

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**WILSON W SAYE**  
Claimant

**APPEAL NO. 09A-UI-08014-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT & COMPANY**  
Employer

**OC: 11/30/08**  
**Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Benefit Overpayment

**STATEMENT OF THE CASE:**

Swift & Company filed a timely appeal from a representative's decision dated May 20, 2009, reference 02, which held claimant eligible for benefits based upon his separation from employment. After due notice, a telephone conference hearing was scheduled for and held on June 18, 2009. Claimant participated personally, the employer participated by Mr. Tony Luse, employment manager.

**ISSUE:**

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

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered the evidence in the record, finds: The claimant was employed as a full-time production worker by Swift & Company from January 27, 2009 until April 21, 2009 when he was discharged. The employer determined that the claimant had falsified his application for employment.

At the time of hire, applicants are provided an application for employment and are required to answer a number of questions regarding their background. When Mr. Saye completed his application for employment, he did not respond in the affirmative to questions asking whether he had previously been convicted of a felony or as a sex offender. Subsequently, when another candidate was not hired for employment because of a felony record, that individual brought to the company's attention the fact that Mr. Saye was a convicted sex offender felon and was employed by the company. A further review of the claimant's background showed that Mr. Saye had been convicted of the felony offense. As the employer reasonably believed that the claimant had withheld pertinent background information from the company, a decision was made to terminate Mr. Saye from his employment. Applicants are warned on the application for employment that false or misleading answers to questions may result in termination from employment.

It is the claimant's position that because the employer had previously been mailed a form relating to his probation/parole status, that the employer knew or should have known that Mr. Saye had been convicted of a felony. The company has routinely sent forms of this nature regarding employees who have been convicted of various offenses of both misdemeanor and felony classifications.

### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant a denial of unemployment insurance benefits. It does.

The evidence in the record establishes that Mr. Saye clearly knew that he had been convicted as a felony sex offender. Although aware that the company was making a specific inquiry on the application for employment with respect to information of that nature, Mr. Saye made a conscious decision not to include that information on his application for employment. Subsequently, when the company became aware that Mr. Saye was a felony sex offender, they investigated and determined that the claimant had not provided truthful information in his application for employment. A warning is provided to potential employees on the application that false or incomplete statements can result in termination from employment.

Although the administrative law judge is aware that Mr. Saye maintains that the employer had tacit notice of his status when they were sent a probation/parole form, the administrative law judge does not agree. The evidence in the record establishes that the company is routinely sent numerous forms of this nature regarding employees and the forms are sent regarding convictions of both felony and misdemeanor offenses. By receipt of a parole or probation notice, asking the employer to provide the work status to the court system, the employer was not placed on any specific notice. Regarding the worker's employment history, the employer was reasonable in its expectation that applicants for jobs would not only be truthful in their answer, but would not withhold pertinent information from the company.

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.

For the reasons stated herein, the administrative law judge concludes that the employer has sustained its burden of proof in showing the claimant's discharge was disqualifying. Benefits are withheld.

Iowa Code section 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.

**DECISION:**

Representative's decision dated May 20, 2009, reference 02, is reversed. Wilson Saye is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, providing that he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to the UIS Division for determination.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

srs/pjs