

**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**

**STANLEY R JACKSON JR  
15203 LINDEN ST  
CLEAR LAKE IA 50428**

**EXPRESS SERVICES INC  
PO BOX 720660  
OKLAHOMA CITY OK 73172-0660**

**Appeal Number: 06A-UI-03904-RT  
OC: 12/04/05 R: 02  
Claimant: Respondent (1)**

**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, 4<sup>th</sup> 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 for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Express Services, Inc., filed a timely appeal from an unemployment insurance decision dated March 31, 2006, reference 03, allowing unemployment insurance benefits to the claimant, Stanley R. Jackson. After due notice was issued, a telephone hearing was held on April 26, 2006, with the claimant participating. Andre Smith, Staffing Consultant, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer from October 13, 2004, until he was discharged on March 3, 2006. The employer is a temporary employment firm. The claimant's most recent assignment was at Larson Manufacturing in Clear Lake, Iowa, beginning December 27, 2005. That assignment was a "temp-to-hire" position. However, the claimant's assignment ended on March 3, 2006 when he was informed that the assignee, Larson Manufacturing, was not going to be hiring any more "temp" workers as full-time employees. There were also some issues as to quality. On that same day the claimant was discharged by the employer because of a conviction for theft in the third degree.

When the claimant was first hired he informed the employer that a theft charge was pending against him but he thought that it would be dismissed. This came up as a result of a background check done on the claimant at the time of his hire. The employer told the claimant that if he was convicted he might not be able to work any longer for the employer but the claimant was not told that he had to notify the employer as soon as he was convicted. On January 9, 2006, the claimant called the employer and asked the employer to check out his background and as a result of that check a conviction for third degree theft appeared. The claimant had pled guilty on that charge after the claimant had been assigned to Larson Manufacturing. The employer contacted Larson Manufacturing and informed them of the third degree theft conviction but Larson Manufacturing agreed to continue employing the claimant through the employer. The claimant was told by the employer that that might be his last assignment but that he would be allowed to continue working there. The claimant worked there until he was separated on March 3, 2006. Pursuant to his claim for unemployment insurance benefits filed effective December 4, 2005 and reopened effective March 5, 2006, the claimant has received unemployment insurance benefits in the amount of \$1,575.00 since separating from the employer on or about March 3, 2006 and reopening his claim for benefits effective March 5, 2006 as follows: \$225.00 per week for seven weeks from the benefit week ending March 11, 2006 to the benefit week ending April 22, 2006. The claimant received benefits prior to his assignment to Larson Manufacturing but those are not relevant here.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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, (8) provide:

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).

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The parties agree that the claimant was discharged by the employer, Express Services, Inc., but disagree as to the date. The employer's witness, Andre Smith, Staffing Consultant, testified that the claimant was discharged on March 3, 2006. The claimant testified that he was discharged on March 10, 2006. Although it makes little difference here, the administrative law judge concludes that the claimant was discharged on March 3, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for a current act of disqualifying misconduct. It is well established that the employer has the burden to prove a current act of disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for a current act of disqualifying misconduct.

The evidence is clear that the claimant was discharged by the employer, Express Services, Inc., and the claimant did not quit. Therefore, any inquiry into whether the claimant was deemed to have quit by failing to contact the employer after the completion of assignment is moot. It is also clear that the claimant was discharged for a third degree theft conviction. However, the third degree theft conviction came to light on January 9, 2006, when the claimant initiated a search by the employer of his background which divulged the third degree theft conviction. At that time the claimant was assigned to Larson Manufacturing in Clear Lake, Iowa. The employer called Larson Manufacturing and Larson Manufacturing consented to have the claimant continue working and the claimant did so until his assignment ended on March 3, 2006

which was also the day that the claimant was discharged. Essentially, the employer waited two months to discharge the claimant after learning of his third degree theft conviction and the administrative law judge concludes that a discharge occurring that long after knowledge of the reasons for the discharge is a discharge for past acts. A discharge for misconduct cannot be based on past acts. While it is true that past acts and warnings can be used to determine the magnitude of the current act of misconduct there is no evidence of a current act of misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged but not for a current act of misconduct.

The administrative law judge also concludes that the claimant committed no act of disqualifying misconduct. The claimant informed the employer when he was hired that he had a criminal charge pending and the employer was fully aware of it at that time and the employer nevertheless placed the claimant in assignments. The employer did tell the claimant at that time that the employer might not be able to continue to employ him but this was equivocal. The employer did not tell the claimant that he had to notify it as soon as possible of the conviction. Nevertheless, the evidence indicates that the claimant was convicted after he began the assignment at Larson Manufacturing on December 27, 2005. It appears to the administrative law judge that the claimant notified the employer of his conviction in a reasonable time. The claimant initiated the contact with the employer for a background check that led to the discovery of the conviction of third degree theft. At that time again the claimant was told that his assignment at Larson Manufacturing might be his last assignment but at that time the claimant's assignment was "temp-to-hire" without an expiration date. The administrative law judge concludes that the claimant did not make any willful or deliberate false statements to the employer. There was evidence that the employer's insurance company would not bond the claimant but this argument fails because the employer allowed the claimant to continue working for two months after it learned of the claimant's conviction. The administrative law judge also concludes that the termination of the claimant's assignment at Larson Manufacturing was not for disqualifying misconduct. The claimant testified that his assignment ended when Larson Manufacturing determined not to hire any more "temp" workers as full-time employees and this is not disqualifying misconduct on the part of the claimant. There is also some evidence that the claimant's assignment may have ended because of quality issues but again this is not disqualifying misconduct. Mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity is not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, let alone a current act of disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged on March 3, 2006 but not for a current act disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of a current act of disqualifying misconduct to warrant the claimant's disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,575.00 since separating from the employer herein on or about March 3, 2006 and reopening his claim for benefits effective March 5, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

**DECISION:**

The representative's decision of March 31, 2006, reference 03, is affirmed. The claimant, Stanley R. Jackson, Jr., is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for a current act of disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

cs/tjc