IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSEPH M HAVARD Claimant	**APPEAL NO. 17A-UI-07394-JTT**
	ADMINISTRATIVE LAW JUDGE DECISION
PER MAR SECURITY & RESEARCH CORP Employer	
	OC: 06/18/17 **Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 14, 2017, reference 02, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant was discharged on June 19, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on August 8, 2017. Claimant Joseph Havard participated. Stewart Holloway represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit 1 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

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

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joseph Havard was employed by Per Mar Security & Research Corporation as a full-time security officer from July 2016 until June 19, 2017, when Stewart Holloway, Operations Manager, discharged him from the employment. Throughout the period of employment with Per Mar, Mr. Havard was assigned to Grandview University in Des Moines. Mr. Havard's immediate supervisor was Steven Randolph, Per Mar Security Coordinator posted at Grandview University. Mr. Havard's work hours were 7:00 a.m. to 3:00 p.m., Monday through Friday. Mr. Havard was allowed two 15-minute breaks and a 30 minute lunch break during his shift. While the security office at Grandview was the designated break area for Per Mar staff, Mr. Havard and Mr. Randolph took breaks in other locations, including near the bowling building and the football field.

Mr. Havard's primary duties involved patrolling the Grandview campus in a marked Per Mar Security vehicle to discern threats to campus safety and property. Mr. Havard's duties included providing transportation to students and staff as needed. Mr. Havard's duties included assisting students and staff with jumpstarting vehicles, changing tires, monitoring parking lots to ensure that only properly permitted vehicles were parking in the lot and issuing parking tickets.

The final incident that triggered the discharge occurred on June 12, 2017 and came to the employer's attention that same day when Grandview official Adam Voigts sent an email message to Mr. Holloway. Mr. Voigts was Per Mar's point of contact at Grandview. Mr. Voigts attached to the email a photograph that he had taken of Mr. Havard between 1:30 and 2:00 p.m. that same day. The photograph showed Mr. Havard asleep in the driver's seat of his patrol car. Mr. Havard's car seat was upright, but his eyes were closed, the back of his head was resting against the seat head rest and his mouth was hanging open. Mr. Voigts wrote, "This needs to be taken care of." Upon receipt of the email from Mr. Voigts, Mr. Holloway traveled to the Grandview campus, but did not arrive in time to meet with Mr. Havard before Mr. Havard's 3:00 p.m. shift end time.

Mr. Holloway returned to Grandview the following morning and spoke with Mr. Havard about the photograph. Mr. Holloway asked Mr. Havard whether he was sleeping at work the previous day. Mr. Havard denied that he had been sleeping and asserted that he had been meditating. Mr. Holloway told Mr. Havard that regardless of whether he was sleeping or meditating, he would not have been able to perform his duties with his eyes closed. Mr. Holloway told Mr. Havard that he appeared to be sleeping in the photo and was terminated from the employment effective immediately. Mr. Havard asked whether he could receive a warning instead. Mr. Holloway told Mr. Havard that he would not be able to place Mr. Havard at another post after he had slept while on duty. The employer has a written work rule that prohibits sleeping on the job and that indicates an employee violating the rule will be subject to discipline up to discharge from the employment. Mr. Havard was familiar with the work rule.

Earlier in 2017, Mr. Randolph had contacted Mr. Holloway to report that Mr. Havard was sleeping in patrol car outside the Grandview bowling alley. Mr. Holloway was nearby at the time and went to Mr. Havard's location. As Mr. Holloway's vehicle approached Mr. Havard's patrol car, Mr. Holloway observed that Mr. Havard appeared to be sleeping. However, as Mr. Holloway approached, Mr. Havard was alert and indicated that he was listening to the Iowa Hawkeyes' bowl game. Mr. Holloway told Mr. Havard that he needed to stay awake during his shift.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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.

While Mr. Havard denies that he was sleeping in the patrol car on June 12, the weight of the evidence establishes that he did indeed sleep in the car that day. That evidence includes, but is not limited to Mr. Havard's closed eyes, resting head, open mouth, and Mr. Havard's request for

a warning in lieu of being discharged from the employment. The evidence does not establish how long Mr. Havard was asleep. The employer presented insufficient evidence to establish that incident occurred outside an authorized break. The weight of the evidence does not establish that Mr. Havard knowingly and intentionally went to sleep. This one incident was insufficient to establish misconduct in connection with the employment. The weight of the evidence does not establish an earlier sleeping incident.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Havard was discharged for no disqualifying reason. Accordingly, Mr. Havard is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The July 14, 2017, reference 02, decision is affirmed, but the discharge date is corrected to June 13, 2017. 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

jet/rvs