

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ROBERT S TAYLOR
Claimant

NORDSTROM INC
Employer

APPEAL 16A-UI-09781-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/14/16
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Nordstrom, Inc. (employer) filed an appeal from the August 30, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon the determination it failed to furnish sufficient evidence to show it discharged Robert S. Taylor (claimant) for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on September 23, 2016. The claimant did not participate. The employer participated through Human Resources Generalist Kris Smith and was represented by Ted Valencia of Talx UC Express. Employer's Exhibits 1 through 3 were received. Official notice was taken of the administrative record

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits?

Can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Stock Control Processor beginning on November 6, 2011, and was separated from employment on August 8, 2016, when he was discharged. His immediate supervisor was Aaron Little.

The employer has an attendance policy which states after eight attendance points an employee could be subject to discharge. At seven points, an employee is given an attendance notification and put on notice that further absences could result in discharge. The employee is also given the opportunity to have one attendance point removed after 30 days of perfect attendance. The

attendance policy also requires employees to notify the employer about any absences prior to the start of their shift.

The claimant received one point for the seven days of work he missed from September 28, 2016 through July 6, 2016 due to illness. He notified the employer of his absences prior to the start of his shift. On July 11, 2016, the claimant was given his seven point notification.

The time clock is located approximately a three-minute walk from the employees' entry door. The employer allows employees to punch in five minutes before the start of their scheduled shift to make sure they are on the floor and ready to start working at their scheduled start time. If an employee forgets to clock in at the start of the shift, at the end of the shift he is given the opportunity to record an adjusted clock in time.

On August 2, 2016, the claimant was not at work for the start of shift meeting at 2:00 p.m. Little noticed his absence and the next day checked to see when the claimant had clocked in. He noticed the claimant had an adjusted start time of 1:55 p.m. On August 4, 2016, Little sent an email to Loss Prevention asking when the claimant swiped his badge to enter the building. Loss Prevention reported the claimant entered the building at 1:59:05 p.m.

Little asked the claimant about the situation. The claimant believed he had arrived at work around 1:58 p.m. Little asked him if he could have clocked in by 2:00 p.m. if arrived at that time. The claimant acknowledged he could not. Little informed the claimant that the employer would review his attendance and decide what to do with his employment.

The employer reviewed the claimant's attendance record and the 20 notifications that he was at seven attendance points he had received over the course of his employment. It determined that based on the time card fraud and excessive absenteeism the claimant was to be discharged. On August 8, 2016, Little notified the claimant his employment was terminated.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$2,235.00, since filing a claim with an effective date of August 14, 2016, for the six weeks ending September 24, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits based upon wages credited from this employer's account are denied.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa regulations define misconduct:

"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.

Iowa Admin. Code r. 871-24.32(1)a. 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).

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Green v. Iowa Dep't of Job Serv.*, 299 N.W.2d 651 (Iowa 1980). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

In this case, the claimant failed to accurately report his time by approximately five minutes. The claimant's act was careless. It is reasonable to conclude from the circumstances of the situation that he had a wrongful intent when he reported his time. The claimant was on his last absence point and was aware he could lose his job if he was absent or tardy again. When he arrived to work late, he did not clock in and then altered his timesheet. The claimant's conduct is a deliberate disregard of the employer's interest in having trustworthy employees. Accordingly, benefits are denied.

Iowa Code § 96.7 provides, in pertinent part:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) (a) 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 employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of

benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

Iowa Admin. Code r. 871-24.10(1) 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 unrebutted 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.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. 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. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview the claimant is obligated to repay to the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The August 30, 2016, (reference 01) unemployment insurance 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 been overpaid unemployment insurance benefits in the amount of \$2,235.00 and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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