

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTOPHER S CLAIR
Claimant

APPEAL NO. 11A-UI-00222-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION
Employer

OC: 11/28/10
Claimant: Appellant (1)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated January 6, 2011, reference 03, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 15, 2011. Employer participated by Doug Ogren, Kiosk Sales Manager. The employer was represented by John O'Fallon. Claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Doug Ogren.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The claimant worked as a retail sales associate at the employer's kiosk in Jordan Creek Mall in West Des Moines, Iowa. He was a full time employee. He was hired on July 1, 2009. His last day of work was November 3, 2010. He was terminated on November 3, 2010, for excessive tardiness.

The incident that led to the claimant's termination occurred on November 3, 2010. He was tardy. The employer has a written policy that termination will result if there are more than five occurrences with a 12-month period. The claimant was tardy on the following days: February 15, 2010; February 16, 2010; February 21, 2010; March 1, 2010; June 4, 2010; August 11, 2010; August 13, 2010; October 27, 2010; and November 3, 2010. A written warning was given after each instance of tardiness. The claimant was told on October 27, 2010, that his job was in jeopardy if he had any further instances of tardiness.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) The concept includes tardiness and leaving early. Absence due to matters of personal responsibility such as transportation problems and oversleeping is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984) Absence due to illness and other excusable reasons is deemed excused if the employee properly notified the employer. See Higgins, supra, and 871 IAC 24.32(7) The employer has the burden of proof to show misconduct.

The evidence in this case established excessive unexcused tardiness. The claimant had eight instances of tardiness from February 15, 2010, to November 3, 2010. He was given a written

warning after each instance of tardiness. He was informed on October 27, 2010, that any further instances of tardiness would lead to termination. The claimant did not participate in the hearing and the reason for his tardiness is unknown. Since the employer has established misconduct, benefits are denied.

DECISION:

The decision of the representative dated January 6, 2011, reference 03, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css