

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

BRANDY D COLE

Claimant

APPEAL NO. 19A-UI-04531-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KINSETH HOTEL CORPORATION

Employer

OC: 05/05/19

Claimant: Respondent (2)

Iowa Code Section 96.5(1) – Voluntary Quit

Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 24, 2019, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on May 4, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on June 27, 2019. Claimant Brandy Cole did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Christopher Hunter of Employers Unity represented the employer and presented testimony through Coral Erickson, Tasia Jones, and Emily Klauer. Exhibits 1 through 6 were received into evidence. The administrative law judge took official notice of the database readout (DBRO) that documents the benefits paid to Ms. Cole and her base period wages. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether Ms. Cole was discharged for misconduct in connection with the employment.

Whether Ms. Cole voluntarily quit without good cause attributable to the employer.

Whether the employment was part-time.

Whether the claimant has sufficient other base period wage credits to be monetarily eligible for benefits if the base period wages from the Kinseth employment are excluded.

Whether the claimant was overpaid benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brandy Cole was employed by Kinseth Hotel Corporation, doing business as Holiday Inn Dubuque, as a part-time housekeeper. Ms. Cole began the employment in October 2018 and last performed work for the employer on April 20, 2019. Ms. Cole was then absent from scheduled shifts on April 27 and 28, 2019 without notice to the employer. If Ms. Cole needed to be absent from work, the employer's written attendance policy required that she telephone the workplace at least three hours prior to the start of her employment and speak directly with her supervisor. The attendance policy was set forth in the employee handbook the employer provided to Ms. Cole at the start of her employment. The employer did not have a written policy that stated three consecutive no-call/no-show absences would be deemed a voluntary quit.

On May 1, 2019, Ms. Cole contacted her immediate supervisor, Executive Housekeeper Tasia Jones, and asked whether she still had a job. Ms. Cole told Ms. Jones that she had been in jail. At the time of the May 1, 2019, Ms. Cole was on the schedule to work 9:00 a.m. to 2:00 p.m. on May 5, 2019. During the May 1 call, Ms. Jones instructed Ms. Cole that Ms. Jones would be at the workplace at 10:00 a.m. on May 4 and that Ms. Cole should come to the workplace that day to discuss her employment. Ms. Cole appeared at the workplace on May 4, but did so prior to 10:00 a.m. Ms. Jones was not yet at the workplace. Ms. Cole spoke with Emily Klauer, Assistant Executive Housekeeper, who told Ms. Cole to return after 10:00 a.m. when Ms. Jones would be at the workplace. Ms. Cole did not return to the workplace that day to speak with Ms. Jones. Ms. Cole was subsequently absent from a scheduled shift on May 5, 2019 without notice to the employer. Ms. Cole's only further contact with the employer was on May 7, 2019, when she went to the workplace to collect her paycheck. Ms. Cole was at that point on the schedule to work May 11 and 12, 2019, from 9:00 a.m. to 2:00 p.m. Ms. Cole did not appear for those scheduled shifts and did not provide notice to the employer that she would be absent from those shifts. On May 13, 2019, Ms. Jones documented Ms. Cole's separation from the employment as a voluntary quit based on three no-call/no-show absences on May 5, 11 and 12, 2019.

During the week of May 5-11, 2019, Ms. Cole established an original claim for benefits that Iowa Workforce Development deemed effective May 5, 2019. Iowa Workforce Development set Ms. Cole's weekly benefit amount at \$112.00. Ms. Cole received that amount in benefits for the week that ended May 11, 2019. Kinseth Hotel Corporation is a base period employer in connection with Ms. Cole's claim for benefits. Ms. Cole's base period consists of the four quarters of 2018. Ms. Cole's highest earning base period quarter was the fourth quarter of 2018, when she was paid \$2,428.61 from the Kinseth employment and \$159.39 from another employment. Ms. Cole's next highest earning base period quarter was the first quarter of 2018, when she was paid \$1,106.95 for non-Iowa employment. In the second quarter of 2018, Ms. Cole's wages from various employments totaled less than \$600.00. Ms. Cole was not paid any wages in the third quarter of 2018.

On May 23, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Cole's separation from the employment. Ms. Cole participated in the fact-finding interview and provided a verbal statement to the deputy. Ms. Cole's statement included the intentionally misleading statement that she had been discharged by the General Manager on April 30, 2019. The employer's third-party representative of record is Employer's Unity, L.L.C. Coral Erickson, an Employers Unity representative, participated in the fact-finding interview on behalf of the employer and provided a verbal statement to the deputy. Ms. Erickson lacked personal knowledge concerning Ms. Cole's employment, but included information from the employer in verbal statement. Prior to the fact-finding interview,

Ms. Erickson had filed a protest on behalf of the employer via SIDES. The written protest included a summary statement that Ms. Cole had voluntarily quit the employment by being a no-call/no-show on May 5, 11 and 12, 2019. Ms. Erickson attached to the protest a Separation Notice completed by Ms. Jones on May 13, 2019, a written statement from Ms. Jones dated May 13, 2019, and work schedules that showed the scheduled shifts Ms. Cole had missed toward the end of the employment.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). 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. See Iowa Administrative Code rule 871-24.25.

The weight of the evidence establishes that Ms. Cole voluntarily quit and was not discharged from the employment. At the time Ms. Cole spoke with Ms. Jones on May 1, 2019, neither Ms. Jones nor anyone else had told Ms. Cole she was discharged from the employment. She was on the schedule to work additional shifts. She was invited to meet with Ms. Jones on May 4, 2019 to discuss her employment. Ms. Cole's actions communicated an intention to voluntarily separate from the employment.

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 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 section 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 section 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 evidence in the record indicates that the claimant voluntarily quit the employment without good cause attributable to the employer. The claimant demonstrated an intention to voluntarily

separate from the employment by failing to appear as scheduled for the May 4 meeting with Jones, by being absent on May 5, 11 and 12 without notice to the employer, and failing to make any contact with the employer beyond May 4 other than picking up a paycheck on May 7.

An individual who voluntarily quits part-time employment without good cause attributable to the employer and who has not re-qualified for benefits by earning 10 times her weekly benefit amount in wages for insured employment, but who nonetheless has sufficient other wage credits to be eligible for benefits may receive reduced benefits based on the other base period wages. See Iowa Administrative Code rule 871-24.27.

Iowa Code § 96.4(4)a-c provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

4. a. The individual has been paid wages for insured work during the individual's base period in an amount at least one and one-quarter times the wages paid to the individual during that quarter of the individual's base period in which the individual's wages were highest; provided that the individual has been paid wages for insured work totaling at least three and five-tenths percent of the statewide average annual wage for insured work, computed for the preceding calendar year if the individual's benefit year begins on or after the first full week in July and computed for the second preceding calendar year if the individual's benefit year begins before the first full week in July, in that calendar quarter in the individual's base period in which the individual's wages were highest, and the individual has been paid wages for insured work totaling at least one-half of the amount of wages required under this paragraph in the calendar quarter of the base period in which the individual's wages were highest, in a calendar quarter in the individual's base period other than the calendar quarter in which the individual's wages were highest. The calendar quarter wage requirements shall be rounded to the nearest multiple of ten dollars.

c. If the individual has drawn benefits in any benefit year, the individual must during or subsequent to that year, work in and be paid wages for insured work totaling at least eight times the individual's weekly benefit amount, as a condition to receive benefits in the next benefit year.

The minimum earnings requirements referenced in Iowa Code section 96.4(4) include a requirement that Ms. Cole have wages of at least \$1,610.00 in one of her base period quarters and at least \$800.00 wages in another. See 2018 Iowa Workforce Development Unemployment Insurance Claimant Handbook, Monetary Eligibility, available at <https://www.iowaworkforcedevelopment.gov/monetary-eligibility>.

With the exclusion of the base period wages from the Kinseth employment from Ms. Cole's claim, Ms. Cole lacks the necessary wage credits to be monetary eligible for unemployment insurance benefits. Accordingly, Ms. Cole is disqualified for benefits until she has worked in and been paid insured wages equal to 10 times her weekly benefit amount. Ms. Cole must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions

are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Cole received \$112.00 in benefits for the week that ended May 11, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. Cole received constitute an overpayment of benefits.

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.
24.10(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.

Ms. Erickson's participation on behalf of the employer in the fact-finding interview telephone call and the protest documents Ms. Erickson submitted to Iowa Workforce Development prior to the fact finding interview were sufficient to satisfy the participation requirement. Because the employer participated in the fact-finding interview, Ms. Cole is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid to Ms. Cole.

DECISION:

The May 24, 2019, reference 01, decision is reversed. The claimant voluntarily quit the part-time employment without good cause attributable to the employer. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$112.00 in benefits for the week that ended May 11, 2019. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn