

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

JEFF L FOSTER
2616 W 61ST ST
DAVENPORT IA 52806

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

Appeal Number: 05A-UI-12075-DT
OC: 10/30/05 R: 04
Claimant: Respondent (1)

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

United Parcel Service (employer) appealed a representative's November 16, 2005 decision (reference 01) that concluded Jeff L. Foster (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 December 14, 2005. The claimant participated in the hearing. Randy Ervin appeared on the employer's behalf and presented testimony from two other witnesses, Dennis Lang and Pat Wood. The hearing record was held open through December 16, 2005 for the receipt and admission into the record of Employer's Exhibits One, Two, and Five through Ten. Based on the evidence, the arguments

of the parties, 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 3, 1997. He worked full time as supervisor of the twilight sort at the employer's Davenport, Iowa hub. His last day of work was October 19, 2005. The employer suspended him that day and discharged him on October 29, 2005. The reason asserted for the discharge was changing part time supervisors' time cards and retaliation against an employee.

From about August into September 2005, the claimant's manager instructed him to secure some of the part time supervisors on the twilight shift to work double shifts. He was told that he should have the part time supervisors who worked over only reflect 7.99 hours on their time card. His understanding was that his manager was working with the part time supervisors to keep track of any hours they worked during a day that was over 8.0 hours so that they would be paid for it on a different day. However, this would avoid the time and a half overtime the part time supervisors would otherwise be entitled to receive for working over 7.99 hours. The claimant denied that he physically altered any of the part time supervisors' time cards, but he acknowledged that he passed on his manager's instructions that the part time supervisors were only to report 7.99 hours per day, and he approved the time cards even knowing they were inaccurate.

On September 19, 2005 a part time supervisor who felt his time card had been altered and that he was being underpaid for working overtime complained to the security and human resources management. The employer began an inquiry into the matter. As part of the inquiry, the employer interviewed the claimant on October 13, 2005. This was the first notification to him that there was a problem or that he was under investigation. The day after the interview, the claimant saw the part time manager who had complained and asked him, "why weren't you ma -- -- adult enough to talk to me before going to H.R.?" The next day, another full time supervisor gave the complainant part time supervisor a write up for lack of documentation, an issue that was seldom written up. The employer provided secondhand testimony that the claimant had instructed the other full time supervisor to write up the complainant. The claimant denied that he had instructed the other full time supervisor to write up the complaint; rather, the other supervisor had come to him expressing concern regarding the complainant's frequent violation of the requirement, and the claimant advised her that if she felt the complainant needed to be written up, she should write him up.

As a result of the claimant's involvement with the irregularities with the part time supervisors inaccurate and short time reporting, as well as the employer's conclusion that the claimant had retaliated against an employee that had followed the employer's open door policy by his comment to the complainant and his involvement in the other supervisor giving the complainant a write up, the employer suspended and then discharged the claimant.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not

whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:

- a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
- a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is his involvement in the time card irregularity and the alleged retaliation against the complainant. First, the administrative law judge finds that the simple statement made by the claimant to the complainant was not retaliation. While instigating an unwarranted reprimand against the complainant after learning of the complaint would be retaliation, the claimant denied that he instructed the other supervisor to write up the complainant but asserted he merely supported the other supervisor's desire to write up the complainant for a long-standing problem. No first-hand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. Without contrary information being provided first-hand, the administrative law judge is unable to ascertain whether the employer's source is credible, or whether the employer's witnesses might have misinterpreted or misunderstood aspects of the report. Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible.

Finally, the evidence does not support the employer's assertion that the claimant altered time cards himself. Even assuming that claimant's complicity in his manager's system to manipulate the part time supervisors' hours was a known violation of the employer's policies on the claimant's part, since the interaction with the complainant does not support a conclusion of retaliation, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The time card incidents occurred almost a month prior to the employer's discharge of the claimant. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's November 16, 2005 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/pjs