

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**SHANE A RICHARDSON**  
Claimant

**STREAM INTERNATIONAL INC**  
Employer

**APPEAL 16A-UI-12694-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/30/16  
Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism  
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 November 21, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was scheduled to be held on December 15, 2016. The claimant participated personally. The employer participated through Staci Albert, human resources manager. Employer witnesses included James Hanson, operations manager, and Shawn Granato, team leader. No testimony was taken and the parties agreed to continue the hearing to December 22, 2016 to allow the claimant to receive the proposed employer exhibits. At the December 22, 2016, the same parties participated, excluding Mr. Hanson. Employer Exhibits 1 through 13 were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Did the claimant quit the employment for good cause reasons attributable to the employer or was he discharged for reasons that would constitute misconduct and  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any 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 customer service representative and was separated from employment on November 2, 2016 (Employer Exhibit 6). The evidence is disputed as to whether the claimant voluntarily quit the employment by way of job abandonment (by way of no call/no show) or whether he was discharged for excessive absenteeism.

The employer has an attendance policy which assigns point values to attendance infractions, and upon receipt of 12 points in a rolling one year period, an employee may be discharged (Employer Exhibits 10, 11, 12 and 13). The employer also has a policy which provides that three no call/no shows will result in a voluntary separation due to job abandonment (Employer Exhibit 12). The claimant was presented the policies at hire, and they were available on the employer's intranet. In addition, the claimant received multiple written warnings for the accumulation of attendance points, including two warnings on June 6, 2016 (Employer Exhibits 1 and 2), June 11, 2016 (Employer Exhibit 3), and September 27, 2016 (Employer Exhibits 4 and 5).

The claimant indicated that sometime in the evening of October 23 or morning of October 24, 2016, he hit his head. He has no recollection of how it happened, nor did his girlfriend, who lived with him and their child. The claimant denied having a diagnosed medical condition which may have contributed to the fall or being impaired prior to the fall. When he awoke, he had blood on the floor and his head. He notified the employer that he needed to go to the hospital, where he had multiple stitches. The claimant then left early on October 25, 2016 because he was not feeling well. He worked a full day on October 26, 2016 without issue. He was absent again on October 27, 2016, and on October 28, 2016, he worked five hours of his shift, when he had a discussion with the employer. Mr. Granato had told the claimant that points had not been assigned to his absences for the week due to the head injury but because of his point standing his job was in jeopardy, and he would need to work overtime the following week to preserve his job. The claimant then told Mr. Granato he intended to leave early to go back to the hospital. During the conversation, Mr. Granato did not tell the claimant he would be fired if he left early, or that he was fired for leaving. Nor did Mr. Granato request the claimant submit his identification badge when he left so that he could not return to work. Rather, the claimant assumed he was fired based on the discussion of the claimant's job being in jeopardy due to his attendance. The claimant was not hospitalized but had his stitches removed at his October 28, 2016 visit.

Believing he had been discharged, the claimant did not attempt to return to work on October 31, November 1 or November 2, 2016. He made no attempts to report his absences via the required hotline. Mr. Granato left two voicemail for the claimant on October 31, 2016 when he did not arrive to work, and a third on November 1, 2016 in the morning. The claimant denied receiving the calls. Then Ms. Albert attempted to text message the claimant three times between November 1 and 2, 2016 (Employer Exhibit 7) and also tried to call him and left a voicemail. The claimant acknowledged the phone number used by Ms. Albert was correct but denied receipt of the text messages or voicemail. When he saw there was a missed call, he attempted to return the call, unaware of who called him. Ms. Albert was unable to immediately take the call but had voicemail available. The claimant disconnected the call before it went to voicemail which would have identified Ms. Albert as the owner of the phone. The claimant did not call back again or leave any messages, or return to work. Separation thereby ensued.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1568.00, since filing a claim with an effective date of October 30, 2016. The administrative record also establishes that the employer did participate in the November 18, 2016 fact-finding interview by way of Shawn Granato and James Hanson.

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

For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was 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.

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.

Iowa Admin. Code r. 871-24.25(27) 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:

(27) The claimant left rather than perform the assigned work as instructed.

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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the claimant was not discharged but quit the employment.

The credible evidence presented is that the claimant's job was in jeopardy prior to separation due to continued attendance matters (Employer Exhibits 1 through 5.) The claimant knew his

job was in jeopardy based on the amount of attendance points he accumulated. In addition, on October 28, 2016, the employer requested the claimant accept some overtime shifts to help preserve his job. This was partially due to additional attendance infractions the claimant had after suffering a personal injury on October 24, 2016. The employer did not discipline him for the absences affiliated with the injury, but based on the conversation that day with Mr. Granato about his job, the claimant believed by leaving early to revisit the hospital, he would be discharged. However, the credible evidence presented is that Mr. Granato did not tell him he would be discharged or even request he return his identification badge as he left, which is customary when an employee is discharged. The administrative law judge is sympathetic to the ongoing medical treatment or pain associated with the claimant's medical treatment, but is not persuaded the employer discharged the claimant for leaving early on October 28, 2016.

Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. Even if the claimant believed he had been discharged on Friday, October 28, 2016, he would have known on Monday, October 31, 2016 that he had not, by way of Mr. Granato leaving him two voicemails. At that point, he knew or should have known he still had a job. The employer provided credible evidence that Mr. Granato followed up with a third voicemail, and Ms. Albert did as well, in addition to sending three text messages to a valid phone number to the claimant. Since the claimant did not follow up with and his assumption of having been fired was erroneous, his failure to continue reporting to work was an abandonment of the job. Benefits are denied.

Iowa Code § 96.3(7)a-b 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 § 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 § 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 § 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 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 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.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The claimant had been overpaid benefits in the amount of \$1568.00. 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 it 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. The employer satisfactorily participated in the fact-finding interview by way of Mr. Granato and Mr. Hanson. Since the employer did participate in the fact-finding interview the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

**DECISION:**

The November 21, 2016, (reference 01) decision is reversed. The claimant was not discharged but quit the employment by way of job abandonment, 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. The claimant has been overpaid unemployment insurance benefits in the amount of \$1568.00, 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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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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