

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA J LUNA
Claimant

APPEAL NO. 08A-UI-06810-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION
Employer

OC: 07-15-07 R: 02
Claimant: Respondent (2)

871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 17, 2008, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on August 11, 2008. The claimant did participate. The employer did participate through James Walford, Telesales Manager, and was represented by Bill O'Neil of Barnett Associates. Claimant's Exhibit A was received. Employer's Exhibit One was received.

ISSUE:

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

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 associate full-time beginning November 12, 2007 through June 5, 2008, when she was discharged.

On May 30 the claimant met with James Walford, her direct supervisor, where she was told that her poor attendance record was placing her job in jeopardy. The claimant was given the restated warning of dismissal that put her on notice that she could not incur another attendance occurrence through February 1, 2009. The claimant signed off on the warning notice.

The claimant was to work on June 2, as it was her normal schedule shift. She was to be at work at 9:00 a.m. On Sunday, June 1, 2008, the claimant contacted Mr. Walford to tell him that she might not be into work the next day, as her daughter had gone into labor early. Mr. Walford told the claimant to call the mission control desk as she was required to do and that he did not know what the consequences of her calling in would be, as the decision was not his to make.

The claimant did not show up for work on Monday, June 2, nor did she call the mission control desk to report her absence as she was required to do. The claimant did not call Mr. Walford to report her absence.

The claimant's phone records show no call made to the employer until June 6, 2008.

On June 3, 2008, the claimant was mailed a letter telling her that if she failed to return to work by Thursday, June 5, 2008, she would be terminated for her failure to report for work. The claimant neither called nor reported for work. On June 5, the claimant was sent another letter telling her that due to her failure to report for work by June 5, she was terminated effective June 5 for her failure to report for work.

The claimant's phone records show that she did not call the employer until June 6, 2008, after she had been discharged. The claimant admits that she knew that if she was going to miss work, she was to call the "mission control" desk to report her absence.

The claimant's cell phone records indicate that she made and received calls on June 2, 3, and 5, but no call was made by her to the employer to notify them of her absences. Mr. Walford did not give the claimant permission to miss work on May 31 nor did he give her permission to skip proper notification procedures to the employer. The claimant's daughter delivered her baby on June 2.

The claimant alleges that she asked Mr. Walford for permission to take vacation on June 2. Mr. Walford did not have the authority to grant the claimant's vacation request. The claimant knew that in order to have vacation granted on short notice, that she would need to contact the mission control desk, which she did not do. The claimant knew that her job was in jeopardy if she missed work on June 2 or any day thereafter due to the warning she had been given and based on her acknowledgment of the same during the hearing.

The claimant alleges that she did not receive the letters dated June 3 and June 5, 2008 until June 6, at which time she contacted the employer. The claimant assumed that she had been discharged due to missing work on June 2.

Claimant has received unemployment benefits since filing a claim with an effective date of July 15, 2007.

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 was discharged from employment due to a final incident of absenteeism that occurred on June 2, 3, 4 and 5, 2008, when she was a no-call, no-show for work. The claimant was last warned on May 30, 2008, that she faced termination from employment upon another incident of unexcused absenteeism. Prior absences occurred on February 1, February 21, April 28, April 29, May 5, and May 28. The claimant did not follow the employer’s procedures for reporting her absences on June 2, 3, 4 and 5. The claimant knew that she was to contact mission control, as she had done so before. She also demonstrated that she knew her job was in jeopardy when she called her supervisor on Sunday, June 1, on his cell phone. She also had the ability to make phone calls, as her cell phone bill shows her making and receiving calls on each day she was absent from work. The claimant simply did not properly report her absences to her employer, although she had the ability to do so and knew that she was required to do so.

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and that the final absence was not excused. The claimant’s final absences were not properly reported to the employer and thus must be considered unexcused. The final absences, in combination with the claimant’s history of unexcused absenteeism, are 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 state pursuant to section 602.10101.

Because claimant's separation was disqualifying, benefits were paid to which claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met: First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The July 17, 2008, reference 02, decision is reversed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. Claimant is overpaid benefits in the amount of \$1,767.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw