

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICIA F SKALA
Claimant

APPEAL NO: 08A-UI-08491-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORDSTROM INC
Employer

OC: 08/10/08 R: 03
Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Nordstrom, Inc. (employer) appealed a representative's September 9, 2008 decision (reference 01) that concluded Patricia F. Skala (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 8, 2008. The claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Peg Heenan of TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Jeremy Ranck and Robin Pospisil. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on November 8, 2007. She worked full time as a returns processor in the employer's Cedar Rapids, Iowa catalog store fulfillment center. Her regular work schedule was 2:30 p.m. to 11:00 p.m., Monday through Friday, plus overtime as needed. Her last day of work was July 24, 2008. The employer discharged her on July 31, 2008. The reason asserted for the discharge was excessive absenteeism.

The employer has an eight-point attendance policy of which the claimant was on notice. Prior to July 25 the claimant had already incurred 5.75 points, of which at least 2.25 points were for reasons other than personal illness, including a tardy, an absence due to transportation issues, and an absence to care for her sister's children. On July 25 the claimant called in an absence due to feeling ill, which brought her to 6.75 points.

The claimant was scheduled to work overtime in another department on July 26 and July 27, but requested and was granted time off for those days, as she was going with her boyfriend to visit

family in Chicago, about four hours away. She was scheduled to return to work on July 28. However, that day she called her supervisor, Mr. Ranck, and told him she would be absent as she was having car problems and was still in Chicago getting her car fixed. She was advised that this would bring her to 7.75 points. She assured Mr. Ranck she would be back to work on July 29.

On July 29 the claimant again called Mr. Ranck and advised him that she was having further car problems, that there might have been sugar put in the gas tank, and so she was still in Chicago and was going to be absent again, and asked for the rest of the week off. Mr. Ranck advised her that this would technically bring her to 8.75 points. However, he agreed that she could have excused time off for July 30 and July 31, but she absolutely had to be back for work for August 1 due to the work load and that if she was not, she would be discharged.

On July 31 the claimant again spoke with Mr. Ranck and indicated that there was no way she could be back for work on August 1. As a result, Mr. Ranck informed her she was discharged.

The claimant established a claim for unemployment insurance benefits effective August 10, 2008. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$1,304.00.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). Absences due to issues that are of purely personal responsibility, including transportation issues, are not excusable. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). Even if the claimant had an initial emergency reason she could not immediately return to Cedar Rapids, she has not provided good cause for not securing some other means of returning to Cedar Rapids so she could return to work by

August 1. The claimant's final absence was not excused and was not due to illness or other reasonable grounds. The claimant had previously been warned that an additional absence could result in termination. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

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 whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's September 9, 2008 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of July 31, 2008. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs