

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANA K MCMURRIN
Claimant

NORDSTROM INC
Employer

APPEAL NO. 13A-UI-12969-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/20/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism/Tardiness
871 IAC 24.32(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated November 12, 2013, reference 01, that held he was discharged for excessive unexcused absenteeism on October 24, 2013, and benefits are denied. A hearing was held on December 12, 2013. The claimant participated. Tom Kuiper, Representative, Robin Pospisil, HR Manager, and Clot Lemke, Supervisor, participated for the employer.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record finds that: The claimant was hired on November 28, 2005 and last worked as a part-time customer service specialist on October 24, 2013. The claimant received the employer attendance policy that provides an accumulation of eight points may result in employment termination. Unless a health absence is covered by FMLA or ADA, the employer counts one point for it.

Claimant has been diagnosed with irritable bowel syndrome and she has had health issues with it for the past two years. She was approved for intermittent FMLA by the employer third party vendor (Sedgwick). The claimant could miss work a day here and there as needed when she had a health issue related to her bowel.

The claimant expired FMLA on September 23, 2013 was not eligible for further leave. She began seeking a work accommodation with the employer due to her ongoing bowel problem. On October 11 she received a warning she had fourteen (14) attendance points. The employer listed the absence and tardiness issues. She knew a further tardy could lead to termination.

On her way to work on October 24, claimant stopped to aid an injured person when she came upon an accident scene. She stayed until law enforcement arrived, and proceeded to work. She sent an e-mail to her supervisor after arriving that she clocked-in nine minutes late due to the accident. Her supervisor did not question claimant or require her to provide proof. The employer discharged claimant on October 24 for excessive attendance points.

REASONING AND CONCLUSIONS OF LAW:

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 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 administrative law judge concludes that the employer failed to establish a current act of misconduct in the discharge of the claimant on October 24, 2013, for excessive "unexcused" absenteeism.

Claimant admitted her tardiness history. She thought about termination when she stopped to render aid to an injured motorist. She was late only nine minutes and the employer did not question it. Given the circumstances, claimant had a choice to be a good Samaritan or risk losing her job. This is not a current act of misconduct and job disqualifying misconduct is not established.

DECISION:

The decision of the representative dated November 12, 2013 reference 01 is reversed. The claimant was not discharged for a current act of misconduct in connection with employment on October 24, 2013. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs