

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DUANE M ROUM
Claimant

APPEAL NO. 11A-UI-09983-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LENNOX INDUSTRIES INC
Employer

**OC: 06/26/11
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Duane Rous filed a timely appeal from the July 22, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 22, 2011. Mr. Rous participated personally and was represented by attorney Barry Kaplan. Brent McDowell represented the employer. Exhibits One through Six 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: Duane Rous was employed by Lennox industries as a full-time press operator from 1983 until June 17, 2011, when the employer suspended him for intentionally causing damage to the supervisor's vehicle. The employer subsequently discharged Mr. Rous on June 24, 2011 for the same conduct. On June 15, Mr. Rous left the production building at the scheduled end of the shift, entered the employer's parking lot, made his way to his supervisor's personal vehicle, and keyed the vehicle along the driver side of the vehicle. Mr. Rous then made his way to his own vehicle and exited the production complex. The supervisor, David Cleland, discovered the damage as he prepared to leave the production complex. The supervisor and security staff reviewed surveillance video that showed Mr. Rous walking immediately next to the vehicle, with his hand moving along the length of the driver's side of the vehicle. The video surveillance showed Mr. Rous looking around before he started toward the vehicle to see whether anyone else was in the vicinity. Other members of management subsequently reviewed the video.

On July 17, the employer interviewed Mr. Rous, who denied personal knowledge of the incident. The employer notified Mr. Rous that the conduct constituted a dischargeable offense and suspended him from the employment. The employer contacted law enforcement and Mr. Rous. Mr. Rous was subsequently cited for criminal mischief. The employer notified Mr. Rous in writing on June 24 that he was discharged from employment. A prosecutor later decided to dismiss the criminal charge.

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).

Mr. Rourm's own testimony placed him in the surveillance video next to the supervisor's vehicle. The video surveillance shows Mr. Rourm checking for witnesses and then choosing to take a path between vehicles that was, at mid-point, almost entirely obstructed by the cement base of a light post. Mr. Rourm's testimony that he took that route because he was in a hurry is unpersuasive. Mr. Rourm had worked at that same facility for 27 years. The surveillance video shows Mr. Rourm choosing to maneuver around the cement base of the light post on the side immediately next to the supervisor's vehicle. The surveillance video then shows Mr. Rourm making intermediate contact with the vehicle with his hand as he walked the length of the vehicle. The preponderance of the evidence in the record establishes that Mr. Rourm did indeed intentionally damage the supervisor's personal vehicle.

The fact that a prosecutor subsequently decided to dismiss a criminal charge does not decide the issue in this case. A prosecutor's determination not to use public resources to pursue a criminal charge or conclusion that he or she could not convince a jury of the claimant's guilt *beyond a reasonable doubt* has no effect on whether the evidence in this case meets the lower burden of proving misconduct *by a preponderance of the evidence*.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Rourm was discharged for a current act of misconduct. Accordingly, Mr. Rourm is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Rourm.

DECISION:

The Agency representative's July 22, 2011, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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