IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JENNIFER L MOORE
Claimant

SEVENTH AVENUE INC
Employer

APPEAL NO: 11A-UI-13731-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/02/11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jennifer L. Moore (claimant) appealed a representative's October 7, 2011 decision (reference 04) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Seventh Avenue, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 14, 2011. The claimant participated in the hearing. Lynn Rankin appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Seven 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 the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

After a prior period of employment with the employer that began on November 17, 2008 and ended with a layoff due to a location closure on December 31, 2010, the claimant returned to working for the employer on January 24, 2011. She worked full-time as a packer/puller at the employer's Clinton, Iowa, distribution facility. Her last day of work was August 31, 2011. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The employer measures attendance by the percentage of scheduled hours that an employee does not work. If an employee's percentage of scheduled but unworked hours exceeds 15 percent, the employee is placed on a 90-day probation and their percentage is returned to zero. If during the probation the percentage of unworked scheduled hours exceeds 20 percent, the employee is discharged.

The claimant was placed on probation on June 29 due to previously missing work due to her own personal illness and the illnesses of her children, as well as a transportation issue. As a result, at that time her time away percentage was supposedly returned to zero. On August 31

the employer informed her that her time away from scheduled work since June 29 was 24.76 percent and that she was discharged.

The employer could not explain how it arrived at that figure; the number of scheduled hours during the period was not provided, nor was the number of hours she worked versus the number of hours she was scheduled to work but did not. It appears the claimant had very few scheduled hours in late July to late August, as she was laid off from about July 20 through August 23. She had previously been allowed to take off scheduled work on July 1 and July 6, but the employer could not establish whether those hours were counted against her as scheduled hours that she did not work or not. The claimant asserted, and the employer had no evidence to the contrary, that the only other time she missed was that she left a half-hour early on August 24 for a doctor's appointment that had been scheduled prior to the recall from layoff, an absence on August 25 due to personal illness, and an absence on August 29 and three-hour late arrival on August 30 due to a family financial crisis.

The employer's secondhand testimony was that the claimant's supervisor would receive a weekly report indicating the employees' percentages of time away from scheduled work and would advise the employees should their percentages approach the 15 or 20 percent mark. The claimant's firsthand testimony was that her supervisor had said nothing to her after June 29 that her time away from scheduled work was approaching any critical level and that, in fact, on August 31 the supervisor herself had expressed surprise that the claimant had passed the allowable levels.

REASONING AND CONCLUSIONS OF LAW:

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). The question is not whether the employer was right 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 matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 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. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). The employer has not established what incidents since June 29 were considered in calculating her away from work percentages, and has not established that an excessive amount of that time was due to a reason considered unexcused for purposes of unemployment insurance eligibility. Further, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). Here, it does not appear that the employer effectively communicated to the claimant in the late August time that she was approaching the discharge threshold, and has not established that the claimant had some reasonable means of calculating that for herself. The employer has failed to meet its burden to establish misconduct. Cosper, supra. 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 October 7, 2011 decision (reference 04) is reversed. 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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