

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID R LOVELAND

Claimant

APPEAL NO. 10A-UI-08000-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARTIN MARIETTA MATERIALS INC

Employer

OC: 01/10/10

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 25, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 20, 2010. Claimant David Loveland participated. Doug Robey, Plant Manager, represented the employer. Exhibits One through Five were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: David Loveland was employed by Martin Marietta Materials as a full-time night shift driller from 2002 until April 23, 2010, when the employer discharged him for sleeping on the job on the morning on April 15, 2010. Mr. Loveland's usual work hours were 8:00 p.m. to 6:00 a.m., Monday through Friday. Mr. Loveland's immediate supervisors were Night Foreman Marcus Borkowski and Leadman Ron Hampton. Mr. Borkowski suspended Mr. Loveland at the beginning of his shift on April 16, 2010, and told Mr. Loveland at that time that he would likely face a three-day suspension. When Mr. Loveland did not hear further from the employer, he contacted the employer on May 23, 2010 and was discharged at that time.

On April 14, 2010, Mr. Loveland started his overnight shift at 7:00 p.m. Mr. Loveland was operating a truck to haul rock from an underground mine. Another employee, Brandon Davis, was operating the loader that provided the rock for Mr. Loveland to haul. At 3:45 a.m., Mr. Davis experienced a problem with his machinery and left the area where he and Mr. Loveland had been working, to address the problem. Mr. Loveland understood that Mr. Davis might be away for 15-20 minutes and decided to pull over and wait for Mr. Davis to return. Another loader operator was also working in the mine and had three trucks waiting to haul rock. Mr. Loveland pulled over, shut off his lights, and waited. As he waited, Mr. Loveland fell asleep leaning against the steering wheel of his truck. At 4:15 a.m., Mr. Loveland's supervisor's discovered him asleep in the truck and, after several attempts, awakened

Mr. Loveland. The supervisors then sent Mr. Loveland home for the shift, due to his violation of the employer's below ground policy. The below ground policy required that all employees remain awake and alert in case of a fire emergency that necessitated quick evacuation. Mr. Loveland was aware of the policy. The employer was concerned not only that Mr. Loveland had fallen asleep, but also that his lights were off and there were no cones to warn approaching vehicles of the presence of his truck.

In making the decision to discharge Mr. Loveland, the employer considered an incident from November 2008, when Mr. Loveland fell asleep during a meeting. The meeting occurred at the end of Mr. Loveland's 10-hour overnight shift at a time when Mr. Loveland was tired and his eyes were irritated from the mining work.

In making the decision to discharge Mr. Loveland, the employer considered prior reprimands relating to accidental damage of equipment. These incidents dated from April 2009 and September 2008.

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).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See Hurtado v. IDJS, 393 N.W.2d 309 (Iowa 1986). In Hurtado, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

The weight of the evidence in the record establishes that on April 15, 2010, Mr. Loveland inadvertently dozed off in his truck seven or eight hours into his shift while he was waiting for a coworker to return so that they could recommence their work together. Given the posture in which the employer found Mr. Loveland, and other attending circumstances, the evidence fails to indicate that Mr. Loveland intentionally went to sleep. The evidence does establish that Mr. Loveland was both careless and negligent in leaving this truck underground with no lights on or warning cones. The weight of the evidence indicates another sleeping incident 18 months earlier. The weight of the evidence indicates that that incident was also a case of Mr. Loveland inadvertently dozing during a meeting at the end of a long overnight shift. The administrative law judge concludes that the non-intentional sleeping behavior did not constitute misconduct in connection with the employment that would disqualify Mr. Loveland for benefits. The administrative law judge further concludes that the prior instances of carelessness or negligence were sufficiently remote that the final incident on May 15 cannot be considered to be part of a pattern of carelessness or negligence indicating willful or wanton disregard of the employer’s interests.

While the decision to discharge Mr. Loveland was within the employer’s discretion, the administrative law judge concludes that Mr. Loveland was not discharged for misconduct in connection with the employment that would disqualify him for unemployment insurance benefits. Mr. Loveland is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits paid to Mr. Loveland.

DECISION:

The Agency representative's May 25, 2010, reference 01, decision is affirmed. 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw