

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN C SWINDERMAN
Claimant

APPEAL NO. 10A-UI-13784-H2

**ADMINISTRATIVE LAW JUDGE
DECISION**

WISCH SYSTEMS INC
Employer

OC: 08-22-10
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 29, 2010, reference 04, decision that allowed benefits. After due notice was issued, a hearing was held on December 8, 2010. The claimant did participate. The employer did participate through Joseph Getz, Owner, Mario Rikle, Master Digital Artist and Brian DePriest, Detective with the Keokuk Police Department. Employer's Exhibit One was entered and received into the record.

ISSUES:

Was the claimant discharged due to job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as an executive sales director full time beginning on March 12, 2010 through August 25, 2010 when he was discharged.

On August 12 Mr. Getz told the claimant that because business was so slow he would have to lay him off effective September 1, 2010. Mr. Getz wanted to give the claimant as much warning as he could so that the claimant could begin looking for work as soon as possible. As part of his job responsibilities the claimant was required to develop a business plan, marketing plans, trade show lists and customer call lists and customer data bases.

On August 24 Mr. Getz was in the office and noticed that the claimant's office was completely cleaned out. He tried to get on the claimant's computer and discovered that the claimant had removed every piece of work he had from the computer. The data bases were empty and the claimant had either destroyed or taken the employer's work product. The claimant agreed that the work product he had on the employer's computer belonged to the employer and not to him. The claimant did not have permission to take or copy the information; much less destroy it on the employer's work computer.

Mr. Getz reported the theft to the police department. After obtaining a search warrant Detective DePriest obtained from the claimant's home, both his lap top computer and a jump drive. All of the employer's information was discovered on the jump drive. It took hours for Detective DePriest to transfer the information from the jump drive to his work computer. When the employer obtained the information stolen by the claimant, both Mr. Getz and Mr. Rikle discovered that the claimant had accessed information on the server that he did not have access to on his own computer. That information included personal tax returns among other things. The employer did not recover all of the information the claimant destroyed, as they were never able to recover his e-mail account. The claimant admitted to Detective DePriest that he had copied the company documents on to a jump drive. The claimant's explanation that he did not think he destroyed the information on the employer's work computer is simply not believable in light of his admitted taking of the documents and his familiarity with the work computer. Additionally, it would have taken the claimant hours to make the copies and to access all of the information he had to use a computer other than his own in the office. Such conduct evidences the claimant's intent to make the copies and to destroy the employer's work product.

The claimant has received unemployment benefits after the separation on a claim with an effective date of August 22, 2010.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). The administrative law judge is persuaded that the claimant knew exactly what he was doing when he not only copied the information from his work computer, but that he intentionally deleted the information from the employer computer. The claimant had no right to the information and had no right to destroy it on his work computer. His claim that he “accidentally” destroyed the information is not believable in light of his computer experience. The employer’s evidence establishes that the claimant committed substantial misconduct and benefits are denied.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer’s account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual’s separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant’s separation was disqualifying, benefits were paid to which the claimant was not entitled. 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.

DECISION:

The September 29, 2010 (reference 04) 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.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs