IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ASHLEY A BROWN
Claimant

SEARS ROEBUCK & COMPANY
Employer

APPEAL NO. 10A-UI-06294-DT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 03/21/10
Claimant: Respondent (2/R)

Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits
871 IAC 26.8(2) – Postponement Requests

STATEMENT OF THE CASE:

Sears, Roebuck & Company (employer) appealed a representative's April 16, 2010 decision (reference 01) that concluded Ashley A Brown (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 16, 2010. The claimant received the hearing notice and responded by calling the Appeals Section on June 14, 2010. She requested that the hearing be rescheduled to a later time; she was advised to check back later to see if her request had been granted. The request was not granted. The claimant had not provided a valid telephone number at which she could be reached for the hearing. Therefore, the claimant did not participate in the hearing. Bridget Clark appeared on the employer's behalf and presented testimony from two other witnesses: Fred Hoffman and Theo Harlan. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing have been rescheduled?

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The hearing was scheduled for 12:00 p.m. on June 16, 2010. The notices setting that date and time for the hearing had been mailed to the parties' addresses of record on May 14, 2010. The claimant made her first contact with the Appeals Section at 4:03 p.m. on June 14, seeking to have the hearing time rescheduled. The reason she gave was that she was working at the scheduled time for the hearing. The staffperson to whom she spoke advised the claimant that given how close it was to the scheduled hearing, she would need to contact the Appeals Section to learn if her request had been granted. The claimant provided a number to the staffperson for

the administrative law judge to contact her regarding her request; however, when the administrative law judge attempted to contact the claimant at that number at 4:12 p.m. to find out if there was a good reason the request for rescheduling had not been made earlier, the number was not in service, nor was the number in service on June 15.

An Appeals Section staffperson attempted to contact the claimant on the number listed for her on her claim information, and reached a person who identified himself as the claimant's sister's fiancé. He gave the staffperson the sister's telephone number, and on June 15 the staffperson contacted the claimant's sister to pass on a message to the claimant to contact the Appeals Section as soon as possible. No further contact was received by the Appeals Section after the claimant's call at 4:03 p.m. on June 14.

The claimant started working for the employer on October 29, 2007. She worked full-time as water heater sales associate in the employer's Des Moines, Iowa store. She normally worked Monday through Friday, 6:00 a.m. to 2:30 p.m. Her last day of work was March 15, 2010.

The claimant had missed some days in March prior to March 15, reporting that her son was sick. On March 18 she called in and reported she would be absent, as her son had a doctor's appointment. On March 19 she called in and reported she would be absent, as her son was sick. Beginning March 22 she was a no-call, no-show for further scheduled days of work.

The claimant had been given prior warnings for attendance; she had been given a Step Three warning for attendance on February 18, 2010, and a verbal coaching for attendance on March 2. Some of the claimant's prior absences had been for personal illness, but some of them had been for other reasons, including illnesses of her children. The employer was uncertain of which children were sick or what the ages of the children were. Had the claimant returned to work on March 22, she likely would have been given a final Step Four discipline for attendance, but she would have had an opportunity to seek to explain and excuse her absences. The claimant had not been told by anyone with the employer that she was discharged or would in fact be discharged had she returned to work. After the claimant was a no-call, no-show for work, the employer would have found that to be a separate violation of its policies, which would have resulted in termination.

The claimant established a claim for unemployment insurance benefits effective March 21, 2010. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

The first issue which must be addressed is whether the claimant's request for postponement of the hearing effectively only a day and a half prior to the scheduled hearing time should have been granted. While reasonable requests for postponement can be granted, good cause must be shown, and at least absent extraordinary emergency situations, a request is to be made within three business days prior to the hearing. Iowa Code § 96.6-3; 871 IAC 26.8(2). The claimant did not request the postponement within three days prior to the hearing, and the reason for the request was not shown to be of such an emergency nature as would excuse a failure to have made a timely request for a postponement. The claimant's late request to postpone the hearing was properly denied.

A voluntary quit is a termination of employment initiated by the employee—where the employee has taken the action which directly results in the separation; a discharge is a termination of employment initiated by the employer—where the employer has taken the action which directly

results in the separation from employment. 871 IAC 24.1(113)(b), (c). A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The rule further provides that there are some actions by an employee that are construed as being a voluntary quit of the employment, such as where an employee believes she had been discharged and ceases reporting for work but has not been told she has in fact been discharged. 871 IAC 24.25.

The claimant ceased reporting for work without being told she was discharged; therefore, the separation is considered to be a voluntary quit. The claimant then has the burden of proving that the voluntary quit was for a good cause that would not disqualify her. Iowa Code § 96.6-2. The claimant has not satisfied her burden. Benefits are denied.

In the alternative, even if the separation is treated as a discharge, the result is the same. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). Absences due to issues that are of purely personal responsibility are not excusable. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). This generally includes the lack of other care for sick children. Higgins, supra. The claimant has not shown that her final absence was excused or was due to illness or other reasonable grounds. The claimant had previously been warned that future absences could result in termination. Higgins, supra. Treated as a discharge, the employer effectively discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's April 16, 2010 decision (reference 01) is reversed. The claimant voluntarily left her employment without good cause attributable to the employer. As of March 22, 2010, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is then otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue and whether the claimant is eligible for a waiver of any overpayment.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw