

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

COREY JOHANSEN
Claimant

APPEAL NO: 11A-UI-13650-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

UNITED PARCEL SERVICE
Employer

OC: 09-04-11
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 5, 2011, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 10, 2011. The claimant participated in the hearing. Simon Nelson, Business Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Eight were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time preloader for UPS from January 21, 2008 to September 6, 2011. On August 25, 2011, the claimant was driving on the road leading to the employer's facility when another vehicle passed him in the turning lane and then cut him off before turning into the employer's parking lot, causing the claimant to have to swerve to avoid contact with the other vehicle. The claimant parked away from the other employee but when he exited his car he yelled at her, calling her a "fucking dumb blonde bimbo" and stating "don't ever pass me again" (Employer's Exhibit Two). He then screamed several threats including that he would have her followed and told her she "better watch herself, you dumb bitch" (Employer's Exhibit Two). The claimant is studying to be a police officer and knows some police officers. He was stating he would have his police friends follow and possibly harass her. He continued yelling at her so she retreated to her vehicle and while doing so saw four midnight supervisors outside and the claimant yelled at them as well (Employer's Exhibits Two through Five). The supervisors told the claimant to calm down and the claimant said, "I don't fucking care who you are it's a free country." The female employee remained calm and told the claimant he was threatening her in front of supervisors and the claimant replied, "Fuck them. I don't care who they are (Employer's Exhibit Two). The claimant returned to his truck because he realized he had his phone with him and then followed the female employee past the guard shack into the

facility without further incident. The claimant went to work and planned to file a grievance against the female employee for her actions in cutting him off on the way into the plant at the end of his shift. The female employee immediately filed a grievance and the employer started the investigatory process. When Business Manager Simon Nelson arrived around 6:30 a.m. he was notified of the incident and started an investigation. He involved the human resources supervisor and security supervisor and they conducted the interview process. After interviewing the female employee and the other witnesses the employer took the claimant out of service effective August 25, 2011. He was scheduled to start vacation August 26, 2011, and when he returned from vacation September 6, 2011, his employment was terminated. The claimant grieved his termination up to the regional level in Chicago and his termination was upheld. The committee cited as one reason for the denial that the claimant never stated he felt threatened during his written statement he wrote on the date of the incident (Employer's Exhibit Five).

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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 employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant had an admitted incident of road rage August 25, 2011, and has attended counseling for anger management and other issues for approximately two years. While the female employee may have driven inappropriately before entering the employer's property, that did not give the claimant the right to verbally attack and threaten her. He was extremely upset when he exited his vehicle and yelled at her, threatening her and using profanity and name calling toward her and yelling at and using profanity when the supervisors who were standing outside told him to calm down. The female employee was understandably upset and felt threatened by the claimant's behavior in the parking lot and regarding the claimant's behavior toward the supervisors who tried to intervene on her behalf to diffuse the situation. With the benefit of two union grievance hearings, the claimant now says he felt threatened by the female co-worker but in reference to her driving rather than her behavior in the parking lot, and did not mention he felt threatened when he wrote his original statement on the day of the incident nor did he tell the employer August 25, 2011, he planned to file a formal complaint against her following his shift. If he truly felt justified and threatened he should have filed a formal complaint immediately. It would seem the claimant is attempting to modify his original statement to the employer about the situation with the benefit of the rulings in the two union hearings, which found he did not state he felt threatened by the female co-worker's behavior at the time of occurrence. The claimant is studying to become a police officer and has friends who are in law enforcement. The temperament he displayed, not for the first time, is not suitable for a workplace, let alone for someone looking to be a police officer, although it is encouraging that he has been seeking counseling, including anger management classes. He yelled at the female co-worker that he was going to have his police friends follow her and that implies that he would have asked them to harass her inappropriately. Granted, he was upset and probably did not mean everything he said, but his anger, yelling and name-calling toward the female co-worker, as well as his response to the supervisors who told him to calm down, constitutes disqualifying job misconduct as that term is defined by Iowa law. The claimant had a similar anger management issue in the parking lot with another employee under similar circumstances in 2008, thus taking this incident out of the realm of an isolated incident. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits must be denied.

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 the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The October 5, 2011, reference 02, 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 has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs