

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARL J BENSKIN

Claimant

APPEAL NO. 10A-UI-14456-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

QWEST CORPORATION

Employer

OC: 08/22/10

Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge for Misconduct

Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

Qwest Corporation filed an appeal from a representative's decision dated October 13, 2010, reference 01, which held that no disqualification would be imposed regarding Carl Benskin's separation from employment. After due notice was issued, a hearing was held by telephone on December 9, 2010. Mr. Benskin participated personally. The employer participated by Laura Griffith, Telesales Manager, and was represented by John O'Fallon of Barnett Associates.

ISSUE:

At issue in this matter is whether Mr. Benskin was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Benskin began working for Qwest on September 14, 2009 as a full-time customer sales and service associate. He was absent from work due to illness on October 13 and received a written warning on October 15. He was again absent due to illness on October 28. He received a final written warning on November 4 and was advised that the next attendance infraction could result in his discharge.

The decision to discharge Mr. Benskin was due to his absence of November 6. He was scheduled to be at work at 9:00 a.m. but had a flat tire on the way to work. Under the employer's policy, an individual is considered absent for the day if he is two or more hours late. When he got his tire repaired, Mr. Benskin went back home because he believed he would be at least two hours late. He returned a call from his supervisor shortly before 3:00 p.m. on November 6. He returned to work on November 9 and was discharged on November 10, 2009. Attendance was the sole reason for the discharge.

Mr. Benskin filed a claim for job insurance benefits effective August 22, 2010. He has received a total of \$2,703.91 in benefits since filing the claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged because of attendance is disqualified from benefits if he was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused. Mr. Benskin's absences of October 13 and 28 are excused as they were for reasonable cause, illness, and were properly reported.

The absence of November 6 is unexcused. Absences due to matters of purely personal responsibility, such as transportation, are not excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The absence is also unexcused as it was not properly reported to the employer. Mr. Benskin had just been warned on November 4 that the next attendance infraction could result in his discharge. In spite of the warning, he returned home on November 6 rather than reporting to the workplace to explain why he was late arriving. He did not try to charge his cell phone while he was changing the tire. Moreover, he did not immediately contact the employer once he changed the tire. If his cell phone was not charged, he could have sought a pay phone to call but did not. Mr. Benskin did not make a good-faith effort to contact the employer regarding his absence on November 6.

The issue becomes whether Mr. Benskin's single unexcused absence is sufficient to establish excessive unexcused absenteeism within the meaning of the law. The Iowa appellate courts have not ruled that a single unexcused absence is insufficient to establish disqualifying misconduct. In Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989), the Iowa Supreme listed the factors to be considered in determining whether a single absence will result in disqualification. The administrative law judge considers this to mean that, in a proper case, an individual may be disqualified on the basis of a single unexcused absence. As indicated in Sallis, two of the factors to be considered are the effect of the absence and whether any attempt was made to notify the employer of the absence.

When Mr. Benskin was absent, other associates would have to assume responsibility for calls he would have taken. As stated above, he did not make a good-faith effort to report the absence to the employer in a timely fashion or as soon as he was able. The administrative law judge has considered these factors along with the reason for the absence, the proximity of the absence to the final warning, and the fact that he was only in the employment two months. For the reasons stated herein, it is concluded that the one unexcused absence of November 6 is sufficient to establish disqualifying misconduct. Accordingly, benefits are denied.

Mr. Benskin has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual's separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated October 13, 2010, reference 01, is hereby reversed. Mr. Benskin was discharged by Qwest for disqualifying misconduct. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Benskin will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs