

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

AARON B RUTER  
1611 – 30<sup>TH</sup> ST NW #5  
CEDAR RAPIDS IA 52405

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

Appeal Number: 05A-UI-11197-RT  
OC: 10/02/05 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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Nordstrom, Inc., filed a timely appeal from an unemployment insurance decision dated October 21, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Aaron B. Ruter. After due notice was issued, a telephone hearing was held on November 15, 2005, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. Robin Pospisil, Human Resources Manager, and Chad Glackin, Team Leader participated in the hearing for the employer. The employer was represented by Peg Heenan of TALX UC eXpress. Employer's Exhibits 1 and 2 were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 and 2, the administrative law judge finds: The claimant was employed by the employer as a part-time personal shopper from February 22, 2005 until he was discharged on March 28, 2005. The claimant averaged 30 hours per week. The claimant was discharged for inappropriate use of the employer's computers and violation of the employer's computer policies. The employer has policies concerning the use of its computers by employees providing that employees must use the employer's computers in a manner reflecting professional and customer service standards and for business purposes. The claimant received a copy of this policy at orientation. In the five weeks prior to the claimant's discharge he accessed inappropriate websites on the Internet using the employer's computer. The most often used website was myspace.com. He accessed that site approximately 30 times in five weeks. On September 28, 2005, the employer recorded images from the claimant's computer on myspace.com and they appear at Employer's Exhibit 1. Clearly the website is inappropriate and not for any business purpose related to the claimant's employment. In fact, the claimant would access these inappropriate websites while working with customers of the employer. The claimant spent at least 150 minutes in a five-week period immediately prior to his discharge in accessing these sites. The claimant had received no warnings or disciplines for this behavior.

Pursuant to his claim for unemployment insurance benefits filed effective October 2, 2005, the claimant has received unemployment insurance benefits in the amount of \$850.00 as follows: \$170.00 per week for five weeks, from benefit week ending October 8, 2005 to benefit week ending November 5, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. 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 employer's witnesses credibly testified, and the administrative law judge concludes, that the claimant was discharged on September 28, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses credibly testified that in a space of five weeks, the claimant accessed inappropriate websites on the Internet using the employer's computer while he was at work and even while he was working with customers. The most often used website was myspace.com, a sample of which appears at Employer's Exhibit 1. This was what the claimant accessed on September 28, 2005. The claimant accessed this website approximately 30 times in the last five weeks of his employment utilizing at least 150 minutes. The employer has policies clearly prohibiting such behavior and the claimant received copies of those policies. Even a cursory review of Employer's Exhibit 1 indicates that the site accessed by the claimant was clearly inappropriate and in violation of the employer's policies. The administrative law judge notes that the claimant accessed this site on numerous other occasions. The administrative law judge concludes that the claimant's accessing of this site while using the employer's computer and while on duty for the employer were deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince willful or wanton disregard of the employer's interests and are disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$850.00 since separating from the employer herein on or about September 28, 2005 and filing for such benefits effective October 2, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision of October 21, 2005, reference 01, is reversed. The claimant, Aaron B. Ruter, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$850.00.

dj/kjw