

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NATHAN WHITESELL
Claimant

APPEAL NO: 12A-UI-00801-E

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION
Employer

**OC: 12-18-11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 19, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held in Waterloo, Iowa, before Administrative Law Judge Julie Elder on June 12, 2012. The claimant participated in the hearing with his wife, Amanda Valentine and his landlord, Reshonda Young. Michelle Ashley and Carol Murley, customer service manager, participated in the hearing on behalf of the employer with Employer Representative Eka Otu. 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 customer service agent for Qwest Corporation from March 17, 2008 to December 22, 2011. He was discharged for exceeding the allowed number of attendance occurrences. The employer's policy states an employee cannot exceed four attendance occurrences and/or seven days or have five incidents of tardiness within a rolling 12-month period. On February 15, 2011, the claimant received a written warning for accumulating five occurrences totaling seven days. The warning stated the next date one of the claimant's absences would drop off was May 13, 2011, and he would meet the satisfactory attendance range if he did not have any other absences until August 10, 2011. The claimant was on disability from March 10, 2011 to May 20, 2011, and ran out of FMLA May 20, 2011, so was assessed one additional unexcused absence for his absence May 20 to May 23, 2011. On June 3, 2011, the employer met with the claimant to extend his occurrence drop-off date and satisfactory attendance extension until November 2011, due to the fact he was on FMLA, which tolled the running of those dates. On June 28, 2011, the claimant went home ill which gave him seven occurrences and 10 total days of absenteeism. The employer met with the claimant and issued him a warning of dismissal for attendance June 30, 2011. That extended his next drop-off date to January 1, 2012, and he would meet the satisfactory range if he did not have any other absences before April 24, 2012. The claimant was absent August 15 to September 5,

2011, due to black mold discovered at his apartment that made him ill. He applied for short-term disability but was denied and received one occurrence for that absence. On September 8, 2011, the claimant received a restated warning of dismissal for seven occurrences for a total of 31 days. Without any further absences, his attendance would be considered satisfactory September 6, 2012. The claimant worked 35 minutes November 28, 2011, before leaving due to illness; he returned to work November 29, 2011, and was off November 30, 2011. He returned to work December 1, 2011, and the employer held an investigatory meeting regarding his November 28, 2011, absence. Immediately after the meeting, the claimant left work due to illness. On December 2, 2011, the claimant reported for work to state he was ill and would not be working. He called in and reported his absence due to illness December 3, 2011, and was scheduled off work December 4 and 5, 2011. On December 6, 2011, he reported for work but left due to illness and called in to report he was ill December 7 and 8, 2011, stating during his last call in he was going to see his physician. Because it was his eighth day of absenteeism in a row, he was eligible for short-term disability. He returned to work December 9, 2011, and the employer met with the claimant December 20, 2011, to inform him that his short-term disability was denied. The employer terminated the claimant's employment December 22, 2011, for exceeding his allowed number of attendance occurrences.

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(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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct, since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant did violate the employer's attendance policy by exceeding his allowed number of attendance occurrences, his absences were due to properly reported illness. Because the final absence was related to properly reported illness, no final or current incident of unexcused absenteeism has been established. Therefore, benefits are denied.

DECISION:

The January 19, 2012, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw