IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROXANE DAVIS
Claimant

QWEST CORPORATION
Employer

APPEAL NO. 17A-UI-07674-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/09/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Roxane Davis (claimant) appealed a representative's July 26, 2017, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Qwest Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 16, 2017. The claimant participated personally. The employer was represented by Dennis Mullens, Hearings Representative, and participated by Christopher Durning, Supervisor for Technical Support. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on July 27, 2015, as a full-time repair service attendant technical support person. The claimant signed for receipt of the employer's handbook on July 27, 2015. The handbook states that an employee will be terminated if she is absent seven times in a rolling one year period.

The claimant properly reported her absences due to medical issues on July 16, October 20, 2016, May 10, and 15, 2017, and accrued four attendance points. The claimant fell, broke her leg, and was on short term disability from February 3 to March 1, 2017. Her doctor did not release her to return to work until April 24, 2017. The employer assessed her an attendance point for not returning to work when Sedgwick, its third party insurance claims manager, decided the claimant should return to work on March 2, 2017. The claimant did not work from March 2 to April 24, 2017, but was only assessed one attendance point because the days were concurrent.

On May 16, 2017, the claimant was selected to leave early because the employer was over staffed. The claimant's schedule indicated she was to take a break at a certain time. She

asked many senior staff members whether she should take the break. They all said she should take the break. Other employees had been issued warnings for failure to take breaks. The claimant followed the employer issued schedule and took the break. The employer issued her one attendance point. On May 16, 2017, the employer gave the claimant a warning of dismissal for attendance. The claimant had accrued six attendance points. Five of the points were for absences due to medical issues. The employer notified the claimant that further infractions could result in termination from employment.

On June 20, 2017, the claimant properly reported her absence due to sickness and she was assessed her seventh point. On June 29, 2017, the claimant's supervisor started the termination procedure. On July 7, 2017, the supervisor's boss and human resources signed the termination paperwork. On July 10, 2017, the director of the company signed off on the termination. On July 10, 2017, the employer terminated the claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(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 proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on June 20, 2017. The claimant's absence does not amount to job misconduct because it was properly reported. In addition, the last incident provided by the employer occurred on June 20, 2017. The claimant was not discharged until July 10, 2017. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's July 26, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs