

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JASON M SHOOP**  
Claimant

**APPEAL NO. 11A-UI-04173-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MEDIACOM COMMUNICATIONS  
CORPORATION**  
Employer

**OC: 02/27/11  
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Jason Shoop filed a timely appeal from the March 24, 2011, reference 01, decision that denied benefits. After due notice was issued, an in-person hearing was held on May 10, 2011. Mr. Shoop participated and presented additional testimony through Benjamin Scott. Denise Hastings, Director of Human Resources, represented the employer. Exhibits One through Five and A were received into evidence.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Jason Shoop was employed by Mediacom Communications on a full-time basis from 2007 until March 1, 2011, when Denise Hastings, Director of Human Resources, and Sarah Blair, Human Resources Representative, discharged him from the employment. Ms. Blair communicated the discharge to Mr. Shoop by telephone on March 1, 2011. From October 2010 until the discharge Mr. Shoop's title was Customer Service Sales Associate. From December 2009 until October 2010, Mr. Shoop had held the title of Lead Customer Service Associate. The demotion that occurred in October 2010 was at Mr. Shoop's request. Mr. Shoop last performed work for the employer at the beginning of February 2011 and then commenced an approved leave of absence under the Family and Medical Leave Act. The leave of absence was based on work-related stress.

In September 2010, Mr. Shoop had complained to Ms. Blair that he was being harassed by another Lead Customer Service Tech, Tiffany. Mr. Shoop had made multiple prior complaints about the same person. In September, Tiffany had sent Mr. Shoop instant messages via computer in which messages she mentioned that Mr. Shoop's brother had multiple arrests for

operating a motor vehicle while intoxicated and mused that Mr. Shoop's brother might face a period of incarceration. In the messages, Tiffany had also told Mr. Shoop that his girlfriend, Jamie, who also worked for the employer, had made negative remarks about him. The comments were indeed harassing in nature.

In response to Mr. Shoop's September 2010 complaint about inappropriate instant messages, the employer directed the information technology staff to retrieve the record of Mr. Shoop's instant messages sent or received via the employer's computer system. The information technology staff provided the entire history of Mr. Shoop's instant messages to Denise Hastings, Director of Human Resources, within five days of her request of the same. In January, Mr. Shoop checked in with Human Resources Representative Sara Blair regarding the status of his complaint and Ms. Blair told him it was still being investigated. The weight of the evidence indicates that the employer was instead investigating Mr. Shoop's conduct at that point.

In the course of reviewing the history of Mr. Shoop's use of the instant messaging system - ostensibly for the purpose of investigating Mr. Shoop's harassment complaint against Tiffany the employer came across inappropriate correspondence between Mr. Shoop and a coworker, Benjamin Scott. Despite Mr. Shoop's assertions and Mr. Scott's assertions that they did not send, or *do not recall* sending the correspondence, there is little doubt that Mr. Shoop and Mr. Scott sent and received each and every inappropriate message reflected in Exhibit One. In the correspondence, which dates from April 2010 through October 16, 2010, Mr. Shoop and Mr. Scott exchanged inappropriate sexual remarks about various female coworkers. The employer discovered the inappropriate messages four to six weeks before discharging Mr. Shoop from the employment.

Ms. Hastings and Ms. Blair combed through Mr. Shoop's instant messaging correspondence for weeks and collected those messages the employer deemed emblematic of Mr. Shoop's violation of the employer's policies, including the employer's policy against harassment. The employer concluded its exhaustive review of Mr. Shoop's instant messages a week before March 1, 2011. The employer then notified Mr. Shoop and Mr. Scott on March 1 that each was discharged from the employment. Mr. Scott, like Mr. Shoop was out on an FMLA leave of absence at the time of the discharge.

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

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record fails to establish a current act. The evidence establishes that the conduct in question ceased in October 2010. The conduct occurred via the employer's instant messaging system and the employer had the means and ability to review the conduct as it occurred, if the employer chose to do that. The evidence establishes that the employer's review of the conduct occurred in the context of Mr. Shoop's September 2010 complaint about a supervisor. Mr. Shoop had specifically told the employer that the harassment he had received occurred through the instant messaging system. It is unclear why it took the employer from September 2010 to February 2011 to investigate Mr. Shoop's complaint. It is also unclear why it took the employer so long to come across Mr. Shoop's inappropriate instant messages, why it took so long to review the messages, or why it took the employer so long to notify Mr. Shoop that the conduct the employer had discovered *weeks or months* earlier subjected him to possible or actual discharge. The administrative law judge noted gaps in the employer's evidence. The employer acknowledged the same and cited Ms. Blair's promotion as an explanation for the gaps. The employer had the ability to present testimony through Ms. Blair, but elected not to. The evidence fails to establish a reasonable basis for the employer's delay and fails to establish a current act of misconduct. Because the evidence fails to establish a

current act, the administrative law judge must conclude that Mr. Shoop was discharged for no disqualifying reason. Accordingly, Mr. Shoop is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Shoop.

This decision regarding the absence of a current act upon which a disqualification for benefits might be based in no manner excuses or minimizes the misconduct reflected in the instant messages.

**DECISION:**

The Agency representative's March 24, 2011, reference 01, decision is reversed. The discharge was not based on a current act. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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