IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

AMBER N STALEY
Claimant

SEARS ROEBUCK & COMPANY
Employer

APPEAL NO. 14A-UI-05008-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/13/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Sears Roebuck & Company (employer) appealed a representative's May 5, 2014, decision (reference 01) that concluded Amber Staley (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 3, 2014. The claimant participated personally. The employer participated by Ryan Neff, Store Manager, and Jason Myers, Unemployment Insurance Consultant.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 24, 2012, as a part-time cashier in the jewelry department. The claimant signed for receipt of the employer's handbook and attendance policy on December 29, 2013. On February 10, 2014, the employer issued the claimant a written warning for attendance. The employer notified the claimant that further infractions could result in termination from employment.

On February 17, 2014, the claimant was admitted to the hospital. She was supposed to work that day. She did not have the proper telephone number to call to report an absence. She called the employer and talked to a co-worker. The co-worker told her she would report the absence to the human resources manager. Later that day the claimant's mother called back and checked to make certain the message had been relayed. On February 20, 2014, the claimant was supposed to work again but she was still in the hospital. The claimant was physically unable to call the employer to report her absence. The claimant's mother reported the claimant's absence to the employer prior to the start of her shift in the same manner as she did on February 17, 2014.

The employer message was not relayed to the store manager. The claimant accumulated attendance points. The employer terminated the claimant effective February 20, 2014. The claimant would have been terminated February 20, 2014, even if she had properly reported her absence due to medical issues.

The claimant filed for unemployment insurance benefits with an effective date of April 13, 2014. The employer did not participate in the fact-finding interview on May 2, 2014, because the employer did not receive notice of the fact finding interview until May 5, 2014.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which 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. On the other hand 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. Roberts v. Iowa Department of Job Service, 356 N.W.2d 218 (Iowa 1984). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was an improperly reported illness. The claimant's absence does not amount to job misconduct because the claimant could not properly report her absence due to medical incapacity. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's May 5, 2014, decision (reference 01) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs