

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

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**Appeal Number: 05A-UI-06504-H2T  
OC: 05-29-05 R: 04  
Claimant: Respondent (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

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 16, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 27, 2005. The claimant did participate. The employer did participate through Rick Ruden, Human Resources Director;; Cindy Helmke, Human Resources Manager; Gary Kriener, Cresco General Manager; and Tammy Henderson, Human Resources Assistant. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a lead person full time beginning May 15, 1989 through June 1,

2005, when he was discharged. On May 25 at approximately 6:15 p.m. the claimant was caught by Gary Kriener with Huber wood and two-by-eight boards loaded in a trailer attached to his pick up truck. The claimant was attempting to take the wood off the company property and specifically admitted that he had asked permission from Mr. Kreiner approximately three weeks prior to take the Huber wood. Three weeks prior to May 25 Mr. Kriener specifically told the claimant that he could not take the Huber wood until he figured out whether it could be used for another purpose. On May 25 the claimant admitted that no one had given him permission to take the Huber wood or the two-by-eights off company property. During an interview held on May 31, the claimant admitted that he made an error in not getting authorization or permission to take the wood. Also during the May 31 interview, the claimant admitted that he had several opportunities during the day on May 25 to ask Mr. Kreiner for permission to take the materials, yet he never did so. At hearing, the claimant admitted that he knew he had to have approval or permission from Mr. Kriener to take the wood or to load it in his trailer.

Mr. Kriener normally leaves the plant by 5:00 p.m. or shortly thereafter every day. When the claimant saw Mr. Kriener it was about 6:15 p.m. and they were both in their vehicles heading toward the main plant gate. Mr. Kreiner stopped his truck and waited for the claimant to pull up along side of him. He then asked the claimant what he was doing at the plant so late, as the claimant's shift ended at 4:30 p.m. that day. The claimant then told him he was taking home wood that he, Mr. Kreiner, had told him he could take. Mr. Kreiner got out of his truck and looked at the wood in the claimant's trailer. He told the claimant he was not supposed to be taking that wood and that he had never given the claimant permission to take the Huber wood or the two-by-eights home. Mr. Kreiner told the claimant there would be an investigation and they both left, leaving the wood behind on the plant property.

The employer often reuses wood originally intended for one purpose for another to keep costs down. If materials cannot be reused, then the employer sells them at auctions. The two-by-eights are valuable boards to sell at auctions.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

#### 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 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

At hearing the claimant admitted he knew he had to have permission from Mr. Kreiner to take the Huber wood and the two-by-eights off the company property. The claimant was clearly preparing to take the wood and it was just a coincidence that Mr. Kreiner happened to be working late that night and saw the claimant leaving. The claimant admitted he did not have permission to take the wood from the employer. The claimant was going to take wood that did not belong to him, and that he did not have permission to take. Such conduct amounts to attempted theft from the employer. Attempted theft constitutes disqualifying misconduct. Benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The June 16, 2005, 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 is overpaid benefits in the amount of \$1,322.00.

tkh/kjw