

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CANDICE M RIGBY**  
Claimant

**APPEAL NO. 07A-UI-05569-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**QWEST CORPORATION**  
Employer

**OC: 04/29/07 R: 01**  
**Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code section 96.3-7 – Recovery of Overpayment of Benefits

**STATEMENT OF THE CASE:**

Qwest Corporation filed a timely appeal from the May 18, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 20, 2007. Claimant Candice Rigby did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Terry Newman of Barnett Associates represented the employer and presented testimony through Derek Memmott, Telesales Manager. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant.

**ISSUES:**

Whether the claimant voluntarily quit or was discharged from the employment. The administrative law judge concludes the separation was in the form of a discharge.  
Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Candice Rigby was employed by Qwest Corporation as a full-time Center Sales and Service Associate from July 11, 2005 until April 23, 2007. Derek Memmott, Telesales Manager 1, was Ms. Rigby's immediate supervisor. Ms. Rigby's regular work hours were 8:30 a.m. to 5:30 p.m., Monday through Friday, but the start time and end time could move forward 30 minutes, based on the employer's needs.

At the beginning of April 2007, Ms. Rigby notified Mr. Memmott that she would be leaving the employment at the end of April to return to work for Gateway Computers. In mid-April, Ms. Rigby notified Mr. Memmott that her start date at Gateway Computers had been pushed back and that she would be leaving Qwest at a later date.

The employer decided to sever the employment relationship in response to Ms. Rigby's ongoing attendance issues and notified Ms. Rigby of the decision on April 23, 2007. The final absence

that prompted the employer to sever the employment occurred on April 20. On that date, Mr. Rigby notified the employer that she would be tardy for personal reasons and then failed to report for work. On April 6, Ms. Rigby had left work early due to a "family emergency," but did not disclose the nature of the "emergency" to the employer. On April 9, Ms. Rigby notified the employer that she would be absent, but did not provide a reason. Ms. Rigby later indicated she had been absent for personal reasons. On April 17, Ms. Rigby was late returning from lunch because she had been completing paperwork for her new employment at Gateway Computers. Mr. Memmott had approved a late return, but Ms. Rigby was gone longer than the approved time period. On April 19, Ms. Rigby was absent for personal reasons.

The absences in April followed similar absences in February and March. On February 20, Ms. Rigby notified the employer she would be tardy and then failed to report for work. On March 19, Ms. Rigby notified the employer that she would be absent for personal reasons. On March 26, Ms. Rigby notified the employer she would be tardy and then failed to report for work.

Ms. Rigby established a claim for benefits that was effective April 29, 2007 and received benefits totaling \$538.00.

#### **REASONING AND CONCLUSIONS OF LAW:**

The first question is whether Ms. Rigby quit or was discharged from the employment. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The greater weight of the evidence in the record establishes that the separation from the employment took the form of a discharge, rather than a quit. Though Ms. Rigby had indicated an intention to sever the employment relationship, she had not taken overt action to effect a separation at the time the employer severed the employment relationship.

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.

The employer has the burden of proof in a discharge matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the

absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that the final absence on April 20, 2007 was an unexcused absence under the applicable law. This absence followed a pattern of unexcused absences. The evidence indicates that Ms. Rigby took a cavalier approach to appearing for work and/or following through on her representations to the employer that she would appear for work.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Rigby was discharged for misconduct. Accordingly, Ms. Rigby is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Rigby.

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.

Because Ms. Rigby has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Rigby must repay to Iowa Workforce Development. Ms. Rigby is overpaid \$538.00.

**DECISION:**

The claims representative's May 18, 2007, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until

she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged. Claimant is overpaid \$538.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs