

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**MARCO A. GARCIA**  
Claimant

**APPEAL 21A-UI-10955-CS-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GREEN BUICK GMC INC.**  
Employer

**OC: 03/07/21  
Claimant: Respondent (2)**

---

Iowa Code §96.5(2)a-Discharge/Misconduct  
Iowa Code §96.5(1)- Voluntary Quit  
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:**

On April 8, 2021, the employer/respondent filed an appeal from the April 5, 2021, (reference 01) unemployment insurance decision that allowed benefits based on claimant being dismissed for unsatisfactory work that did not qualify as misconduct to deny benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 6, 2021. Claimant personally participated at the hearing. Employer participated through Human Resources and Payroll Manager Mandy Andrews. Employer's exhibit 1 was admitted into the record. Administrative notice was taken of claimant's unemployment insurance benefits.

**ISSUES:**

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

Was the claimant overpaid benefits?

Should claimant repay benefits and/or charge employer due to employer participation in fact finding?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on April 12, 2010. Claimant last worked as a full-time sales person. Claimant was separated from employment on March 3, 2021, when he did not call or show up to work.

On March 1, 2021, claimant was scheduled to work and he did not call in to the employer to notify them he would not be at work.

On March 2, 2021, claimant was scheduled to work and he did not call in to the employer to notify them he would not be at work.

On March 3, 2021, claimant was scheduled to work and he did not call in to the employer to notify them he would not be at work. Employer called the claimant to try to make contact with him. Claimant did not answer the phone calls. Employer terminated the claimant effective March 3, 2021. Employer sent the claimant a letter informing him that he was

Claimant testified that during this time he was experiencing family issues and did not go to work.

Employer has a policy that if an employee does not show up for three days without calling in they are considered to have abandoned their job and a voluntary resignation from employment. (Exhibit 1). This policy is in the employer's handbook. Claimant received the handbook when he was hired on April 12, 2010.

Claimant had received a written warning for excessive absenteeism on August 30, 2020. Claimant was made aware that if he continued missing work that he would be terminated.

Both claimant and the employer did not participate in the fact-finding interviews.

The claimant filed a claim for unemployment insurance benefits with an effective date of March 7, 2021. The claimant filed for and received a total of \$6,372.00 in state regular unemployment insurance benefits for the weeks between March 13, 2021 and June 26, 2021.

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

For the reasons that follow, the administrative law judge concludes the claimant voluntarily left employment without good cause attributable to the employer.

Iowa Code §96.5(1) provides:

An individual shall be disqualified for benefits:

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.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

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 decision in this case rests, at least in part, on the credibility of the witnesses. 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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events. Claimant's testimony was vague. Claimant could not testify with specificity on whether he called in to his supervisor to inform him whether he was going to be absent March 1, 2021-March 3, 2021. Claimant testified that he was dealing with family issues during that time period and did not go to work. The employer testified they called claimant on March 3, 2021 and the claimant did not return their phone call.

The employer had a policy that three days of not calling and not showing up for work was deemed job abandonment and a voluntary resignation. Claimant acknowledges that he knew about the employer's no call, no show policy. Claimant acknowledges that he received two separate written warnings for his absenteeism. Claimant knew that he was supposed to report any absences prior to his scheduled shift start time. The administrative law judge finds claimant failed to report these absences in violation of the employer's policy. An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. Inasmuch as the claimant failed to report for work or notify the employer for three consecutive workdays in violation of the employer policy, the claimant is considered to have voluntarily left employment without good cause attributable to the employer. Benefits are withheld.

Because claimant's separation was disqualifying, benefits were paid to him which he was not entitled. The administrative law judge finds claimant has been overpaid regular state unemployment benefits in the amount of \$6,372.00 for eleven weeks ending June 26, 2021. Claimant is not required to repay the regular state unemployment benefits because the employer did not participate in the fact-finding interview due to no fault of his own.

Iowa Code §96.3(7) provides, in pertinent part:

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.

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.

Claimant has been overpaid unemployment insurance benefits in the amount of \$6,372.00 as he was not eligible to receive unemployment insurance benefits from March 13, 2021 through June 26, 2021. However, since the employer did not participate in the fact-finding interview, claimant is not required to repay these benefits and the employer's account shall be charged.

**DECISION:**

The April 5, 2021, reference 01, decision is REVERSED. The claimant voluntarily left employment without good cause attributable to the employer. 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.

Claimant has been overpaid unemployed insurance benefits in the amount of \$6,372.00, but he is not obligated to repay those benefits since the employer did not participate in the fact-finding interview. The employer's account shall be charged.



---

Carly Smith  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau

July 19, 2021  
Decision Dated and Mailed

cs/mh

**NOTE TO CLAIMANT:**

- This decision determines you are not eligible for regular unemployment insurance benefits under state law. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.