

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARTIN M SHEPARD**  
Claimant

**APPEAL NO. 08A-UI-04295-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BEN SHINN TRUCKING INC**  
Employer

**OC: 04/06/08 R: 03  
Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Martin Shepard filed a timely appeal from the April 28, 2008, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 30, 2008. Mr. Shepard participated. Sandy Carlson, Director of Safety, represented the employer. At the request of the employer, administrative law judge took official notice of the Agency administrative file documents submitted for, or generated in connection with the April 24, 2008 fact-finding interview.

**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: Martin Shepard was employed by Ben Shinn Trucking Company as a full-time truck driver from May 18, 2003 until April 8, 2008, when the employer discharged him. Sandy Carlson, Director of Safety, Wes Baker, Terminal Manager, and Roger Shinn, President, made the decision to discharge Mr. Shepard.

The final incident that prompted the discharge occurred on April 7, 2008. On that date, Mr. Shepard was assigned to pick up a load of coal at Hull Enterprises in Muscatine. Mr. Shepard regularly hauled coal from Hull Enterprises. The coal was destined for the Ames power plant. Hull Enterprises requires that trucks hauling coal from its facility be swept clean prior to loading to prevent metal shavings from being delivered to the Ames power plant. Hull Enterprises posted signs that alerted drivers to their responsibility to sweep out their trailers prior to loading coal. Hull Enterprises provided an area at its facility where drivers could park and sweep out their trailers. Ben Shinn Trucking provided each driver with a broom to be used to clean out the trailer. Metal shavings present in the coal can overwhelm the magnets at the power plant and/or damage the power plant's boilers. Mr. Shepard regularly hauled scrap metal and this would leave metal shavings in his trailer. Mr. Shepard did not carry a broom in his truck and did not clean out his trailer before loading coal.

On April 7, Mr. Shepard did not sweep out his trailer prior to presenting it to be loaded with coal. Mr. Shepard indicates he did not sweep out the truck because it was raining and he did not want to fall as he climbed into the trailer. A Hull Enterprises employee pointed out metal shavings in the trailer and directed Mr. Shepard to clean the trailer before loading. Mr. Shepard borrowed a broom and swept out his trailer. Jennifer Hull, of Hull Enterprises, Inc., notified Ben Shinn Trucking to advise that Mr. Shepard had not cleaned out his trailer before presenting it to be loaded. Ms. Hull told the employer that Mr. Shepard would no longer be allowed to haul coal from the Hull Enterprises facility. On March 6, Mr. Shepard had also failed to clean out his trailer before he presented it to be loaded with coal. On that date, a Hull Enterprises employee spotted a piece of metal cable in Mr. Shepard's trailer and directed Mr. Shepard to remove it before his trailer would be loaded with coal.

In early February 2008, the employer had removed Mr. Shepard from another coal-hauling route. That route involved loading coal at the Ottumwa Generating Station (OGS) and hauling the coal to a Cargill facility in Eddyville. Mr. Shepard would make several trips from OGS to Cargill each day. Department of Transportation regulations required that the gross weight of Mr. Shepard's truck and trailer not exceed 80,000 pounds. Mr. Shepard was responsible for making certain that the gross weight of his truck did not exceed the legal limit. Mr. Shepard's compensation was based on the number of tons of coal he hauled. The OGS facility had a loading scale that was not accurate in cold weather and indicated weights lower than the actual weight. The OGS facility had a second scale drivers could use to make certain their trucks were not over the legal limit. The OGS facility also had an area where drivers could dump excess coal if their trucks were over the weight limit. In October 2007, Cargill notified Ben Shinn Trucking that it would not be a passive participant in violating the legal weight limit. Throughout January, Mr. Shepard's truck was frequently above, or well above, the legal weight limit when it arrived at the Cargill facility. Mr. Shepard frequently left the OGS facility knowing, based on the readout from the loading scale, that the weight of his truck exceeded the legal limit.

#### **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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The greater weight of the evidence indicates an ongoing intentional refusal to comply with reasonable directives as well as ongoing negligence in failing to follow reasonable directives. The greater weight of the evidence indicates that Mr. Shepard refused to comply with the directive to clean out his trailer before presenting it for loading. The evidence indicates that Mr. Shepard was well aware of his obligation to clean out his trailer before loading at Hull Enterprises. The evidence indicates that Mr. Shepard only cleaned out his trailer when someone at Hull Enterprises spotted objects in his trailer and specifically directed Mr. Shepard to clean out his trailer. Mr. Shepard routinely performed work outdoors in inclement weather. Indeed, working outdoors and around heavy equipment was the essence of Mr. Shepard's employment. The evidence fails to support Mr. Shepard's assertion that he would have been placed at unreasonable risk of injury if he had climbed into his trailer on a day when it had rained. The evidence indicates instead that Mr. Shepard was in the habit of cutting corners unless and until he was caught. The evidence indicates as well that Mr. Shepard routinely violated D.O.T. weight limit regulations when he hauled coal from OGS to Cargill. The evidence indicates that Mr. Shepard was an experienced driver, that he had the ability to gauge whether his truck was over the legal weight limit, and that he routinely exceeded the legal weight limit to maximize his income.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Shepard was discharged for misconduct. Accordingly, Mr. Shepard 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. Shepard.

**DECISION:**

The Agency representative's April 28, 2008, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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