

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JASON M STONEKING**

Claimant

**APPEAL NO. 10A-UI-09134-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**REMEDY INTELLIGENT STAFFING INC**

Employer

**OC: 05/09/10**

**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Jason Stoneking filed a timely appeal from the June 15, 2010, reference 04, decision that denied benefits. After due notice was issued, a hearing was held on August 19, 2010. Mr. Stoneking participated and provided additional testimony through Jeannie Becker. The employer representative was not available at the number the employer had provided for the hearing and did not participate. The employer had listed Sadie Garland as the employer's representative and provided telephone number 319-294-0290, extension 206. The administrative law judge made a total of four attempts to reach the employer representative for the hearing. On the first two attempts, the administrative law judge used the State's ICN network and could not get past the employer's automated answering system. The administrative law judge then made two attempts to reach the employer representative using the Qwest three-way calling system. The administrative law judge was able to get through to extension 206, but on both attempts encountered the message, "Mailbox is full." The record closed at 1:24 p.m. As of the entry of this decision at 1:52 p.m. on the date of the hearing, the employer has not made itself available for the hearing.

**ISSUE:**

Whether the claimant separated from the assignment or from the employment for a reason that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. Jason Stoneking performed work in three temporary employment work assignments. The most recent assignment started in the fall of 2009 and was at Yellowbook USA. The assignment ended on May 7, 2010, when Sadie Garland of Remedy Intelligent Staffing, Inc., notified Mr. Stoneking by telephone at the end of his shift that the assignment had ended. Mr. Stoneking was aware that some of the work at the assignment was winding down and was not surprised by his assignment coming to an end. The employer did not initially provide any additional reason for the assignment coming to an end. Mr. Stoneking asked if there was an issue, and Ms. Garland made a reference to speaking with the client business and their reference to Internet use. Ms. Garland did not indicate that

Mr. Stoneking was discharged from the assignment due to Internet usage. The client business allowed workers to have music or movies playing in the background while they worked and allowed other personal use of the Internet during breaks. The separation from the assignment also ended Mr. Stoneking's relationship with Remedy Intelligent Staffing, Inc.

### **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 employer did not make itself available for the hearing and, thereby, failed to present any evidence to support the allegation that Mr. Stoneking was discharged for misconduct. The weight of the evidence indicates that Mr. Stoneking was involuntarily separated from the assignment because his services were no longer needed. Whether the administrative law judge calls that separation a layoff or a discharge, Mr. Stoneking involuntarily separated from the assignment and from the employment for no disqualifying reason. Accordingly, Mr. Stoneking is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Stoneking.

**DECISION:**

The Agency representative's June 15, 2010, reference 04, decision is reversed. The claimant involuntarily separated from the employment 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

jet/kjw