

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBORAH SWEHLA
Claimant

APPEAL NO: 10A-UI-03140-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION
Employer

OC: 01-17-10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 16, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 13 and June 16 and 18, 2010. The claimant participated in the hearing. Toni Lake, Regional Sales Manager; Melanie Lutz, Kiosk Manager; and John O'Fallon, Employer Representative; participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as full-time retail senior sales associate for Qwest from June 11, 2007 to February 18, 2010. On January 19, 2010, Regional Sales Manager Toni Lake was visiting the store and made reference to another employee that sales seemed low for Sunday, January 17, 2010, and was told the claimant called in sick that day so the kiosk did not have the expected number of employees. Ms. Lake called Kiosk Manager Melanie Lutz about her visit and mentioned the claimant called in sick January 17, 2010, and Ms. Lutz indicated she was unaware that the claimant was not there and consequently checked the claimant's time sheet and noted that she indicated she worked eight hours. As a result of that incident the employer began an investigation and found one employee who said it was almost a daily occurrence so he started documenting her absences in December 2009 but did not notify the employer because he feared retaliation. Using his log the employer compared it to the claimant's time sheet and found she was absent December 14, 2008, but recorded that she worked eight hours; on December 17, 2008, she was one hour late but recorded that she worked eight hours; on December 31, 2008, she left four and one-half hours early and recorded that she worked eight hours; on January 9, 2009, she left four hours early and recorded that she worked eight hours; on January 11, 2009, she was four hours late and recorded that she worked eight hours; on January 17, 2009, she was absent and recorded the time correctly but did not properly report her absence; on January 18, 2009, she was four hours late and recorded that she worked eight

hours; on January 30, 2009, she was 30 minutes late and recorded that she worked eight hours; on January 31, 2009, she left three hours early and recorded that she worked eight hours; and on February 13, 2009, she left three and one-half hours early and recorded that she worked eight hours. The situation was reported to the corporate human resources department after February 13, 2009, but no action was taken before the claimant went off work for a prearranged surgery and short-term disability from March 6, 2009, to February 2010. The employer terminated her employment when she returned from her short-term disability leave. The claimant testified she completed her time card at the beginning of the pay period and forgot to go back and change it to reflect her actual time worked.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant falsified her time card on at least nine occasions and even if it was due to completing her time card at the beginning of her pay period rather than at the end she had a responsibility to correctly report her time. One incident might be explained by doing her time sheet at the beginning of the pay period but ten incidents suggests a deliberate pattern of falsifying her time card. That said, however, the employer was aware of this situation before the claimant went on prearranged short-term disability but chose not to act on the information prior to that time. The claimant was on short-term disability from March 2009 to February 2010. Consequently, although the claimant's actions were misconduct, the fact that the employer waited one year to terminate her employment makes her actions past acts and therefore not disqualifying job misconduct as defined by Iowa law. Consequently, benefits must be allowed.

DECISION:

The February 16, 2010, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs