

**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**

**THOMAS L STONE
13531 – 440TH ST
DERBY IA 50068**

**BURGY TRANSPORT INC
PO BOX 353
ONALASKA WI 54650**

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**Appeal Number: 06A-UI-02694-R
OC: 02/05/06 R: 02
Claimant: Appellant (5)**

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Thomas L. Stone, filed a timely appeal from an unemployment insurance decision dated February 20, 2006, reference 01, denying unemployment insurance benefits to him because records indicate he was discharged from work on February 3, 2006 for disqualifying misconduct. After due notice was issued, an in-person hearing was held in Des Moines, Iowa, at the claimant's request, on March 27, 2006, with the claimant participating. The claimant was represented by Steven C. Jayne, Attorney at Law. Sandra Schmiege, Safety Director, participated in the hearing for the employer, Burgy Transport, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

At 3:30 p.m. on March 23, 2006, the administrative law judge called Ms. Schmieg in response to a message to call her. Ms. Schmieg asked that the hearing be conducted as a telephone hearing. Ms. Schmieg lives in Minnesota and works in Wisconsin. One of the potential local witnesses was ill and the other one was driving a truck on the road. The administrative law judge informed Ms. Schmieg that he would have to conduct an in-person hearing but because of the distance that Ms. Schmieg would have to drive he would consent to have her participate by telephone. However, the administrative law judge explained that if the employer wanted witnesses from the local terminal, where the claimant was employed, they would have to participate in person. No such witnesses appeared at the hearing but Ms. Schmieg testified by telephone. The claimant's attorney, Steven C. Jayne, had no objections.

The claimant had requested a subpoena for certain documents which subpoena was issued on March 8, 2006. The employer received the subpoena but could not provide a date of receipt. However, when the employer received the subpoena nothing was done. Ms. Schmieg did not learn of the subpoena until Friday, March 23, 2006. When the administrative law judge spoke to Ms. Schmieg she never said anything about a failure to comply with a subpoena. Nevertheless, the employer did not comply with the subpoena. Accordingly, the administrative law judge prohibited the employer from using any evidence derived from any written documents included in the claimant's request for a subpoena. The administrative law judge permitted Ms. Schmieg to testify only from personal knowledge or what she had orally heard from other witnesses.

During the course of the hearing it became apparent that another issue was posed, whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3). That issue was not set out on the notice of appeal and in-person hearing. Nevertheless, the parties permitted the administrative law judge to take evidence on and decide, if necessary, whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not able, available, and earnestly and actively seeking work.

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 as a full-time lead driver from February 10, 2004, until he was discharged on February 3, 2006. Occasionally the claimant would drive a truck for the employer over the road. The claimant was discharged for allegedly using abusive language to co-workers and for failing to repair equipment or see that equipment was prepared when needed. Ms. Schmieg testified that the claimant directed profanity at a co-worker, Ron Coe. She testified that she learned of this from conversations with Mr. Coe. She also testified that other co-workers overheard these comments. Ms. Schmieg testified from what those coworkers had told her. However, the claimant did not use profanity at his co-workers but did use inappropriate language occasionally calling them "idiot" or "stupid." The claimant did this when he was frustrated with his co-workers' performance. When the co-workers would not fuel a truck and it would slow down freight the claimant would become angry and use such words. The claimant had no recollection of any profanity directed at his co-workers. In fact, the inappropriate language was not directed at any specific co-worker but just in general when the claimant was frustrated.

Concerning the repair of equipment, the claimant had a load to take to Kansas which required an overnight trip which was over-the-road. The tractor that was reserved for day loads or local

trips had a flat tire. The claimant could not use that tractor, in any event, because he was driving over-the-road. He specifically told Mr. Coe by telephone to fix the tire and also left a note to that effect. If the claimant himself had seen to the fixing of the tire the load he was to take to Kansas might have been delayed. The employer preferred not to have equipment fixed in Des Moines, Iowa, but rather have the equipment taken to the employer's shop in Wisconsin for repairs there.

The claimant learned of his discharge from a faxed notice of termination setting out the above reasons for the discharge. The employer also provided the claimant a COBRA notice which is sent out when one is separated from his employment for reasons not including "gross misconduct."

The claimant is presently not able to work. The claimant's physician has informed the claimant that he is not permitted to work. The claimant is receiving workers' compensation benefits for a temporary total disability. The claimant is not looking for work. If the claimant was otherwise able to work the claimant would be only able to work at a day job. If the claimant was able to work he would have no other time or day or location restrictions on his availability for work. Pursuant to his claim for unemployment insurance benefits filed effective February 5, 2006, the claimant has received no unemployment insurance benefits. Records only show one weekly claim for benefits for the benefit week ending February 11, 2006 but he received no benefits for that week being shown as disqualified because of a discharge for misconduct.

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 ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not able, available, and earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits for those reasons.

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.

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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on February 3, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove 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 disqualifying misconduct. The employer's witness, Sandra Schmieg, Safety Director, testified that the claimant was discharged for abusive language, in particular profanity, and not seeing to the repair of the employer's equipment. The testimony of Ms. Schmieg was entirely from hearsay. The claimant denied any profanity directed at co-workers but conceded that he may have used words such as "idiot" or "stupid" when frustrated at his co-workers but that they were not directed at any particular co-worker. The claimant testified that he would get frustrated when his co-workers would not perform their job functions such as fueling a truck which would then cause a slowdown in the moving of freight. The administrative law judge is constrained to conclude here that the claimant's direct testimony outweighs the hearsay evidence of Ms. Schmieg. The administrative law judge concludes that the claimant's use of such language did not involve profanity and that the words that he did use, while inappropriate, do not demonstrate willful or deliberate conduct so as to establish disqualifying misconduct for those reasons. Ms. Schmieg could offer no specifics about the claimant's failure to repair equipment. For the only specific example testified to by the claimant, the claimant provided a reasonable explanation. There is no evidence here of willful or deliberate misconduct. The issue then becomes whether the claimant's actions were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

The administrative law judge concludes that the claimant's actions do not establish carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge concludes that the claimant's use of inappropriate language was carelessness or negligence. The failure to repair equipment, at most, would be carelessness or negligence. However, there is no evidence of any specific warnings to the claimant prior to his discharge. Accordingly, the administrative law judge concludes that the claimant's actions and behavior were, at most, ordinary negligence in isolated instances and are not disqualifying misconduct. The administrative law judge concludes that there is not a preponderance of the evidence of any acts on the part of the claimant that were deliberate acts

constituting a material breach of his duties and obligations arising out of his worker's contract of employment or that evinced a willful or wanton disregard of the employer's interests or that were carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for 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 including the evidence therefore. 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 substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he is excused from the provisions that require him to be available for work and earnestly and actively seeking work. There is not a preponderance of the evidence that the claimant is either temporarily unemployed or partially unemployed as defined by Iowa Code section 96.19(38)(b) and (c) so as to excuse the claimant from the requirements that he be available to work and earnestly and actively seeking work. The administrative law judge also concludes that the claimant has not demonstrated by a preponderance of the evidence that he is able, available, and earnestly and actively seeking work. The claimant credibly testified that he has a physician's restriction against working. The claimant further credibly testified that he is receiving worker's compensation for a temporary total disability. The claimant also testified that he is not looking for work. Accordingly, the administrative law judge concludes that the claimant is not able, available, and earnestly and actively seeking work. The claimant did testify that concerning his availability for work he would restrict his work to day jobs but the administrative law judge does not believe that this unduly impedes his opportunity for employment. The claimant testified that other than his physical restrictions for his medical condition, the claimant has placed no other restrictions on his availability for work. However, an individual who is ill or injured and not able

to perform work is not available for work as is an individual who has a medical report on file submitted by a physician stating that such individual is not able to work and these make the individual unavailable for work. See 871 IAC 24.23(1) and (6). The claimant's physical restriction causing him to be unable to work and unavailable for work and not seeking work were present before February 5, 2006 when the claimant effectively filed his claim for unemployment insurance benefits. Accordingly, the administrative law judge concludes that at relevant times beginning no later than February 5, 2006 and continuing thereafter, the claimant is and was not able, available, and earnestly and actively seeking work and, as a consequence, he is ineligible to receive unemployment insurance benefits from and after February 5, 2006. Unemployment insurance benefits are denied to the claimant from and after February 5, 2006, until, or unless, he demonstrates that he is able, available, and earnestly and actively seeking work and is otherwise entitled to receive such benefits.

DECISION:

The representative's decision of February 20, 2006, reference 01, is modified. The claimant, Thomas L. Stone, is not disqualified to receive unemployment insurance benefits as a result of his separation from the employer herein, because he was discharged but not for disqualifying misconduct. However, the claimant is ineligible to receive unemployment insurance benefits from and after February 5, 2006, until, or unless, he demonstrates that he is, able, available, and earnestly and actively seeking work, because the claimant is not and has not been able, available, and earnestly and actively seeking work under Iowa Code section 96.4(3).

cs/tjc