

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GARY J KAYSER**

Claimant

**APPEAL NO. 09A-UI-06861-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**UNITED PARCEL SERVICE**

Employer

**OC: 04-05-09**

**Claimant: Respondent (2R)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.3(7) - Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 23, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 29, 2009. The claimant did participate. The employer did participate through (representative) Josh Krosser, On Road Supervisor and Terra Vellema, Occupational Health Supervisor.

**ISSUES:**

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a driver/service provider full time beginning April 11, 1988 through March 31, 2009 when he was discharged.

On March 29, 2009 the claimant received a second OWI charge in his own vehicle. Under the employer's policy, an employee who is charged with operating a motor vehicle while intoxicated is required to report the incident to the employer before the beginning of their next work shift. The claimant reported for work on Monday March 30 and while he did not drive a UPS vehicle, he did work that day without reporting the OWI charge he received the previous day. The claimant worked a split shift on March 31 and worked the first part of his shift prior to telling Wayne Nicholson that he had received another OWI on March 29.

In August 2007 the claimant had received an OWI which resulted in the loss of his driver's license. Under the employer's union contract the claimant was given an indoor job and placed in an alcohol rehabilitation program. As part of the program the claimant was not to receive another OWI charge. The claimant was told in August 2007 that he was required to report his OWI charge prior to his next work shift. The claimant was put back on the road in September 2008 after he regained his driving privileges.

In January 2009 the claimant suffered a non-work-related stroke that resulted in him being moved temporarily to a non-driving position until he could obtain DOT certification to drive again. Even though he was working in a non-driving position, he was still classified under the contract as a 'driver' and obligated to notify the employer of his OWI before the start of his next work shift if he received an OWI charge.

Mr. Nicholson asked the claimant why he had not told him about the OWI charge prior to starting work on Monday March 29 and the claimant told him that he was upset about the charge and did not want to face the employer about the charge. The claimant also admitted that he knew he was obligated to report the OWI charge to the employer before the start of his next work shift. Since the claimant had been through the same process in August 2007 the employer knew that the claimant knew he was required to report the charge before the start of his next work shift. The claimant went through the grievance process with the employer and his discharge was upheld.

The claimant has received unemployment benefits since filing a claim with an effective date of April 5, 2009.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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.

The administrative law judge is persuaded that the claimant knew he was obligated to report the OWI charge to the employer prior to the start of his work shift, as the claimant had been through the same process in August 2007. The administrative law judge is also persuaded that the claimant admitted as much to Mr. Nicholson. The claimant was still classified as a driver and was obligated under the employer's union contract to make the report of the OWI in a timely manner as set out in that contract. The claimant had been disciplined for the same conduct in August 2007. The claimant's failure to timely report the OWI charge of March 29, 2009 to the employer constitutes disqualifying misconduct. Benefits are denied.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. 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 not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

**DECISION:**

The April 23, 2009, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$2,625.00.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/pjs