IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

MASEY L BOTTS Claimant **QWEST CORPORATION** Employer	**APPEAL 15A-UI-09634-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/02/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the August 26, 2015, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 11, 2015. Claimant participated. Employer did not participate.

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 screening consultant from July 13, 1998, and was separated from employment on August 5, 2015, when she was discharged.

The employer has an attendance policy which applies occurrences or days when an employee is absent, tardy, or leaves early, regardless of reason for the infraction. The policy also provides that an employee will be warned as points are accumulated; fifth occurrence or eight days is a written warning, the next occurrence or day is a warning of dismissal, the next occurrence or day after that is a restated warning of dismissal, and then a further occurrence or day is possible termination. The occurrences and days are calculated on a rolling 12-month period. Claimant was made aware of the employer's policy at the time of hire. If an employee is going to miss work, be late, or leave early, they are required to contact the employer. The employer does not accept and has not requested a doctor's note for absences.

The final incident occurred when claimant left work early on August 3, 2015. Claimant had to leave work early because she became ill. Claimant was vomiting at her desk and had a high fever. Claimant informed the employer about the reason why she was leaving work early. Claimant had only received a written warning (June 12, 2015) and a warning of dismissal (July 31, 2015) prior to August 3, 2015, for her current rolling 12-month period. Claimant anticipated only receiving a restated warning of dismissal, not a discharge. Claimant had received two prior restated warnings of dismissal pursuant to the employer's policy during her

work at the employer, on August 21, 2007 and February 25, 2008. Claimant was aware of other employees in similar situations that received a restated warning of dismissal instead of discharge.

Claimant was also issued warnings of dismissal for her attendance infractions on June 9, 2005, October 26, 2005, August 3, 2007, October 31, 2007, March 14, 2010, January 7, 2013, November 12, 2013, and May 20, 2014. Claimant testified all of her attendance infractions were due to illness.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

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). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

An employer's attendance policy 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 the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant testified all of her absences related to illness. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Furthermore, claimant's last absence (leaving work early) was because she was vomiting at her desk and had a high fever. Claimant followed the employer's proper procedures and reported this illness to the employer. Because claimant's last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Furthermore, claimant testified that on prior occasions, after receiving a warning of dismissal, if she then obtained another occurrence or day, she was given a restated warning of dismissal (August 21, 2007 and February 25, 2008) pursuant to the employer's policy. Claimant also testified that other employees in similar situations received a restated warning of dismissal pursuant to the employer's policy, as opposed to termination. Even if claimant may have had excessive absences, since the consequence was more severe than other employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

DECISION:

The August 26, 2015, (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

jp/pjs