

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

DONALD K GARNER  
#903  
1725 S 50<sup>TH</sup>  
WEST DES MOINES IA 50265

UNITED PARCEL SERVICE  
C/o TALX UCM SERVICES  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-04784-HT  
OC: 03/27/05 R: 02  
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  
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

The employer, United Parcel Service (UPS), filed an appeal from a decision dated April 20, 2005, reference 02. The decision allowed benefits to the claimant, Donald Garner. After due notice was issued a hearing was held by telephone conference call on May 24, 2005. The claimant did not participate but Exhibits A and B were admitted into evidence in lieu of testimony. The employer participated by Security Manager Denny Lang, Human Resources Manager Sonia Smith, Training Manager Randy Ervin and Security Supervisor Rose Nutting. Exhibits One through Five were admitted on behalf of the employer.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Donald Garner was employed by UPS from January 1, 1984 until March 30, 2005. He was a full-time feeder driver. Feeder drivers do not do package deliveries to businesses and homes, but drive freight from one "hub" to another. Mr. Garner was allowed a one-hour unpaid break while at the Minneapolis, Minnesota hub, and two paid 15-minute breaks at other times. If any delays are encountered, construction, accidents, bad weather, the driver is to call into dispatch immediately and inform someone of the delay.

Security Manager Dennis Lang was asked to do surveillance on Mr. Garner on his feeder route between Des Moines, Iowa and Minneapolis, Minnesota. The route is carefully calculated by UPS and there were some discrepancies on the claimant's time records. Mr. Lang personally followed Mr. Garner's truck in another vehicle on March 23, 2005, to determine if there was a problem. Mr. Lang observed the claimant take a total of four breaks while on the road, for a total of 45 minutes, he was in the Minneapolis, Minnesota hub for one hour and 14 minutes. At the end of the run in Des Moines, Iowa, he took another break for 11 minutes.

The claimant did not exit his tractor at any time during the breaks he took while en route. However, when he was questioned about it by Mr. Lang on March 24, 2005, he said he had been doing equipment checks during some of these stops. That would require him to leave the cab and check the tire, lights, fenders and other external parts of the tractor and trailer. He had no response when Mr. Lang confronted him with the report he had not left the tractor at any of those breaks.

The claimant acknowledged knowing how to use the IVIS system, a computer in the cab of the tractor which is used to account for all the driver's time. He had recorded only 33 minutes for his lunch break instead of 66 minutes, which resulted in him being paid for 33 minutes at an overtime rate. He was suspended pending further review and notified he was discharged on March 30, 2005, by Division Manager Keith Gardiner.

The claimant appealed his discharge to a state panel which is comprised of an equal number of union and employer representatives. The discharge was upheld by the panel.

Donald Garner has received unemployment benefits since filing a claim with an effective date of March 27, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes 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 has presented first-hand, eyewitness testimony, supported by documentation, that the claimant was entering information into the time keeping system which was not accurate. He misrepresented the facts at a meeting held to gather information from him about the incident. Mr. Garner took excessive breaks, did not accurately record the amount of time he took for lunch, took more breaks than he was entitled to, and fraudulently asserted he had used some of those breaks to do equipment checks, which it would have been impossible for him to do without leaving the truck. The claimant violated his duties to the employer to provide true, accurate and correct information on his time card and to perform his duties in compliance with company policy. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The representative's decision of April 20, 2005, reference 02, is reversed. Donald Garner is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount provided he is otherwise eligible. He is overpaid in the amount of \$1,860.00.

bgh/s