

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK T ROBERTSON

Claimant

QWEST CORPORATION

Employer

APPEAL NO: 09A-UI-17339-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/018/09

Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32 (7) – Excessive Unexcused Absenteeism
871 IAC 24.32(8) – Current Act

STATEMENT OF THE CASE:

The employer appealed a department decision dated November 3, 2009, reference 01, that held the claimant was not discharged for misconduct on September 12, 2009, and benefits are allowed. A telephone hearing was held on December 23, 2009. The claimant participated. Steve Zaks, Representative, and Barb Boles, Manager, participated for the employer.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began full-time employment on March 31, 2003, and last worked for the employer as a full-time supervisor of network operations on September 24, 2009. The claimant was a management person who received an annual salary of \$61,300, and he was not subject to the usual attendance rules for hourly employees. The claimant worked Monday thru Friday, 1:00 p.m. to 9:30 p.m.

The claimant was granted FMLA for his wife's illness on August 17, 2009 thru September 17. The claimant had intermittent leave that allowed him to leave work for his wife's doctor appointments and similar considerations. Manager Boles counseled the claimant about leaving work early during a monthly review meeting on August 27th. The claimant left work early on September 4th due to his wife's illness that he later notified Boles. The claimant missed work on September 8 due to personal illness that later was diagnosed as pneumonia. The claimant was granted FMLA, as needed, for his illness to October 12. The claimant did work for 6 hours on September 24, but left due to illness.

The employer presented the claimant with a termination letter when he returned to work on October 12 that referred to warnings dated April 15 and June 10, 2009.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 administrative law judge concludes the employer has failed to establish that the claimant was discharged for misconduct and/or any current act of misconduct in connection with employment on October 12, 2009. The claimant worked only six hours on one day for the period from September 4 to his termination when he returned to work on October 12.

The employer offered no testimony or evidence about the claimant's FMLA for his wife or his personal illness that was in force and effect from about August 17 to October 12, 2009. The claimant was authorized to leave work early for his wife's medical treatment, and as a management person, he was not subject to hourly employee attendance rules. The claimant's absences for health issues that include leaving work early for those reasons during his final period of his employment, are for excusable reasons, and are not disqualifying job misconduct.

DECISION:

The department decision dated November 3, 2009, reference 01, is affirmed. The claimant was not discharged for misconduct on October 12, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs