

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMBER R MARSH
Claimant

APPEAL NO. 13A-UI-04358-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MEDIACOM COMMUNICATIONS CORP
Employer

**OC: 03/17/13
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The employer filed an appeal from the April 5, 2013 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on May 17, 2013. Claimant participated. Employer participated through customer operations senior manager Lisa Glasgo, customer service supervisor Brian Piper, and human resources senior manager Debbie Hornbuckle. Employer's Exhibit One was received.

ISSUES:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a customer service representative from April 2011 and was separated from employment on March 16, 2013. Her last day of work was February 27. She had been on medical leave for most of December 2012 and January 2013 and had exhausted her Family Medical Leave Act (FMLA) leave on January 16, 2013. She returned to work in late January and worked intermittently in February 2013. She had surgery on March 8 and was released to work on March 15 but was still ill. On March 16 she called and told general supervisor Jean Meloit she was sorry for not calling to report her absence on March 15 because she was sick after surgery and her husband did not wake her up to call but let her sleep. Meloit told her to call Piper before reporting to work on Monday, March 18 and told her that because of the no call-no show her job was in jeopardy. She did not say when she would return but said she hoped to return by Tuesday, March 19. On March 16 she went in to pick up her check and saw her desk was cleared off and work items (binder with passwords, product information, etc.) were in a trash can by the back door. Her personal items were in a box set aside and given to her later. She called Piper on Monday and left a voice mail but got no return call. She was unaware Piper was not at work that day. She also sent Piper an e-mail and got no response. She called again at 10:17 a.m. without response. Piper did not contact claimant before the

termination letter was mailed on March 22. As a result of these circumstances she believed she was fired and did not call or report for work on March 19, 20, and 22, 2013. She did not contact Hornbuckle to explain extenuating circumstances after receiving the March 22 termination letter on March 27.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code section 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.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency,

unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

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); see also Iowa Admin. Code r. 871-24.25(35). 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).

Since claimant attempted to reach Piper several times as directed this indicates an intention to retain the employment. Because there was unclear communication between claimant and employer about the interpretation of both parties' statements about the status of the employment relationship; the issue must be resolved by an examination of witness credibility and burden of proof. Since most members of management are considerably more experienced in personnel issues and operate from a position of authority over a subordinate employee, it is reasonably implied that the ability to communicate clearly is extended to communication about employment status. After she found her personal items missing, her work-related desk items in the trash, claimant's interpretation of the conversation with Meloit and Piper's failure to return her calls and e-mail as a discharge was reasonable and the burden of proof falls to the employer.

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(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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. The failure to report to work without notification to the employer on March 15 was an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. Because claimant reasonably believed she was fired on March 16 and attempted to contact her supervisor as directed on March 16, she would not reasonably expect to have to call or report on March 19, 20 or 22, 2013. Because her other absences were otherwise related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Benefits are allowed.

DECISION:

The April 5, 2013 (reference 01) decision is affirmed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs