

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBORAH S HANSEN
Claimant

APPEAL NO. 17A-UI-00647-TNT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEVENTH AVENUE INC
Employer

OC: 12/25/16
Claimant: Respondent (1)

Iowa Code § 96.5(2)a -- Discharge

STATEMENT OF THE CASE:

Seventh Avenue Inc., the employer, filed a timely appeal from a representative's decision dated January 17, 2017, reference 01, which held the claimant eligible to receive unemployment insurance benefits, finding that she was dismissed from work on September 1, 2016, while absent with permission. After due notice was provided, a telephone hearing was held on February 9, 2017. Claimant participated. The employer participated by Ms. Teah Shirk, Employment Specialist. Claimant's Exhibits 1, 2, and 3 and the Employer's Exhibits A, B, and C were admitted into the hearing record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Deborah Hansen was employed by Seventh Avenue Inc. from October 4, 2013 until September 1, 2017, when she was administratively separated from employment by the company after the claimant had not returned to work on the date expected by the employer. Ms. Hansen was employed part-time working 20-30 hours per week and was paid \$10.25 per hour. Claimant most recently worked as a return processor.

Because the employer's work is seasonal, work becomes slower in summer months. Some workers are laid off by the company, or request voluntary layoff status. The employer also grants leave of absences for personal or medical reasons, as well as leaves under the Family Medical Leave Act.

On June 27, 2016, Ms. Hansen met with Ms. Teah Shirk and completed a temporary time off request form (non FMLA) and requested to take time away from work beginning July 1, 2016 for approximately 90 days. Ms. Hansen's intent was to provide care to her brother who was terminally ill. Although the expected return to work date was not specified, the form made reference to an absence from work for 90 calendar days. The "acknowledgement" portion of the

form instructed the claimant if she was not able to return by the expected return to work date, it was the employee's responsibility to notify the company prior to the end of the leave of absence and that failure to do so would result in disciplinary action up to and including termination of employment. (Employer's Exhibit A)

Prior to the expiration of the time that Ms. Hansen had been authorized to be off from work by the company, her brother passed away. The claimant continued to busy herself with additional duties regarding her brother's belongings.

Ms. Hansen was called by Ms. Shirk and met with Ms. Shirk on approximately August 26, 2016. Ms. Shirk wanted the claimant to return again in the position of an administrative assistant in the company's offices and wanted the claimant to return to help Ms. Shirk effective September 1, 2016.

Although Ms. Hansen was agreeable to resuming the clerical position again, Ms. Hansen expressed concern for her ability to return on that date because her father's health was now failing and he had been scheduled for a number of medical procedures. The discussion continued and Ms. Hansen agreed she would like to resume the position working with Ms. Shirk, but the claimant's ability to return before the end of the 90-day leave period would be contingent upon the amount of care that she was now required to give to her father in the interim.

The claimant left the meeting with the belief that she had made the employer aware of continuing circumstances that prevented her from accepting the employer's offer to return to work before the end of her leave of absence. Based upon the claimant's agreement that she would like to return the office position working with Ms. Shirk, Ms. Shirk believed the claimant had accepted the offer to return effective September 1, 2016.

During the days that followed the August 23, 2016 meeting, Ms. Hansen's father's condition rapidly deteriorated. On August 31, 2016, the claimant left a voice mail message and sent a text message for her employer that she was unable to return to work on September 1, 2016, due to her obligations associated with the care of her father. Ms. Shirk received the claimant's message declining to return to work prior to the expiration date of her leave. Because the employer had started the process of re-instating the claimant effective September 1, 2016 and the claimant had not returned that date, the employer had administratively separated the claimant from the company's employment rolls.

The claimant's father passed away during the end of September 2016. Soon thereafter, Ms. Hansen contacted the company about returning to work. The claimant was told she must go through the application process at that time.

REASONING AND CONCLUSIONS OF LAW:

The evidence in the record establishes that Ms. Hansen did not choose to voluntarily quit her employment with Seventh Avenue Inc. The claimant requested a leave of absence for approximately 90 days duration, so that she could provide care to a family member who was in rapidly declining health, and return to her employment afterwards. The employer, in turn, agreed to the leave of absence allowing the claimant to be gone for these purposes for up to 90 days, and longer, if she informed the employer for the need of the extension. Before the leave of absence had initially expired, the employer offered the claimant an opportunity to return to work earlier to fill a specific office position within the company. While both the employer and the claimant wished to resume the employment and have the claimant fill the job position, the claimant explained at length that a new obligation to assist a different family member that had

unexpectedly arisen and the claimant needed to give priority to that obligation before returning to work. Because the employer had begun the re-instatement process, somewhat prematurely, the claimant was administratively separated from the company's employment rolls while the claimant was still authorized to be away from work on the mutually agreed upon leave of absence would not expire until on or about October 1, 2016.

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. 871-24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

The propriety of a discharge is not the issue during an unemployment insurance appeal. The employer may be justified in discharging the employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrong-doing or repeated negligence or carelessness that equals willful misconduct and culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000).

The claimant reasonably believed she continued to be on an approved leave of absence and had not agreed to return to work prior to its expiration. The claimant was dismissed from work on September 1, 2016, while absent with permission. Misconduct in connection with the work has not been established. Accordingly, the claimant is eligible to receive unemployment insurance benefits provided she meets all other eligibility requirements of Iowa Law.

DECISION:

The representative's decision dated January 17, 2017, reference 01, is affirmed. The claimant was dismissed from work on September 1, 2016, under non-disqualifying conditions. Unemployment insurance benefits are allowed provided the claimant is otherwise eligible.

Terry Nice
Administrative Law Judge

Decision Dated and Mailed

rvs/rvs