

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

OMAR A SHERONICK
Claimant

APPEAL NO: 15A-UI-00226-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORDSTROM INC
Employer

OC: 11/30/14
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 30, 2014, reference 03, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 29, 2015. The claimant participated in the hearing. Jill McDowell, Human Resources Assistant; Matt Super, Receiving Manager; and Tom Kuiper, Employer Representative; participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time receiving processor for Nordstrom from October 23, 2014 to November 19, 2014. He was discharged from employment due to a final incident of absenteeism that occurred on November 17, 2014.

The claimant was originally hired to work from 1:00 p.m. to 9:30 p.m. He requested to change his schedule to 12:00 p.m. to 9:30 p.m. and the employer granted his request. The claimant was 13 minutes tardy November 1, 2014 and received .25 points; he was three minutes tardy November 3, 2014 and received .25 points; he left between two and four hours early due to illness November 4, 2014 and received .50 points; he was 16 minutes tardy November 5, 2014 and received .25 points; he was 12 minutes tardy November 10, 2014 and received .25 points; he was a no-call/no-show November 12, 2014 and received one point; he was seven minutes tardy November 13, 2014 and received .25 points; he was one hour and 31 minutes tardy November 14, 2014 and received .25 points; and he was four minutes tardy November 17, 2014 and received .25 points.

The claimant's no-call/no-show occurred when the employer was requiring employees to work six days a week and the claimant wanted to work Friday, November 14, 2014 instead of Wednesday, November 12, 2014 but failed to notify the employer of his plans and consequently he received one point for a no-call/no-show for November 12, 2014.

The employer had multiple conversations with the claimant about his tardiness and asked him several times if he would like to go back to the 1:00 p.m. start time but the claimant always declined the offer and stated he wanted to start work at 12:00 p.m. He worked at Dunkin Donuts from 6:00 a.m. to 10:00 a.m. and stated his tardiness was the result of his wanting to take a nap between his two jobs.

The employer's attendance policy allows employees to accumulate eight attendance points before termination occurs. The employer's policy also states employees may be discharged if the employer determines there is a pattern of absenteeism or tardiness. The claimant had 3.25 points at the time of termination.

The claimant received a written warning November 15, 2014 following his no-call/no-show and the employer also reviewed the attendance policy with the claimant at that time. The employer told the claimant his job was in jeopardy during the two verbal conversations it held with the claimant regarding tardiness and the written warning. There is no evidence that these absences were related to illness.

The claimant has claimed and received unemployment insurance benefits in the amount of \$1032 since his separation from this employer.

The employer participated in the fact-finding interview personally through the statements of Kris Smith as well as documentation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The claimant accumulated seven incidents of tardiness between November 1 and November 17, 2014. While he did not reach the eight points usually required for termination, the employer’s policy also states that if an employee shows a pattern of absenteeism, which includes tardiness, he may be terminated prior to reaching eight points. The claimant had 3.25 attendance points but did have seven incidents of tardiness.

If the employer worked five days per week the claimant had a possible 19 days of work and if the employer worked six days per week the claimant had a possible 24 days of work during his short tenure with the employer. In either case, seven incidents of tardiness, accompanied by one no-call/no-show absence, does demonstrate a pattern of tardiness.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant’s history of absenteeism, is considered excessive. Therefore, benefits must be denied.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) “Participate,” as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if un rebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer’s representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer’s representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Kris Smith and documentation of the claimant's attendance record. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$1032.

DECISION:

The December 30, 2014, reference 03, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. Therefore, the claimant is overpaid benefits in the amount of \$1032.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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