IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JONI D WICHERT
Claimant

B R STORES INC
SUPER SAVER/ALPS
Employer

APPEAL NO: 13A-UI-10136-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/11/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Joni D. Wichert (claimant) appealed a representative's September 5, 2013 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from B R Stores, Inc. / Super Saver/ALPS (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 2, 2013. The claimant participated in the hearing. Donna Bristol appeared on the employer's behalf and presented testimony from two witnesses, Jacqueline Gibler and Austin Gibson. During the hearing, Claimant's Exhibits A and B were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on April 10, 2013. She worked part time (26 - 30 hours per week) as a cashier and grill worker in the employer's Council Bluffs, Iowa grocery store. Her last day of work was August 2, 2013.

On July 29 the claimant had been sent home during her shift because she was wearing black jeans rather than the required black slacks; she was told she could not return until she could come in wearing proper attire. She told the supervisor that she would not be able to get the black slacks until after the next day.

The claimant had been scheduled for a shift from 1:00 p.m. to 9:00 p.m. on July 30. At about 11:00 a.m. on the morning of July 30 the service manager, Gibler, the dairy manager, Gibson, and the store director saw the claimant near the back side of the employer's building near another store. She did not, however, report to the store for her shift at 1:00 p.m. She did not separately call to confirm that she was going to be absent that day. The employer therefore considered her to be a no-call/no-show for her shift. Under the employer's policies a single no-call/no-show can be used to conclude that an employee has voluntarily quit. The employer therefore determined that the claimant had voluntarily quit, and so informed her when she sought to return for her next scheduled shift on August 2.

The reason the claimant had been near the back of the employer's building at 11:00 a.m. on July 30 was that she was waiting for a bus to take her where she could do some shopping for black slacks. The claimant did not have any other ready means of transportation. She did in fact purchase several pairs of black slacks later that day of July 30.

The employer provided some evidence that while outside the employer's store on the morning of July 30, the claimant had made some comments to Gibson that could be considered consistent with an intent to quit. The claimant denied making those statements. Gibler established that when the decision was made that the claimant's employment was ended it was made strictly on the basis of her single no-call/no-show for work that day, not anything that might have been said by the claimant on the morning of July 30. The claimant's job was not otherwise in jeopardy, and she had no prior attendance issues.

REASONING AND CONCLUSIONS OF LAW:

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. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. *Bartelt v. Employment Appeal Board*, 494 N.W.2d 684 (Iowa 1993); *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that she voluntarily quit by being a no-call/no-show on July 30, 2013. The intent to quit can be inferred in certain circumstances. For example, a three-day no-call, no-show in violation of company rule is considered to be a voluntary quit. 871 IAC 24.25(4). The employer's policy does not comply with this rule, however, as it infers an intent to quit after only a single day. Since the employer's policy does not satisfy the rule as far as what can be deemed a voluntary quit under Iowa Code Chapter 96, the claimant's actions did not demonstrate the intent to sever the employment relationship necessary to treat the separation as a "voluntary quit" for unemployment insurance purposes. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code § 96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance

benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). 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).

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 which 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 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. 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).

The reason the employer effectively discharged the claimant was her unreported absence on July 30, 2013. Excessive unexcused absences can constitute misconduct. 871 IAC 24.32(7); *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). Even though the unreported absence on July 30 could be considered to be unexcused, it was an isolated incident, and there is no showing of excessive unexcused absences. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 5, 2013 decision (reference 01) is reversed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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