

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUSTIN C SWINDERMAN
Claimant

APPEAL NO. 110-UI-02387-H

**ADMINISTRATIVE LAW JUDGE
DECISION**

WISCH SYSTEMS INC
Employer

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

Section 96.5(2)a - Discharge

STATEMENT OF THE CASE:

Wisch Systems filed an appeal from a decision dated September 29, 2010, reference 04. The decision allowed benefits to the claimant, Justin Swinderman. After due notice was issued, a hearing was held in Burlington, Iowa on March 29, 2011. The claimant was paged in the main waiting area at 12:29 p.m., 1:17 p.m. and 1:36 p.m. He did not respond and did not participate. Wisch Systems participated by Owner Joseph Getz, Master Digital Artist Mario Rikle, Detective Brian DePriest, and was represented by Mitchell Taylor.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment insurance benefits.

FINDINGS OF FACT:

Justin Swinderman was employed by Wisch Systems from January 4 until August 25, 2010 as a full-time marketing and sales executive. Sometime in August he was notified by Owner Joseph Getz he was going to be laid off and the employer's facility, as far as copiers and word processors, would be at his disposal for a new job search.

On August 20, Mr. Swinderman was not in the office and Mr. Getz discovered this when he went to talk to the claimant. At that point his office was completely stripped of all personal property and many items belonging to the employer such as file folders, writing instruments, and manuals. The employer then looked at the company computer Mr. Swinderman had been using and found it stripped of all data. It was completely blank as if it were a brand new computer. The data which had been on the computer included things such as trade show schedules, customer lists, e-mails, marketing information, business plans, cold call lists, serial numbers of boards which had been serviced, sales material, invoices and billing information, all material pertinent to web site development such as graphics, text and code, a prospect data base, credit references for the corporation, and 50 or 60 pages of information obtained at an agricultural trade show. There were also letter and fax templates missing, an internal phone list, and budget information.

The employer was substantially alarmed as a good deal of this information was covered under a non disclosure agreement between Wisch Systems and various clients. This information is forbidden to leave the employer's premises and if the clients had discovered it had been taken, the employer's business could have been forced to shut down for taking the privileged information.

Mr. Getz notified a locksmith that day but was unable to make arrangements for the locks to be changed until Monday, August 23rd. A report was made to the Keokuk Police Department regarding the missing data.

Detective Brian DePriest, contacted the claimant pursuant to the employer's complaint. Mr. Swinderman denied having any information that belonged to the employer but the detective left him with the implication that the transfer of the material might have been a "mistake" and if the claimant discovered anything to please give the detective a call. The next day Mr. Swinderman called Mr. DePriest and said he had "accidentally" copied the employer's information on an external hard drive.

The claimant brought the material on a "jump drive" to the detective who then transferred the data to his own computer and wiped the data from the claimant's jump drive. Detective DePriest then notified the employer who sent Master Digital Artist Mario Rikle to the police department to copy the information from the police computer to another portable drive. Mr. Rikle found that his drive was too small to download all of the data and came back the next day with a larger drive. It took approximately one and one-half hours to transfer all of the information the claimant had taken. It was then discovered that the material had been taken from a variety of computers within the company which meant the claimant would have had to physically take the portable jump drive from his computer to Mr. Rikle's computer to Mr. Getz's computer, and to the computer of the company secretary in order to download all of the information. There was personal information belonging to Mr. Rikle such as financial matters as well as personal information of Mr. Getz. The claimant would have had no reason to copy all of this material much less the personal information belonging to his co-workers. There was no way this material could accidentally have been downloaded because Mr. Swinderman had created a separate directory into which he transferred all of this information from the various sources.

The claimant was not at work on August 23 or 24 but did show up to work on August 25, 2010. He talked to Mr. Rikle through the office door because the locks had been changed and Mr. Rikle would not authorize him to enter. Mr. Rikle said the claimant would have to talk to Mr. Getz about the situation.

The claimant did call later that day to speak with Mr. Getz who then told him he was fired for the taking of company data. The claimant tried to assert that he had taken the material from the company computer in order to download it on his personal computer and work from home. However, this data, under the confidentiality and non disclosure agreements, as well as the provisions of the employee handbook, cannot be taken out of the office without violating those agreements. In addition, Mr. Getz noted that much of the information taken did not pertain to the job duties of the claimant or any particular assignment he had been given.

The claimant has received unemployment insurance benefits since filing a claim with an effective date of August 22, 2010.

REASONING AND CONCLUSIONS OF LAW:

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.

The claimant was discharged for theft of the employer's intellectual property. The property that he downloaded came from many sources within the company which would have required the claimant to physically go to other computers, attach his jump drive, and then copy the data on the computer to his jump drive. He would have no reason or authority to do that. By the removal of this data from the office he jeopardized the employer's business in terms of a non disclosure agreement between Wisch Systems and its clients. Also the claimant wiped his computer clean of all data so that the employer would have no access to the work product that he created as part of his regular job duties. The harm that could have been done with customer lists, marketing and business plans, financial information, e-mails and sales material is substantial. The claimant acted with willful and deliberate malice to the employer, willfully violating the terms of his contract of hire under company policies as well as the non disclosure agreements. This is a violation of the duties and responsibilities the employer has a right to expect from employees and conduct not in the best interests of the employer. The claimant is disqualified.

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.

The claimant has received unemployment insurance benefits to which he is not entitled and these must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of September 29, 2010, reference 04, is reversed. Justin Swinderman is disqualified and benefits are withheld until he has requalified by earning ten times his weekly benefit amount, provided he is otherwise eligible. The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code chapter 96.3(7) is remanded for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

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