

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANITA J BELL
Claimant

APPEAL NO. 14A-UI-09694-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORDSTROM INC
Employer

OC: 08/17/14
Claimant: Respondent (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

Nordstrom Inc. filed a timely appeal from a representative's decision dated September 9, 2014 (reference 01) which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on October 7, 2014. Claimant participated. The employer participated by Ms. Jaquin Jones, Hearing Representative, and witnesses Jill McDowell, Ronald Wesbrook, and Justin Bird.

ISSUE:

At 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: Danita Bell was employed by Nordstrom Inc. from April 21, 2014 until July 21, 2014 when she was discharged for excessive absenteeism and tardiness. Company employees are subject to discharge if they accumulate eight or more attendance infraction points. Employees are allowed to remove infraction points by 30 days of good attendance. The company assesses .25 attendance infraction points for tardiness up to two hours, .50 infraction points for tardiness between two and four hours, and one infraction point for tardiness of more than four hours. Failure to report for scheduled work without prior approval results in one point being assessed against the employees attendance record. Leaving early is also an attendance infraction point similar to those assessed for late arrivals.

Ms. Bell was aware of the company's attendance policy and had been specifically warned that her job was in jeopardy on July 17, 2014 when she had accumulated 7.5 attendance infraction points. At that point Ms. Bell had been tardy in reporting to work on 21 occasions and had called off work due to illness on three occasions. The final incident that resulted in Ms. Bell's discharge from employment took place on July 21, 2014 when Ms. Bell was absent and had reported to the employer that she had "overslept."

Ms. Bell did not dispute the number of infraction points that had been assessed against her when she was warned on July 7, 2014 and did not dispute the infraction points when she was reminded the following day that her attendance infractions had been excessive when she was late in reporting to work on that date.

It is the claimant's position that some of the infraction points assessed against her early in her employment were caused by time clock issues and the claimant's inability to access her locker at work. It is the claimant's further position that she did call her employer prior to the beginning of the work shift on July 21, 2014 and left a message at the employer's "front desk" stating that she could not report because of wrist and hand pain. Company records did not reflect that the claimant called in as required.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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. 871-24.32(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.

In discharge cases, the employer has the burden of proof. See Iowa Code Section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee, may not necessarily be serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In order for a claimant's absences to constitute misconduct which would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive requires consideration of the claimant's acts and the warnings that had been served upon the claimant. The evidence also must establish that the most recent attendance infraction that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absence related to issues of personal responsibility, such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, providing the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that Ms. Bell had been excessively tardy in reporting to work and reporting to work late on numerous occasions. The final incident that caused the claimant's discharge took place when Ms. Bell failed to report for work on July 21, 2014 stating that she had "overslept." Company records do not reflect that the claimant had called in sick.

The Iowa Supreme Court in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that excessive and unexcused absenteeism is a form of job misconduct. The court held that the absences must both be excessive and unexcused, and that the concept includes tardiness, leaving early, ect. The case in court of Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984), held that matters due to "personal responsibility" such as transportation problems and oversleeping are considered unexcused.

The administrative law judge concludes that the employer has sustained its burden of proof in showing that the claimant's attendance infractions were excessive and unexcused. And the claimant's discharge was, therefore, under disqualifying conditions.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has not received unemployment insurance benefits since filing a claim with an effective date of August 17, 2014 and, therefore, has not been overpaid job insurance benefits.

DECISION:

The representative's decision dated September 9, 2014 (reference 01) is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. And she meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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