

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAWRENCE F EMMICK
Claimant

APPEAL NO. 09A-UI-07841-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

UNITED PARCEL SERVICE
Employer

OC: 04/19/09
Claimant: Respondent (1)

Section 96.5-1 – Voluntary Quit
Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated May 15, 2009, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 15, 2009. Claimant participated. The claimant was represented by Joe Flannery, attorney at law. Employer participated by Craig Kuehl, business of manager in Sioux City, Iowa, and Rose Nuttig, security supervisor. The record consists of the testimony of Craig Kuehl; the testimony of Rose Nuttig; the testimony of Lawrence Emmick; and the testimony of Barbara Emmick.

ISSUE:

Whether the claimant voluntarily left for good cause attributable to the employer;
Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was initially hired by UPS on May 4, 1995. He worked in pre-load, which involved the unloading of semi trucks at the Sioux City facility and was also a part time air driver. As an air driver, he picked up packages and letters that were to be delivered by air and took them to the airport in Sioux Falls, South Dakota. He drove a UPS issued truck.

UPS drivers are paid on an hourly basis. A driver such as the claimant fills out a time card by hand. The employer became concerned when other drivers doing the same route as the claimant averaged nearly two and one half hours less than the claimant. This issue was reported to UPS security and on April 18, 2009, surveillance was done on the claimant as he drove the route.

The surveillance showed that the claimant took 24 minutes to pick up two packages at a UPS store. He then went to Hull, Iowa, to check for packages even though he had had a telephone

call telling him that there were no packages there and he did not need to go to Hull. He drove through LeMars, Iowa, instead of using the more direct route around town. He also spent 28 minutes in a parking lot even though he did not record any break time. There were other discrepancies in his time card as well. The employer concluded that the claimant was falsifying his time card and took him off work on April 20, 2009, pending further investigation. On April 21, 2009, a meeting was held at the Sioux City facility with the claimant. A union steward was also present. The results of the investigation were reviewed with the claimant and he was told he was terminated.

The claimant had the right to a union hearing in Omaha, Nebraska. The claimant and the employer went to Omaha on April 21, 2009, for that union hearing. When the claimant arrived at the union hearing, he had a meeting with the business agent for the union. He was told that if he resigned instead of being terminated he could collect his four weeks of vacation. The claimant decided that he did not want to go through the union hearing and elected to resign for what was called personal reasons.

The claimant's explanation for the 28 minute stop in the parking lot was that he had received a phone call from his son, who had some problems. The claimant did not realize how much time went by and he then forgot to put down some break time on his time card. His reason for going to Hull was that he was concerned that there might actually be something for him to pick up at the Caseys in Hull, even though he had received the phone call saying there was nothing. Other discrepancies or long stops were attributed by the claimant to have friendly words with people at his pick-up and drop-off sites.

REASONING AND CONCLUSIONS OF LAW:

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

The evidence in this case shows that the claimant was compelled to resign his position from UPS in order to preserve his four weeks of vacation pay. Although his resignation is considered voluntary from the employer's perspective, the claimant had already been terminated for misconduct. Accordingly it is necessary to examine the underlying facts to determine if the employer has sustained its burden of proof on misconduct.

The misconduct that justifies termination is not necessarily misconduct that disqualifies an individual from obtaining unemployment insurance benefits. Because the claimant is paid by the hour and because the claimant is personally responsible for preparing the time card used to determine his wages, the employer has a reasonable expectation that those time cards will be filled out accurately. The employer also had a justifiable concern about the claimant's time card after the discovery that the claimant, over a 14-week period, had averaged 2 ½ hours more than

other drivers on the same route. The surveillance was done on only one day and the termination was based on that one day's surveillance.

After carefully considering the evidence, the administrative law judge concludes that the claimant's actions on April 18, 2009, do not constitute misconduct within the meaning of the unemployment statute. The claimant's actions rather show inadvertencies or ordinary negligence or good faith errors in judgment or discretion. The claimant thought he needed to go to Hull just to make certain there were no packages as he had previously had to go to Hull after he got on the road. He made a mistake by not recording his lunch break while talking to his son. He may not have been as efficient a driver as required by UPS, but when considering all of the evidence in this case, misconduct has not been shown.

DECISION:

The decision of the representative dated May 15, 2009, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs