IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CRYSTAL HUFFMAN
Claimant

QWEST CORPORATION
Employer

APPEAL NO: 11A-UI-12359-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08-21-11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 13, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 12 and continued October 19, 2011. The claimant participated in the hearing with Monica Post, chief steward, and Selena Edmondson, chief steward. Tammy Baker, supervisor repair; Jill Seals, manager of network operations; and Steve Zaks, employer representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Nine were admitted into evidence.

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 a full-time screening consultant for Qwest from November 23, 1994 to August 22, 2011. She was discharged for tardiness. The employer's attendance policy states that employees will receive a written warning after accumulating six attendance occurrences within a rolling 12-month period; a warning of dismissal after accumulating seven occurrences within a rolling 12-month period; and their employment will be terminated upon accumulating eight occurrences within a rolling 12-month period. The claimant's last six incidents of tardiness occurred when she was five minutes tardy September 18, 2010; six minutes tardy November 1, 2010; five minutes tardy December 13, 2010; 32 minutes tardy January 19, 2011; 33 minutes tardy February 18, 2011; and five minutes tardy August 10, 2011. She received a restated written warning March 3, 2011, instead of facing termination, as there was a question regarding whether her February 18, 2011, incident of tardiness should be counted as an occurrence because the claimant requested and was granted priority time and was told she could come in one hour late but the employer determined she was not eligible for priority time and should not have received it but instead should have been assessed an occurrence. She was also placed on a 15-month sustaining period, which is not a part of the employer's written attendance policy, requiring that she not have any further occurrences for one year and three months because she was already on a three-month sustaining period.

Sustaining periods are used when the employer determines there is a consistent pattern of unsatisfactory tardiness or attendance. If an employee has received written warnings and a warning of dismissal in the past, the employer can terminate an employee's employment when she reaches six occurrences. The claimant received seven attendance records of discussions, written warnings, warnings of dismissal, and sustaining periods between June 2010 and the date of her termination August 22, 2011. The claimant was at her desk on time August 10, 2011, but forgot to record on the computer that she was available and, consequently, received an occurrence and her employment was terminated for excessive unexcused tardiness effective August 22, 2011.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability.

Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the claimant did have a poor record of attendance and had received numerous attendance warnings during her 17-year tenure with the employer, six incidents of tardiness between September 18, 2010, and August 10, 2011, does not rise to the level of excessive unexcused absenteeism as that term is defined by Iowa law. The employer did issue several warnings to the claimant, but the February 18, 2011, incident should not have counted against her because she requested and was granted priority time that morning. Additionally, the employer's sustaining periods are not contained in the employer's written attendance policy and are confusing to employees, as is the employer's entire attendance policy. Under these circumstances, while not condoning the claimant's attendance record, the administrative law judge cannot find that six incidents of tardiness in an 11-month period is excessive. Therefore, benefits must be allowed.

DECISION:

The September 13, 2011, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/kjw