

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLEY S HEMPHILL
Claimant

APPEAL NO. 13A-UI-04931-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORDSTROM INC
Employer

OC: 03/17/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated April 16, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on June 3, 2013. Claimant participated. The employer participated by Mr. Thomas Kuiper, Hearing Representative and witness, Ryan Eichorn, Human Resource Assistant.

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 the evidence in the record, the administrative law judge finds: Kimberley Hemphill was employed by Nordstrom, Inc. from April 13, 2012 until March 5, 2013 when she was discharged from employment. Ms. Hemphill was employed as a full-time customer service specialist and was paid by the hour. Her immediate supervisor was Jason Bertch.

Ms. Hemphill was discharged effective March 5, 2013 when the employer believed that Ms. Hemphill had not reported back to work, or kept the employer sufficiently apprised of her inability to return to work on the dates of February 18, February 24, 25, and 26, 2013.

Ms. Hemphill had requested a medical leave of absence to be effective January 15, 2013 for medical/psychological reasons. The claimant believed that the leave of absence return date was open-ended and to be determined by her medical practitioners and the claimant's recovery. Ms. Hemphill had also requested vacation in advance for February 19, 2013 through February 23, 2013 for her mother's surgery.

Ms. Hemphill called in each day to report that she continued to be unable to return to work for medical/psychological reasons and believed that her ongoing absences had been authorized by the company. The claimant was required to call in to a specific telephone number for a unit of

the company that handled the attendance matters for workers who were gone from work for extended periods of time. When Ms. Hemphill received a letter from the company dated February 27, 2013, telling her that she would be discharged if she did not contact the company by March 5, 2013, she did so. During the conversation Ms. Hemphill explained that she had continued to call in and had not been able to return to work, but was willing to do so to keep her job. The representative that spoke to Ms. Hemphill on March 5 returned the call later in the day and confirmed that the claimant had been discharged from employment. It was the employer's belief that claimant had not called in each day as required.

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(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.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Conduct that may be serious enough to warrant the discharge of an employee may not

necessarily be serious enough to warrant the denial of unemployment insurance 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).

The Supreme Court of the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive, unexcused absenteeism is one form of job misconduct. The Court further held, however, that the absences must both be excessive and unexcused but further held that absence due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer.

In the case at hand, the claimant testified that she had called in to a number provided by the employer to report her ongoing absences and that she continued to do so until March 5, 2013 when she was discharged from employment. The administrative law judge concludes that the claimant believed that her absences were authorized and had been excused by the employer. The administrative law judge finds the claimant's testimony that she had called in each day to be credible.

While the decision to terminate the claimant may have been a sound decision from a management viewpoint, the evidence in the record does not establish misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa.

DECISION:

The representative's decision dated April 16, 2013, reference 01, is affirmed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, provided that she is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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