



STATE OF KANSAS

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November 15, 1979

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ATTORNEY GENERAL OPINION NO. 79-265

The Honorable John Vogel
State Representative, Forty-Third District
Route 4, Box 213
Lawrence, Kansas 66044

Re: Labor and Industries--Employment Security Law--
Disqualification for Benefits

Synopsis: A breach of duty under K.S.A. 1978 Supp. 44-706 (as amended by L. 1979, ch. 159, §3) sufficient to disqualify an employee from immediate eligibility for unemployment compensation requires a deliberate refusal of the employee to satisfactorily execute his employment duties. While experience, training and education may be considered, inefficiency or inability do not constitute breach of duty.

* * *

Dear Representative Vogel:

You have requested our interpretation of "just cause" or in the language of the Kansas statute, "breach of duty," in employment termination sufficient to disqualify the discharged employee from unemployment benefits under K.S.A. 1978 Supp. 44-706 (as amended by L. 1979, ch. 159, §3). Your opinion request results from a decision of the Kansas Employment Security Board of Review affirming an earlier determination of eligibility of an employee discharged for unsatisfactory work performance. The employer had hired the claimant on a trial basis, and after one warning that claimant's work was not satisfactory, claimant was discharged. The employer chose not to appeal the Board's decision that there was no "breach of duty" and no resulting ineligibility for unemployment benefits. The employer nonetheless remains concerned over the proper definition of the term. It must be noted that this opinion attempts only to define

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"breach of duty" within the meaning of K.S.A. 1978 Supp. 44-706 (as amended), and in no way passes judgment on the Board's decision. Under K.S.A. 1978 Supp. 44-709(i) (as amended by L. 1979, ch. 161, §2), board decisions are reviewable only by the courts.

At the outset, it should be noted that, while he may be disqualified for a period of time, an employee is never completely ineligible for unemployment compensation. K.S.A. 1978 Supp. 44-706(b) (as amended) provides that an employee is ineligible for employment compensation for seven weeks after discharge "for breach of duty connected with his or her work reasonably owed an employer by an employee." Additionally, an employee discharged for "gross misconduct" is only disqualified until again employed and earning at least eight times the employee's weekly benefit amount. While the statute does define "gross misconduct," it fails to define "breach of duty reasonably owed an employer by an employee." This opinion will seek to clarify the meaning of this statutory term.

Kansas appellate courts have yet to define "breach of duty" for the purposes of 44-706. As there are additionally no applicable provisions in the Kansas Administrative Regulations, the referees and Employment Security Board of Review are without assistance in applying the statute. The Board itself has defined "breach of duty" to mean when "an employee has contributed to, or caused the unemployment by incurring discharge as a consequence of some action constituting a violation of some duty or responsibility there must be a disregard of standards of behavior which the employer has a right to expect of employees." (See attachment #1.) The Board has noted that a breach "denotes a type of action that must be willful in nature, or such wanton disregard as to be determined a willful act." (See attachment #2.) Mere inefficiency or inability to perform the assigned job function are therefore not included in the Board's definition of breach of duty. In the absence of clear statutory definitions, the Board's interpretations are to be given considerable weight and are sometimes considered controlling. Southwestern Bell Telephone Co. v. Employment Security Board of Review, 189 Kan. 600, 607 (1962).

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Review of other jurisdictions' decisions are helpful and support the Board's interpretation. "Breach of duty" has been likened to willful misconduct, Lux v. Unemployment Compensation Board of Review, 180 Pa. Super. 90, 118 A.2d 231, 233 (1955), and there are numerous decisions construing that term. Willful misconduct includes "conscious indifference to the perpetration of a wrong," Neumeyer v. Unemployment Compensation Board of Review, 187 Pa. Super. 321, 144 A.2d 606, 610 (1958); and the inexcusable and unexplained failure, neglect or refusal of claimant to perform the duties assigned to him, especially where he has been warned, Lee v. Doyle, 240 So.2d 19 (La.App., 2nd Cir. 1970). "Willful misconduct" has also been defined as "[b]ehavior evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee." Arthur Winer, Inc. v. Review Board of Indiana, Employment Security Division, 95 N.E.2d 214, 216 (Ind., 1950).

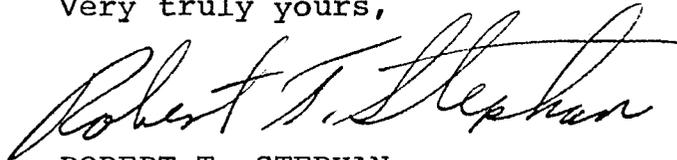
"Breach of duty . . . reasonably owed an employer," in our opinion means failure of the employee to use his or her best efforts to satisfactorily perform the assigned work. Factors to be considered in determining whether or not the employee has expended his "best effort" include prior warnings of dissatisfaction with performance, Kansas App. Ref. Dec. No. 20, 935 K 6/24/58; Kartsonis v. District Unemployment Compensation Board, 289 A.2d 370 (D.C.C.A. 1971); the severity and potential danger resulting from the employee's mistake or negligence, Burge v. Administrator, Division of Employment Security of the Department of Labor, 83 So.2d 532 (2d Cir. 1955); the employee's experience, Reider v. Commonwealth Unemployment Compensation Board of Review, 325 A.2d 347, 348 (Pa. Comwlth., 1974); qualifications before entering the employment relationship, Riehl v. Unemployment Compensation Board of Review, 178 Pa. Super. 400, 116 A.2d 271 (1955); and training or education, In the Matter of the Claim of Alfred Kosziollek, 36 App. Div. 2d 869 (N.Y. 1971). However, one who is inefficient or incompetent due to physical or mental incapacities has not breached his duty of best efforts in his work performance. Seavy & Jenson v. Industrial Commission, 523 P.2d 157 (Colo. App. 1974). Furthermore, "inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion" with no intent to harm the employer's interests should not be considered a breach of an employee's duty to the employer. Agone v. Hansen, 116 Cal. Rptr. 122, 41 Cal. App. 3d 526 (1974).

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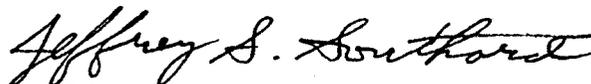
The employer in the present case believed the fact the employee was hired on a trial basis exonerated him from unemployment compensation liability. A case in point to the contrary is Riehl v. Unemployment Compensation Board of Review, 178 Pa. Super. 400, 116 A.2d 271 (1955), where the Court held that an employer could not avoid liability where he hired the claimant on a trial basis because of claimant's limited qualifications at the time of hiring. The Riehl court, like the Kansas Employment Security Board of Review here, pointed out that an inexperienced employee is bound to make mistakes during the training period. Mistakes during the learning process are to be expected and cannot be considered a breach of duty. It also should be noted that K.S.A. 1978 Supp. 44-718 precludes any waiver of eligibility for unemployment compensation. The employee, by accepting employment on a trial basis, could not agree to waive eligibility under the statute in the event the employment arrangement did not work out. See, e.g., Southwestern Bell Telephone Co. v. Employment Security Board of Review, 210 Kan. 403, 405 (1972).

In conclusion, it is our opinion that a "breach of duty" sufficient to delay unemployment compensation eligibility under K.S.A. 1978 Supp. 44-706 (as amended) requires an intentional or deliberate refusal of the employee to exert his best efforts to execute the assigned work duties. Factors properly considered in determining "best effort" include prior experience, education, qualifications or training, while prior warnings and the severity of the mistake may tend to negate any inference of the employee's good faith efforts to satisfactorily perform the employment functions. Finally, in the view of numerous authorities, mistakes in judgment and inefficiency due to incompetence or inexperience do not constitute breach of duty sufficient to suspend eligibility for unemployment compensation.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:gk

Encl.

State of Kansas

EMPLOYMENT SECURITY BOARD OF REVIEW

MEMBERS

Emerson I. Abendroth, Chairman
George J. Trombold, Vice Chairman
Cora L. Hobble, Member

EXECUTIVE SECRETARY

Lyle Phillips

EMPLOYMENT SECURITY BLDG.

401 Topeka Ave.
Topeka, Kansas 66603
Phone 296-5102

January 23, 1978

Mr. Wes Santee
Hayes-Richardson-Santee
Insurance Agency
20 East 9th Street
Box 550
Lawrence, Kansas 66044

Re: BR-5644 K
Vicki L. Crumet

Dear Mr., Santee:

In reply to your letter of January 5, 1977, this is to advise the Board of Review attempts in every case to decide the issues involved pursuant to the laws of the state of Kansas as passed by the legislature and as interpreted by the supreme court of the state and other various jurisdictions. Under the law there are only three reasons that can keep an employer from being charged for unemployment benefits paid an employee. Those reasons are set forth in K.S.A. 44-710 (c) and provide basically that in order not to be charged, the individual must be discharged for breach of duty connected with his employment, gross misconduct, or have quit voluntarily without good cause, attributable to the employment. These basically are the only reasons that an employer can receive a non-charge for benefits that might be paid an individual who would be unemployed.

The terms breach of duty as determined by the legislature and various courts of the state of Kansas and other jurisdictions means that an employee must be more than just inefficient or incapable of performing the job function to which they have been assigned. Breach denotes a type of action that must be wilful in nature, or such wanton disregard as to be determined a wilful

Wes Santee
January 23, 1978

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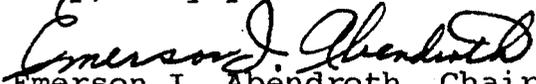
act. Mere inefficiency on the part of an individual in performing the duties of their employment has not under the laws of the state of Kansas nor any other jurisdiction been interpreted to mean breach of duty.

In regard to your questions on your appeal as to whether you can have an individual try out for a probationary period of short duration, and then dismiss then in the event they do not demonstrate an ability to perform tasks assigned, the answer is that you would be liable for unemployment for your pro rata share of unemployment benefits for individuals so discharged. Just because an individual is not capable of learning a certain process, under the law, does not mean that they have breached a duty owed an employer and therefore they would be eligible for the receipt of unemployment benefits.

I would draw your attention to the fact that the Kansas legislature does pass the laws that govern the qualifications and disqualifications of individuals receiving unemployment compensation. It is the duty of the Board only to interpret the laws and not in fact to write them. If you feel that the present situation is not to your liking, the place to start would be the legislature in that the Board is bound to follow the law in all instances.

I trust this will answer the questions you have previously proposed.

Very truly yours,



Emerson I. Abendroth, Chairman
Employment Security Board of Review.

08-07-77

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KANSAS DEPARTMENT OF
HUMAN RESOURCES
Division of Employment
401 Topeka Avenue
Topeka, Kansas 66603

TO

HAYES-RICHARDSON-SANTEE INS.
20 EAST 9TH ST.
LAWRENCE, KANSAS
66044

ISSUE CODE 18211
ISSUE BEGINS 08-07-77
ISSUE ENDS
DATE MAILED 08-25-77
SSN 513-70-7179

VICKI L CRUMET

IT HAS NOT BEEN SHOWN THE CLAIMANT WAS DISCHARGED FOR A BREACH OF A DUTY. THE CLAIMANT IS NOT DISQUALIFIED.

THE CLAIMANT WAS DISMISSED FOR FAILURE TO PERFORM ASSIGNED WORK TO THE EMPLOYER'S SATISFACTION. THERE IS INSUFFICIENT EVIDENCE TO INDICATE THE CLAIMANT'S WORK WAS DELIBERATELY SUBSTANDARD.

THE LAW, KSA 44-706, PROVIDES THAT AN INDIVIDUAL SHALL BE DISQUALIFIED FROM BENEFITS FOR THE WEEK IN WHICH THE WORKER HAS BEEN DISCHARGED FOR A BREACH OF A DUTY CONNECTED WITH THE WORK AND FOR THE FOLLOWING SIX (6) CONSECUTIVE WEEKS. A BREACH OF A DUTY MEANS AN EMPLOYEE HAS CONTRIBUTED TO, OR CAUSED THE UNEMPLOYMENT BY INCURRING DISCHARGE AS A CONSEQUENCE OF SOME ACTION CONSTITUTING A VIOLATION OF SOME DUTY OR RESPONSIBILITY. IN OTHER WORDS, THERE MUST BE A DISREGARD OF THE STANDARDS OF BEHAVIOR WHICH THE EMPLOYER HAS A RIGHT TO EXPECT OF THE EMPLOYEES.

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APPEAL RIGHTS

THIS DETERMINATION IS FINAL 12 DAYS FROM THE DATE MAILED (IF THE 12TH DAY IS A SATURDAY, SUNDAY OR HOLIDAY, THIS IS EXTENDED TO THE FIRST NON-SATURDAY, SUNDAY OR HOLIDAY). YOU MAY APPEAL THIS ON OR BEFORE THE DATE IT BECOMES FINAL.

TO OBTAIN PRESCRIBED APPEAL FORMS, CONTACT ANY EMPLOYMENT SECURITY OFFICE IN YOUR AREA, IN PERSON OR BY LETTER OR PHONE, OR OUR ADMINISTRATIVE OFFICE, 401 TOPEKA AVENUE, TOPEKA, KANSAS 66603.

1. answered 1 Sept 77

2. Discussed - (A) History of N.I.

(B) Failure to perform duties - Deliberate or not?

(C) Did she have reasons to perform?

(D) Law - P

(E) Regulation violation?

#1 sent