IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

ADIA E KINNETZ
2206 – 37TH ST
DES MOINES IA 50310

QWEST CORPORATION
C/O EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 05A-UI-02991-RT
OC: 02-13-05 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Qwest Corporation, filed a timely appeal from an unemployment insurance decision dated March 14, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Adia E. Kinnetz. After due notice was issued, a telephone hearing was held on April 5, 2005, with the claimant participating. Dan Dare, Sales Manager, participated in the hearing for the employer. The employer was represented by Marcy Schneider of Employers Unity, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibit One was admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full-time sales and service consultant or associate from September 22, 2003 until she was discharged on February 8 or 9, 2005. The claimant was discharged for poor attendance and performance issues. Concerning attendance, the claimant was absent on February 7, 2005, because she had no babysitter. Her babysitter called the claimant at the last minute and informed the claimant that she could not baby-sit for the claimant's four-year-old child because the babysitter's child was ill. The claimant properly reported this absence. The employer has a rule or policy that requires that an employee contact the employer by calling "mission control" whenever that employee is going to be absent or tardy. The claimant did so on February 7, 2005. The claimant also had numerous absences because of her minor child either being ill or babysitting or day care provider problems. The claimant was absent on January 31, 2005 because her son was ill and she properly called in this absence. On January 24, 2005, the claimant was required to start work early for one and one-half hours of overtime but the claimant came at her regular time and, therefore, was tardy one and one-half hours. She was tardy because she had problems with the day care provider. The claimant was absent on January 8, 2005, December 14, 2004, and December 11, 2004. All of these were properly reported to the employer. One was because the claimant was involved in a car accident and was in the hospital and the others were related to difficulties with childcare. The claimant was tardy on November 18, 2004, ten minutes because she had to park too far away. The claimant is required to use parking spaces with parking meters and she could not find a close parking space and was, therefore, late. The claimant was also tardy on November 9, 2004 and October 13, 2004 but could not remember why. On both of these tardies the claimant properly reported the tardies to the employer. The claimant received three written warnings for her attendance on November 18, 2004, December 15, 2004, and January 11, 2005 all as shown at Employer's Exhibit One.

Concerning the claimant's performance issues, the claimant could not meet the employer's sales expectations. At first the expectations were 80 percent but the claimant could not meet those. The expectations were changed to revenue per call which amount fluctuated but the claimant also could not meet that expectation. The claimant tried her best but was unable to meet the employer's sales expectations. The claimant had no real sales capability. When the claimant was first hired she was not in sales and did not move to sales until the summer of 2004 when she began to fail to meet the employer's sales expectations. The claimant in addition to the warnings for attendance which also mentioned performance the claimant also received for her performance a written warning on May 6, 2004, a written warning on July 19, 2004, a written warning on August 3, 2004, and a written warning on September 22, 2004.

Pursuant to her claim for unemployment insurance benefits filed effective February 13, 2005, the claimant has received no unemployment insurance benefits. Records show that the claimant, at most, has made only three weekly claims for benefit weeks ending February 19, 2005; February 26, 2005; and March 5, 2005. However, the claimant is shown as being disqualified because of vacation pay.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 parties agree, and the administrative law judge concludes that the claimant was discharged but they disagree as to the date. The employer's witness, Dan Dare, Sales Manager, testified that the claimant was discharged on February 9, 2005. The claimant testified that she was discharged on February 8, 2005. For credibility reasons discussed below, the administrative law judge concludes that the claimant was more credible and, therefore, she was discharged on February 8, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct including excessive unexcused absenteeism. Mr. Dare testified that the claimant was discharged for two reasons, poor attendance and performance issues.

Concerning the claimant's attendance, the evidence establishes that the claimant had a number of absences and tardies. However, the claimant credibly testified that these absences and tardies were due to her child's illness or daycare or babysitting problems associated with her child. The claimant is a single parent of a four-year-old child and was encountering serious daycare problems. This resulted in some absences and tardies. The child was also ill which resulted in other absences or tardies. The claimant credibly testified that she properly reported all of her absences and tardies except for one tardy when she was only ten minutes late and this was because she had to park too far away. Mr. Dare's testimony to the contrary is not credible. He was vague with some of his testimony and conceded that he had only become the claimant's supervisor recently and had no real knowledge of the claimant's attendance before he had become her supervisor. Some of his responses were also equivocal. Finally, Mr. Dare testified that the claimant was discharged on February 9, 2005 after being absent on February 8, 2005 but the claimant was adamant and credible that she was absent on February 7, 2005 and was discharged on February 8, 2005. The claimant was more credible than Mr. Dare. The administrative law judge understands an occasional absence or tardy for minor children. The administrative law judge believes that it is the responsibility of parents to see to proper childcare so that the parent can regularly attend work. However, the administrative law judge is also not unmindful of the problems a minor child can pose especially for a single parent. Accordingly, under the evidence here, the administrative law judge is constrained to conclude, although it is a close question, that the claimant's absences and tardies were for reasonable cause and properly reported and were not excessive unexcused absenteeism and disqualifying misconduct.

Considering the claimant's performance issues, the claimant was unable to meet the employer's sales expectations. The claimant credibly testified that she tried to meet them but she just could not. The claimant further testified that she did not have a sales capability and that when she was first hired she was not in sales but moved to sales in the summer of 2004. The employer had no evidence that the claimant's failure to meet the sales expectations of the employer were willful or deliberate. The administrative law judge concludes that the claimant's failure to meet sales expectations were not deliberate acts or omissions constituting a material breach of her duties nor do they evince a willful or wanton disregard of the employer's interest nor are they carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Rather, the administrative law judge concludes that at most,

claimant's failures were mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity and not disqualifying misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes, although it is a close question, that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. It is true that the claimant received a number of warnings both for her attendance and for her performance. However, the administrative law judge does not believe that these warnings themselves establish disqualifying misconduct. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. 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.
>
> 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 administrative law judge concludes that the claimant has received no unemployment insurance benefits. Even if the claimant had, she would not be overpaid these benefits as a result of her separation from the employer herein. The administrative law judge notes that records show, at most, only claims for three weeks of benefits. The claimant should check with her local Iowa Workforce Development office to inquire about her claims for unemployment insurance benefits if she continues to be unemployed. Records do show that the claimant is disqualified to receive unemployment insurance benefits because of vacation pay by decision dated March 9, 2005, at reference 03. The administrative law judge reaches no conclusion as to whether the claimant received vacation pay and, if so, whether it was properly deducted from her unemployment insurance benefits, because that issue is not before the administrative law judge.

DECISION:

The representative's decision of March 14, 2005, reference 01, is affirmed. The claimant, Adia E. Kinnetz, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

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