

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

ROSE M JOHNSON

Claimant,

and

SWIFT & COMPANY

Employer.

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HEARING NUMBER: 09B-UI-11657

EMPLOYMENT APPEAL BOARD
DECISION

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1-c

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Rose M. Johnson, was employed by Swift & Co. from November 19, 2007 through July 8, 2009 as a full-time production worker on the second shift. (Tr. 2) On May 18th, the claimant contacted the employer to report that she would be absent due to taking care of her sick father. The next day, she contacted the employer, again, to inform the employer that her father was still sick. (Tr. 3-4) The employer granted her FMLA beginning May 18th, 2009. (Tr. 3) Ms. Johnson picked up the FMLA papers from the doctor's office and returned on May 22nd. (Tr. 4-5) On the FMLA papers, the doctor noted that the claimant would "... need to be gone any where from seven days to six months." (Tr. 5, 8)

The claimant's father died on May 29th and she continued to be absent while she was taking care of her

father personal business. (Tr. 5-6, 8) She contacted the employer on July 8th to inquire about returning to work. (Tr. 3, 5, 7) The employer told her she no longer had a job as the FMLA did not cover her once her father passed. (Tr. 6-7) She was then directed to return her equipment. (Tr. 6, 8)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1) (2009) provides:

An individual shall be disqualified for benefits: *Voluntary Quitting*. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25 provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employer no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5...

The record does not establish that the claimant quit. In fact, it is clear from the claimant's behavior early on that she intended to maintain her employment based on the number of times she contacted the employer regarding her absences surrounding her father's illness. The fact that she complied with the employer's instructions to complete FMLA papers is also indicative of a person who fully expected to maintain her employment. "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." FDL Foods, Inc. v. Employment Appeal Board, 460 N.W.2d 885, 887 (Iowa App. 1990), accord Peck v. Employment Appeal Board, 492 N.W.2d 438 (Iowa App. 1992). The record contains no evidence to support that Ms. Johnson had any intention of quitting her job. Her return of company equipment were merely compliance with the employer's directive.

Her continued absence after her father's death was in keeping with what she honestly believed was allowable in light of the employer's granting her FMLA in which the doctor indicated her leave may last up to six months. Ms. Johnson admitted she didn't quit (Tr. 8); rather, she was told she no longer had a job and ordered to return her equipment. Continued work was available even through the employer did not offer it to her. (Tr. 3)

Based on these circumstances, we conclude that the claimant was discharged.

871 IAC 24.1(113) "c" provides:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

Because we consider this separation to be a discharge, the issue of misconduct must be resolved. See, 871 IAC 24.32(4) 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 Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record lacks any evidence to establish that the claimant intentionally disregarded the employer's interests. There was no specific date set as to when Ms. Johnson was to return. Her failure to return right after her father's death was a good faith misunderstanding of FMLA. We conclude that there was no willful intent on her part, and misconduct was not established.

DECISION:

The administrative law judge's decision dated August 27, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/fnv