

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAY D WYNKOOP

Claimant

APPEAL NO. 11A-UI-05947-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JEFF SMID AUTO INC

Employer

OC: 03/27/11

Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge

Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Jeff Smid Auto, Inc. (employer) appealed a representative's April 29, 2011 decision (reference 02) that concluded Jay D. Wynkoop (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last known addresses of record, a telephone hearing was held on June 2, 2011. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Jeff Smid appeared on the employer's behalf and presented testimony from one other witness, Lt. Rod Stoner. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on February 16, 2009. He worked full-time as a dismantler at the employer's Iowa Falls auto recycling business. His last day of work was March 30, 2011.

The employer requires its dismantlers to provide their own tools to perform their work duties. The claimant previously had possessed and used his own tools. On the morning of March 30 the claimant reported that his tools, which he had left the prior day in a vehicle on the employer's premises, had been stolen. The employer advised him that if he did not have tools, he could not work but that if he obtained tools, he could return to work. There were at least a couple communications between the claimant and the employer from March 30 and approximately mid-April in which the employer reiterated that the claimant's job was still available to him if he could return with tools.

The employer immediately suspected that the claimant was the person responsible for the break-in to the employer's premises the night of March 29 in which the claimant's tools, as well as cash and other property in the employer's facility, were taken. A law enforcement investigation was begun. In about mid-April law enforcement discovered that the claimant and his wife had pawned some of the claimant's tools as well as some tools belonging to the employer's facility manager. A search warrant was executed on the claimant's home on April 29, and the remainder of the claimant's tools was found in his home. In an interview with Lt. Stoner on April 30 the claimant admitted that he had broken in on March 29 and taken his own tools, but he still denied any other involvement as to the break-in to the employer's facility. However, in early May charges were filed against the claimant related to the break-in, which included two serious misdemeanors. The claimant made an appearance on the charges on or about June 1, but the charges remained unresolved as of the date of the hearing.

While the employer had held the claimant's job for him pending his obtaining tools and pending the criminal investigation, once the charges were filed the employer determined that the employment was ended due to the claimant's involvement in the break-in.

The claimant established a claim for unemployment insurance benefits effective March 27, 2011. The claimant has received unemployment insurance benefits after the separation.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's breaking in and taking even only his own tools, preventing him from working, shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

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 ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

An issue as to whether the claimant's discharge was due to circumstances amounting to gross misconduct arose as a result of the hearing. "Gross misconduct is deemed to have occurred after a claimant loses employment as a result of an act constituting an indictable offense in connection with the claimant's employment, provided the claimant is duly convicted thereof or has signed a statement admitting the commission of such an act." Iowa Code § 96.5-2-c. If gross misconduct is established, the claimant's wage credits earned prior to the date of discharge from all employers will be canceled. Iowa Code § 96.5-2-b. An "indictable offense" is an offense other than a simple misdemeanor. Iowa Code § 801.4. In terms of theft of property, in order to be at least a serious misdemeanor, the monetary value of the property taken must be at least \$200.01. Iowa Code § 714.2(4). For the gross misconduct disqualification to apply, however, there either needs to be a criminal conviction or a signed statement admitting the commission of such an act. The case will be remanded for an investigation and preliminary determination on this issue. 871 IAC 26.14(5).

DECISION:

The representative's April 29, 2011 decision (reference 02) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of March 27, 2011. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue. The matter is remanded to the Claims Section for investigation and determination of the gross misconduct issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw