

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOSHUA L. LITTLEJOHN**  
Claimant

**APPEAL NO: 17A-UI-06653-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AGRI-INDUSTRIAL PLASTICS CO**  
Employer

**OC: 06/04/17**  
**Claimant: Respondent (2)**

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 June 20, 2017, reference 01, 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 July 24, 2017. The claimant provided a telephone number prior to the hearing but was not available at that number when called for the hearing and did not participate in the hearing. Katie Nichols, Director of Human Resources and Rob Pettit, Director of Operations, participated in the hearing on behalf of the employer.

**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 full-time machine operator for Agri-Industrial Plastics Company from September 19, 2016 to May 25, 2017. He was discharged for attempting to sell property of the employer stolen by a co-worker.

On May 24, 2017, a supervisor notified Director of Operations Rob Pettit that an air router was found for sale on a Facebook page entitled Southeast Iowa Swap and Shop. The pictures of the router showed it to be an orange, specialized, industrial grade router with a specialized nose just like those used by the employer. The router shown for sale in the pictures was not for home use. It cost between \$500.00 and \$600.00 when the employer purchased it. The individual listed as the seller was the claimant's girlfriend.

Mr. Pettit confronted the claimant and asked why his girlfriend would have that router and the claimant agreed it looked just like the employer's routers and stated he had "no idea" how his girlfriend would have possession of the router. Mr. Pettit asked the claimant to bring the router in the next day and ask his girlfriend where she got it. The claimant agreed to do so but later that day went to his supervisor and recanted his statement that he did not know how his

girlfriend came to possess the router. He told his supervisor he received the router from a co-worker and agreed to sell it online for a portion of the profit. The claimant stated he did not want to be known as a thief but he knew the router was stolen and provided the employer with the name of the co-worker who gave it to him to sell.

On May 25, 2017, the claimant brought the router in and Mr. Pettit told him he understood the claimant had changed his story since they last talked the day before. The claimant proceeded to tell Mr. Pettit the same version of events as he told his supervisor. Mr. Pettit thanked the claimant for his honesty and for returning the router and told him for those reasons the employer had decided not to report the incident to the police but informed him that his employment was being terminated for attempting to sell the employer's router, that he knew was stolen by his co-worker, for a profit.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,088.00 for the six weeks ending July 15, 2017.

The employer personally participated in the fact-finding interview through the statements of Director of Human Resources Katie Nichols and Director of Operations Rob Pettit. The employer also submitted written documentation prior to the fact-finding interview.

#### **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 section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant accepted an air router from a co-worker whom he knew stole it from the employer. The cost to the employer to purchase the router was between \$500.00 and \$600.00 and the claimant was attempting to sell it online for profit. The claimant did not use his own name online but chose to use his girlfriend's name in an effort to hide his involvement with the stolen router. When the employer initially confronted the claimant about the router he was not forthright about his knowledge of the situation although later in his shift he did retract his original story about not having any idea how his girlfriend would be in possession of the router. Because the claimant knew the router was stolen from the employer by the co-worker who gave it to him to sell online for a portion of the profit he is equally culpable in the theft as there is little difference between stealing it himself or agreeing to sell it under his girlfriend's name for part of the profit when he was fully aware it was stolen.

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 are denied.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation,

the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

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.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

Consequently, the claimant is overpaid benefits in the amount of \$2,088.00 for the six weeks ending July 15, 2017.

**DECISION:**

The June 20, 2017, reference 01, 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 employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$2,088.00 for the six weeks ending July 15, 2017.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/scn