

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROYAL T CORBIN
Claimant

APPEAL NO. 08A-UI-10777-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION
Employer

OC: 10-05-08 R: 02
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 7, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 3, 2008. The claimant did participate. The employer did participate through Ramona Mitchell, Account Manager for Reed Group and Nicholas Ryan, Tele-sales Manager and was represented by Mary Otu of Barnett & Associates.

ISSUE:

Was the claimant discharged for work-related misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a consumer sales and service agent full time beginning May 14, 2007 through November 6, 2008 when he was discharged.

The claimant was out on a medical leave of absence from August 14, 2008 through October 9, 2008 for a problem with his foot due to his diabetes. After October 9, 2008 the claimant did not have authorization from any of his medical providers to be off work. It was the claimant's obligation to insure that the medical provider he alleges was telling him not to work provided that information either directly to the employer or to the claimant so he could provide it to the employer. At the hearing the claimant had not provided to either the employer or to Iowa Workforce Development any document from any medical provider that indicated he was to be off work after October 9, 2008.

The claimant returned to work for a partial day on October 10. The claimant was then a no-call/no-show for work from October 13 through October 17, 2008. On October 15, 2008 a letter was sent to the claimant indicating that the employer had no idea why he was not reporting to work or calling in to work to report his absence. The letter further informed the claimant that if he did not report to work by October 17, the employer would consider that he was quitting his employment. The claimant did not report to work again.

The claimant's direct supervisor, Nicholas Ryan attempted to call the claimant on October 13, 14, 15 and 16. The claimant did not answer the phone and no voice mail picked up so Mr. Ryan was unable to leave him a message.

Mr. Ryan sent the claimant a text message on October 14 to which the claimant responded that the employer was contacting the wrong doctor for his medical leave restriction. The claimant did not and to date of hearing has not, provided any work restrictions from any physician that kept him off work after October 9.

The claimant's FMLA (Family Medical Leave Act) time expired as of October 9, 2008. After that time period the employer's third party administrator, Reed Group, reviewed the claimant's medical documentation to determine whether the claimant's absence could be considered a medical leave. After October 9 the Reed Group had medical information from a Dr. Barp indicating that the claimant would return to work on October 10 as long as he was able to elevate his foot when needed, engage in no prolonged standing nor walk up any stairs through November 8, 2008. The employer was willing to accommodate the claimant's restrictions, but the claimant did not show up for work after completing a half day on October 10, 2008.

The claimant was not allowed any further leave after October 9 because he had used up his FMLA time and because the employer had work for him that he could perform within his work restrictions. The employer was willing to accommodate the claimant's work restrictions.

The claimant has never supplied any information to either his employer or to Iowa Workforce Development from Dr. Mandrake indicating that he should be off work after October 9, 2008.

The claimant filed a claim for benefits sometime during the week ending October 11, 2008.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The claimant did not have permission from any doctor to be off work for either a FMLA leave or a medical absence after October 9, 2008. The claimant was obligated to report his absence to the employer. The employer was willing to accommodate the claimant’s work restrictions on October 10 and thereafter.

The administrative law judge is not persuaded that the claimant reported his absences to the employer. The claimant alleges that he believed his employment had ended on October 3, yet he returned to work and worked a partial day on October 10, 2008. The claimant also alleges that he called in to the employer to report his absence from work beginning on October 13 and for eight continuous days thereafter. If the claimant believed he was discharged on October 1 or even on October 10, then it makes no sense that he would call in to report his absences if he thought he was discharged. Additionally, if the claimant truly believed he was discharged on October 3, then why would the employer have allowed him to work on October 10? The claimant chose to leave work on October 10 after completing only a half day; he was not sent home by the employer. The claimant did not properly report his absences after October 10 and thus was discharged for failing to show up for work or call in to report his absences on October 13, 14, 15 and 16.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant’s history of absenteeism, is considered excessive. Benefits are withheld.

Iowa Code § 96.3-7, as amended in 2008, 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) 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. 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 section 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. The employer shall not be charged with the benefits.

(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 states pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. 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 whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

DECISION:

The November 7, 2008, reference 01, decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. 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.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css