

**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**

**JULIE J UNDERHILL
PO BOX 355
LE GRAND IA 50142**

**UNITED PARCEL SERVICE
c/o TALX EMPLOYER SERVICES
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 06A-UI-00768-DT
OC: 12/18/05 R: 02
Claimant: Respondent (5)**

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 January 10, 2006 decision (reference 01) that concluded Julie J. Underhill (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 February 17, 2006. The claimant participated in the hearing. Kim Gross appeared on the employer's behalf and presented testimony from one other witness, Jeremy Carmichael. 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 June 1, 2004. Since approximately March 2005 she worked part time as needed as a loader/unloader in the employer's Marshalltown, Iowa package center. Her regular work schedule was to work between 3:45 a.m. and 7:45 a.m. up to five mornings per week. Her last day of work was November 4, 2005.

The claimant suffered a work-related shoulder injury on September 16, 2005. She was given work restrictions of no lifting or pushing over 30 pounds and no over-the-head work. She could not do her current job functions with those restrictions. Beginning September 22, 2005, the employer sought to find temporary alternate work for the claimant within her work restrictions. She did some daytime light clerical work, but was then offered some positions she could not do due to her restrictions. Beginning on or about November 1, she was offered some washing work from 5:00 p.m. to 8:30 p.m., which she did do on a couple of occasions, most recently November 4, but which she could not do on a routine basis because of her family commitments.

She checked in each Friday with the center supervisor, Mr. Carmichael. Starting approximately November 1, each week he told the claimant the only work he had for her was the 5:00 p.m. to 8:30 p.m. work, and each week the claimant informed him that she could not work that schedule, but that if her schedule changed on any day so that she could work that day, she would call and let him know. The claimant went to speak to Mr. Carmichael on Wednesday, November 30, 2005 after a doctor's appointment; she informed him that she still had not been released to return to her regular work duties. He again told her that the only work he had available to her that week and the next were the 5:00 p.m. to 8:30 p.m. hours, and she again told him that those hours would not work for her. He advised her to continue checking in, first making a comment about checking in daily, and then saying "at least every Friday."

The employer considered the claimant a no-call, no-show for work on December 1, December 2, and December 5, 2005. On December 7, 2005, the employer drafted and sent a letter to the claimant advising her that her position was terminated because of being a no-call, no-show for work those three days. The claimant stopped in to talk with Mr. Carmichael on Friday, December 9, 2005, before the claimant received the letter; the claimant informed Mr. Carmichael that nothing had changed regarding her condition or her availability for the evening work, and he did not indicate any change regarding the claimant's employment status. When the claimant returned home that day, she received the termination letter.

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 decisions. 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).

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.

Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Here, the employer knew or should have known that the claimant would be absent for

the evening shifts unless she otherwise informed the employer time. Floyd v. Iowa Dept. of Job Service, 338 N.W.2d 536 (Iowa App. 1986). The claimant's absence from the evening shifts which were being offered in lieu of her regular early morning shifts was reasonable. She had not previously been warned that future absences or failure to call in daily regarding those shifts could result in termination. Higgins, supra. No final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. Cosper, supra. 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 January 10, 2006 decision (reference 01) is modified with no effect on the parties. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/pjs