Employer CBE Companies, Inc. participated through Chief Human Resources Officer Mary Phillips and Supervisor Melissa Galbraith.

**ISSUES:**

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

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 collector beginning December 1, 2014, and her last day worked was September 8, 2015. The claimant typically worked Tuesday through Friday 6:00 a.m. to 2:30 p.m. and Saturday 7:00 a.m. to 3:30 p.m. She reported to Supervisor Melissa Galbraith.

The employer has an in-depth attendance policy. For every ten points an employee accrues, he or she advances on the progressive disciplinary scale with 50 points typically resulting in

discharge. Points generally accrue when an employee does not have paid time off to cover his or her absence. Additionally, an employee who receives three written warnings, which might occur at a ten-point increment or as the result of no-call/no-show on one day, in a six-month period is also subject to discharge.

The claimant missed work on multiple days after the birth of her child in 2015. Most were excused by a doctor's note and the absences did not count toward her total points. However, the claimant did accrue points on August 19 and September 1 when she used some paid time off, but did not have enough time to cover the entire absence. The claimant missed these days due to her ongoing medical issues and believed them to be covered.

As of September 8, 2015, the claimant had 35.5 attendance points. She had received a written warning for her thirtieth attendance point. On September 9, 2015, the claimant called in to work four hours after the start of her shift to report she would not be at work as she did not feel well. On September 10, 2015, the claimant was a no-call/no-show as she had to move herself and her children into a shelter. On September 11, 2015, the claimant contacted Galbraith and explained she could not get to work that day as she did not have transportation. She also asked Galbraith if she still had a job as she knew she had been a no-call/no-show the previous day and had accrued additional attendance points. The claimant would have been able to arrange for transportation the following day, but did not want to put in the expense to do so if she was going to be discharged. Galbraith said she would call the claimant back after looking into whether she was still employed.

Galbraith did not contact the claimant again after that conversation. The claimant did not report to work for her next two shifts on September 12 and 15 of 2015. The employer determined at that time the claimant had abandoned her job. However, even if the claimant had reported to work, the employer had determined there would have been no work for her as she was in violation of the attendance policy. The claimant would have received a second written warning for her fortieth attendance point and a written warning for no-call/no-show which would have put her at three written warnings in a six-month timeframe.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$494.00, since filing a claim with an effective date of August 30, 2015, for the six weeks ending October 10, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The employer has argued that the claimant abandoned her job by being a three-day no-call/no-show. However, it appears the decision to end the claimant's employment was made on September 11, 2015. The claimant had questioned the status of her employment and had she arrived at work on September 12, 2015, there would have been no work available for her. On the dates prior to September 11, 2015, the claimant only had one day of no-call/no-show. Since the claimant did not have three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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(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.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. 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 v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. 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. For purposes of this decision, it will be accepted that the absences on August 19 and September 1 were excused as they were properly reported and pertained to medical issues. The only three absences to be considered are the claimant's September 9, 10, and 11 absences. While the absences were arguably for good reasons, they were not properly reported. The claimant did not call in until four hours after the start of her shift on two of the days and did not notify the employer at all of her absence on another day. The absences are all considered unexcused. The claimant was aware her job was in jeopardy as evidenced by her conversation with Galbraith and her final absence was not excused. The final absence, in combination with the

claimant's other two days of unexcused absenteeism, is considered excessive. Benefits are withheld.

Iowa Code § 96.7 provides, in pertinent part:

7. Recover 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.

871 IAC 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 § 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted 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 § 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 § 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 § 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 § 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 § 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 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. 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 they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

**DECISION:**

The September 17, 2015, (reference 01) decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld 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 \$494.00 and is obligated to repay the

agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

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Stephanie R. Callahan  
Administrative Law Judge

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Decision Dated and Mailed

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