

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

FAYEZ A ELESSAIS
1309 – 39TH ST SE
CEDAR RAPIDS IA 52403-3875

NORDSTROM INC
C/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-01754-HT
OC: 01/08/06 R: 03
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Nordstrom, filed an appeal from a decision dated January 25, 2006, reference 01. The decision allowed benefits to the claimant, Fayez Elessais. After due notice was issued a hearing was held by telephone conference call on March 2, 2006. The claimant participated on his own behalf and Magady Salama acted as interpreter. The employer participated by Human Resources Manager Robin Pospisil, Return Inspections Manager Wendy Stevens and Assistant Returns Inspection Manager Heather Childs. The employer was represented by TALX in the person of Peg Heenan. Exhibit One was admitted into the record.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Fayez Elesais was employed by Nordstrom from October 11, 1999 until January 9, 2006. He was a full-time return inspections processor. His job is to process merchandise which was been returned by customers. The merchandise is provided to his work station in totes and he is to remove one item at a time from the tote. He then takes the LPN tag off of the plastic and he writes his own employee number on it.

After that he is to inspect the item which is to go back into stock, repackage it and put the LPN tag back on the garment. Each item he processes is marked with a "tick" on his PEP sheet, the item is put back into the tote and when the tote is full it is put on a conveyor line to the scanner area. The LPN is taken off of the item, scanned, and the item is return to the appropriate store location.

The "tick" marks on the sheet are to indicate each individual item, no item is given more than one "tick" mark. The tallies on the PEP sheets are used to determine work performance and whether or not the employee has earned bonuses for production efficiency. The claimant had earned such bonuses and good marks for performance as a result of the information on the PEP sheets.

In late December two staff members came to Return Inspections Manager Wendy Stevens and reported Mr. Elesais was putting more than one "tick" mark on his PEP sheet for each item he processed. Ms. Stevens investigated by watching a video surveillance tape of the claimant while he was working on January 3, 2006. She personally counted each item he processed and counted 119. She retrieved his PEP sheet for that day and he had claimed 255.

On January 5, 2006, the claimant was summoned to a meeting with Ms. Stevens, Human Resources Manager Robin Pospisil and Assistant Returns Inspection Manager Heather Childs. The claimant was asked to demonstrate the proper procedure for inspecting returned merchandise with a tote of items in the office. He performed the duties correctly according to the employer's policies. He was then questioned as to the large discrepancy between his PEP sheet and Ms. Stevens' actual count on January 3, 2006. He said he could not account for it and said maybe he had "made a mistake." He was suspended pending further investigation.

The further investigation included having Ms. Childs watch the January 3, 2006, video tape and count the items processed by the claimant, and her total was the same as the manager's, 119. Ms. Childs also checked the scanner data for the dates of December 28, 2005, and January 4 and 5, 2006, to determine how many LPNs had the claimant's personal number on the items as compared to the number of items he claimed on his PEP sheet. In each case the difference between the number of items processed and the number of items claimed was over 100.

On January 9, 2006, the claimant was summoned to a meeting with the same managers as before. Again he was asked if he could account for the large discrepancies on his PEP sheet. He again said he might have made a mistake and asked for a "second chance." This request was denied and he was discharged.

Fayez Elesais has received unemployment benefits since filing a claim with an effective date of January 8, 2006.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is.

Iowa Code section 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.

871 IAC 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant demonstrated he knew exactly what procedure he was to follow in processing returned items. He knew the "one item one tick" rule. Although anyone may be expected to make an error here and there, the discrepancies between the number he claimed was sometimes double the number of items he actually processed. This is not an error or mistake, but a falsification of the company documents. As a result of this fraud he given bonuses to which he was not entitled, and received favorable performance ratings he had not earned. This is dishonesty and a violation of the duties and responsibilities an employer has the right to expect of any employee. It is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of January 25, 2006, reference 01, is reversed. Fayez Elessais is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount provided he is otherwise eligible. He is overpaid in the amount of \$2,388.00.

bgh/tjc