

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ELON R MURPHY**  
Claimant

**APPEAL NO. 12A-UI-05275-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THE CBE GROUP INC**  
Employer

**OC: 04/08/12**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism/Tardiness  
871 IAC 24.32(8) – Current Act of Misconduct

**STATEMENT OF THE CASE:**

The claimant appealed a department representative's decision dated May 3, 2012, reference 01, that held he was discharged for excessive unexcused absenteeism and tardiness on April 2, 2012, and which denied benefits. A hearing was held on May 30, 2012. The claimant was represented by Erin Lyons, attorney at law, and participated personally. Mary Phillips, senior vice president/human resources; Christy Peters, director; and Shelton Rowe, manager; and Martin Dodge, manager, participated for the employer. Employer Exhibit 1 and Claimant Exhibit A were received as evidence.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds that: The claimant worked as a full-time collector from October 1, 2010 to April 2, 2012. The claimant received the employer's attendance policy, which provides for progressive discipline from coaching to verbal to written warnings. The employer's attendance policy is based on a yearly point system where the employer does not focus on the reason for the infraction but rather the nature of it to determine how many points are issued. The policy also provides that three written warnings within six months may result in termination.

The employer terminated claimant on April 2, 2012 for receiving three warnings within a six month period: October 13, 2011; January 17, 2012; and, April 2. The October warning is based on claimant having accumulated 30 attendance points due to unscheduled PTO, missed hand scans, and extended breaks. It does not specify the dates of the attendance infractions and the number of points given.

Claimant was scheduled to work from 3 p.m. to 10 p.m. on Monday, January 16. He called in to report an absence to supervisor Dodge. When Dodge told him he would lose his holiday pay for the previous Friday due to employer policy, he said he would try to make it in. When claimant did not come to work, he was issued a written warning. The employer considers this infraction to be a no-call, no-show to work.

Claimant tried to call in and report an absence due to illness before his shift on the morning of March 31, but was unable to contact any person until he spoke with supervisor Rowe just before 11 a.m. Claimant was scheduled to work from 8 a.m. to noon. Claimant has a doctor statement excusing him from work for this day.

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

Iowa Code section 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 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 administrative law judge concludes that the employer failed to establish misconduct and/or a current act of misconduct in the discharge of the claimant on April 2, 2012, for excessive "unexcused" absenteeism.

The employer has a "mixed" disciplinary policy that it applies to attendance infractions. Employees are warned about points for infractions during a calendar year and are subject to termination for receiving three warnings within six months. Although the employer offered evidence of its discipline, it did not offer its attendance policy.

The first written warning is based on an attendance infraction point accumulation without any specific dates and occurrences as to how the points were awarded. There is no means to determine whether the absences or occurrences could have been for excusable reasons, so misconduct is not established.

The employer mischaracterizes the January 16 absence as a no-call, no-show. Claimant did call and report an absence for this day. His statement that he would try to make it does not excuse the absence, but this is not a no-call misconduct event.

There was a divisive dispute about the claimant reporting an absence on March 31. The most reliable evidence is claimant's doctor statement excusing him from work that day, which means the attendance infraction is not considered a current act of misconduct.

**DECISION:**

The decision of the representative dated May 3, 2012, reference 01, is reversed. The claimant was not discharged for misconduct or a current act of misconduct in connection with employment on April 2, 2012. Benefits are allowed, provided the claimant is otherwise eligible.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

rls/kjw