

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DEONTRE BERKA**  
Claimant

**APPEAL NO. 13A-UI-12865-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PARCO LTD**  
Employer

**OC: 10/20/13**  
**Claimant: Respondent (2R)**

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

**STATEMENT OF THE CASE:**

Parco Ltd. filed a timely appeal from a representative's decision dated November 14, 2013, reference 02, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on December 10, 2013. Although duly notified, the claimant did not participate. The employer participated by Ms. Kristi Quist, Manager and Mr. Bill Hermanson, District Manager. Employer's Exhibits A, B, and C were received into evidence.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct and whether the claimant has been overpaid job insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having considered the evidence in the record, finds: Deontre Berka was employed by the captioned company, doing business as Wendy's, from May 3, 2013 until September 25, 2013 when he was discharged from employment. Mr. Berka was employed as a part-time crew member and was paid by the hour. His immediate supervisor was Kristi Quist.

The claimant was discharged for failing to report for scheduled work on two occasions without providing the required notification to the employer. Mr. Berka was aware of the policy and had received both oral and verbal warnings about his attendance. The claimant had received a verbal warning about punctuality notification. The claimant then failed to report for work and did not provide notification on July 7. This conduct reported in a written warning. Mr. Berka was placed on notice that additional attendance infractions could cause his discharge from employment. The claimant was discharged after he failed to report for scheduled work on September 25, 2013 and provided no notification to the employer as required.

The employer did not participate in the fact finding in this matter.

## REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct in connection with the work. It does.

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 benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000)d, 616 N.W.2d 661 (Iowa 2000). 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. App. 1992).

No aspect of the contract for employment is more basic than the right of the employer to expect employees will appear for work on the hour and day agreed upon. Recurrent failure to honor that obligation shows a substantial disregard for the employer's interests and standards of behavior which an employer has a right to expect under the provisions of the Employment Security Law. If an employee is unable to report for work, the employer has a right to expect that that employee will provide proper advance notice to give the employer an opportunity to secure a replacement or make other arrangements to cover a worker's absence.

In the case at hand the claimant had previously been warned about attendance and punctuality and later specifically warned about his failure to provide notification when unable to report. The claimant was placed on notice that further failing to report without providing required notification could result in his termination from employment. The claimant was discharged when he again failed to report or provide required notification in violation of both company policy and the warnings that had been served upon him. Unemployment insurance benefits are withheld.

Because the claimant has been deemed ineligible for benefits any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment and the amount of the overpayment.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

In the case herein the benefits were not received due to fraud or willful misrepresentation and the employer did not participate in the fact-finding interview. Consequently, the claimant is not responsible for repaying the overpayment and the employer's account remains liable. The matter is remanded to determine the amount of the overpayment..

**DECISION:**

The unemployment insurance decision dated November 14, 2013, reference 02, is reversed. The claimant was discharged. 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 meets all other eligibility requirements of Iowa law. The issue of whether the claimant has been overpaid benefits and the amount of the overpayment is remanded to the

Claims Division for determination. The employer did not participate in the fact-finding interview. Consequently, the claimant is not responsible for repaying the overpayment and the employer's account remains liable for the amount of the overpayment.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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