

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALEXANDER M BROADUS
Claimant

APPEAL NO. 13A-UI-02610-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

UNITED PARCEL SERVICE
Employer

OC: 01/27/13
Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

United Parcel Service filed a timely appeal from a representative's decision dated February 22, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on April 1, 2013. Although duly notified, the claimant did not participate. The employer participated by Mr. Jeff Teal. Employer's Exhibits One through Nine were received into evidence.

ISSUES:

The issues are whether the claimant was discharged for misconduct and whether the claimant has been overpaid job insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Alexander Broadus was employed by United Parcel Service from June 3, 2007 until January 14, 2013 when he was suspended pending a grievance. The claimant was discharged on January 28, 2013. Mr. Broadus was employed as a part-time loader and was paid by the hour.

Mr. Broadus was discharged for being excessively absent and tardy from work. Mr. Broadus most recently had over 50 attendance violations in a one-year period which the employer considered to be excessive. An attempt was made to discharge Mr. Broadus from his employment with United Parcel Service on several occasions; however, Mr. Broadus was able to reclaim his job through a grievance procedure.

Most recently, Mr. Broadus was on a final warning for excessive absenteeism and tardiness and was discharged after he failed to report for work on January 8, 2013 and did not provide any notice to the employer of his impending absence. The claimant was then again tardy in

reporting to work on January 9, 2013. Mr. Broadus provided medical documentation for his absence on January 8, however, the medical documentation did not excuse the claimant from the requirement that he notify the employer prior to the beginning of his work shift that he would be absent.

Based upon the claimant's numerous attendance violations during the most recent year and the final infractions that took place after the claimant had received a final warning, a decision was made to terminate Mr. Broadus from his employment. The claimant's most recent grievance did not overturn his discharge and the claimant's termination from employment was upheld.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the employer has sustained its burden of proof in showing the claimant's discharge took place under disqualifying conditions.

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. 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 a form of job misconduct. The court held that absences must both be excessive and unexcused and that the concept includes tardiness, leaving early, etc. The court further held that absence due to illness and other excusable reasons are deemed excused if the employee properly notifies the employer.

The evidence in the record establishes that the claimant had been excessively absent and tardy and had been properly warned by the employer. The claimant's discharge took place after the claimant failed to provide notification to the employer of his impending absence on January 8, 2013 and again reported late on January 9, 2013.

For the reasons stated herein, the administrative law judge concludes that the employer has sustained its burden of proof in establishing that the claimant's absences were excessive and unexcused. Unemployment insurance benefits are withheld.

Iowa Code section 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.

DECISION:

The representative's decision dated February 22, 2013, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, and is otherwise eligible. The issue of whether the claimant must repay unemployment insurance benefits is remanded to UIS division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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