

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**AMBER I GABORIT**  
Claimant

**QWEST CORPORATION**  
Employer

**APPEAL 15A-UI-09102-DL-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/28/15**  
**Claimant: Respondent (1)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

**STATEMENT OF THE CASE:**

The employer filed an appeal from the August 7, 2015, (reference 02) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on September 1, 2015. Claimant participated. Employer participated through client service representative, Kristina Furnari, sales manager/immediate supervisor, Carla Paris and was represented by Frances Landolphi of Barnett Associates Inc. Employer's Exhibits 1 through 5 were received.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a consumer sales and service associate (9 a.m. to 6 p.m. shift) from December 8, 2014, and was separated from employment on February 23, 2015, when she was discharged. Her last day of work was February 19, 2015. The final absence period began on February 11 and she missed a partial day of work. She missed work and properly reported her absences to the designated 800 number for the employer's workforce center on February 12, 13, 16, 17 and 18, 2015. She worked part of her scheduled shift on February 19 due to scheduled personal time. The employer does not have a record of whether she arrived late or left early on that date. She properly reported her February 20 and 23 absences. She was not warned she must report absences by a certain time of a day she was scheduled. The individuals who kept track of attendance records were not called to testify. She had been warned of possible dismissal in writing on February 11, 2015, about absences on February 9, 10 and 11. All of claimant's absences from work between February 11 and February 23, 2015, were related to properly reported illness of herself or her spouse. The employer did not require her to give a reason for her absences, either generally or specifically, since it counted all absences against her regardless of reason. She opted not to give the employer more information because of this and because she felt embarrassed by the situation. She was absent because of her husband's drug addiction relapse upon his release from prison on January 26,

2015, and his court-ordered commitment on February 26, 2015. She and her mother-in-law shared shifts to watch him because of his suicidal tendencies, and to get him to work and medical (physical and mental health) appointments. She was also experiencing stress and was unwell during this period of time while caring for her spouse and DHS visits so she also had personal medical and therapy appointments to attend. She was tardy from break on two occasions earlier during the employment because of not pushing the phone log-in button fast enough.

On February 19 claimant met with Paris and a witness, when Paris told claimant she was working towards permission to get her dismissed and it would take 24 hours. Claimant continued to report her absences due to her and her spouse's medical conditions. She received the February 18 notice-to-report letter on February 20 instructing her to report by February 23 or face termination. She did not report because Paris had told her on February 19 she would be discharged.

The employer also warned her in writing on February 3, 2015, for January 26 through 30 for a preplanned trip to take her husband to see his father in Florida that the employer had not approved. The employer was aware of the trip at hire and told claimant it would count against her attendance history. The employer has a no-fault attendance policy that treats all absences the same, regardless of reason. Claimant received the employer's attendance policy. (Employer's Exhibit 5)

#### **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 § 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.

Iowa Admin. Code r. 871-24.32(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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job*

*Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra. 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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law." The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10.

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. Because her absences were otherwise related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed.

**DECISION:**

The August 7, 2015, (reference 02) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

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