

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEPHANIE M CROPP
Claimant

APPEAL NO: 08A-UI-07135-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION
Employer

OC: 06/29/08 R: 02
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

Qwest Corporation (employer) appealed a representative's July 29, 2008 decision (reference 01) that concluded Stephanie M. Cropp (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 20, 2008. The claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Steven Zaks of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Lance Wilson. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on February 12, 2007. She worked full time as a sales and service associate at the employer's Des Moines, Iowa call center. Her normal work schedule was 9:00 a.m. to 5:30 p.m., Monday through Friday. Her last day of work was July 1, 2008. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The employer's attendance policy provides for review both of the number of occurrences and the number of days missed, and termination can occur where the employee has had five occurrences or missed eight days of work. As of July 1 the claimant had eight occurrences and had missed ten days of work. At least two days were due to the illness of the claimant's toddler child, and at least one day was due to personal illness. However, the claimant had also incurred a number of tardies and absences for unknown personal reasons, including June 2 and June 12.

The claimant had been given written warnings for her attendance on May 7 and May 22; on June 11 she had been given a final warning of dismissal, and after her tardy on June 12 she was given a restated final warning of dismissal on June 13. In the discussions surrounding the June 13 restated final warning, the claimant was repeatedly asked for an explanation as to the reason behind the June 6 and June 12 occurrences, but she refused to provide any other answer other than they were "personal."

On June 27 the claimant was again tardy by two hours and three minutes. When she was asked for the reason, again she refused to give any explanation other than it was "personal." As the claimant had demonstrated no reason why the June 27 occurrence should be excused, in light of the June 13 restated final warning of dismissal, the employer determined on July 1 that it had no choice but to discharge the claimant.

The claimant established a claim for unemployment insurance benefits effective June 29, 2008. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$303.00.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). Tardies are treated as absences for purposes of unemployment insurance law. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant had an opportunity but declined to provide any explanation under which the final occurrence could be treated as excused. The claimant had previously been warned that future absences could result in termination. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

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 ineligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Claims Section.

DECISION:

The representative's July 29, 2008 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of July 1, 2008. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs