

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SOMDY KEOMANY**  
Claimant

**APPEAL NO. 11A-UI-10517-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WELLS ENTERPRISES INC**  
Employer

**OC: 09/19/10**  
**Claimant: Appellant (1-R)**

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

**STATEMENT OF THE CASE:**

Somdy Keomany filed a timely appeal from the August 4, 2011, reference 01, decision that denied benefits. The hearing was initially scheduled for September 1, 2011, but was abandoned due to a substandard interpreter and the fact that Mr. Keomany could not hear the interpreter. The hearing was rescheduled with the understanding that Mr. Keomany would participate in further proceedings from his attorney's office so that he could hear clearly and so that he could review and respond to the employer's proposed exhibits in the presence of his attorney. After due notice was issued, the hearing commenced on October 19, 2011 and was completed on November 17, 2011. The employer was represented by Tom Kuiper of Talx, who presented testimony through Justin Dodge and Ryan Wright. On both dates, Mr. Keomany was represented by attorney Grant Beckwith.

Mr. Keomany appeared for the October 19 proceeding, but did not appear for the November 17, 2011. Mr. Keomany received appropriate written notice of the November 17, 2011 proceeding. In addition, on October 19, Mr. Keomany participated in a discussion, along with his attorney, about rescheduling the conclusion of his hearing for November 17, 2011. The conclusion of the hearing was in fact delayed to November 17, 2011 at Mr. Keomany's request, to accommodate his out-of-state travel. The digital audio record will reflect that Mr. Keomany clearly understood on October 19 that he was to appear at his attorney's office on November 17 to participate in the conclusion of the telephonic appeal hearing. Laotian-English interpreter Som Baccam assisted with the hearing on October 19 and was standing by to assist with the hearing on November 17, 2011.

Exhibits One through Nine 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: Somdy Keomany was employed by Wells Enterprises, Inc., as a full-time production laborer from 2009 until June 15, 2011, when Justin Dodge, Human Resources Generalist, discharged him from the employment for violation of safety protocol and insubordination. The final incident that triggered the discharge occurred on June 13, 2011, when Mr. Keomany sat on top of a piece of production equipment and thereby placed himself at risk of injury. The Crew Leader in the vicinity instructed Mr. Keomany three times to get off of the piece of equipment before Mr. Keomany got down off of the equipment. As he was getting off the equipment, Mr. Keomany flippantly hollered at the Crew Leader, "You get off." Mr. Keomany knew he was not supposed to sit on the production equipment for safety reasons.

In making the decision to end Mr. Keomany's employment, the employer considered multiple prior incidents. In March 2010, Mr. Keomany went to his car without authorization during a 15-minute break. He was allegedly spotted sleeping in the car. In May 2010 and again in March 2011, Mr. Keomany received a written reprimand for packing product in the wrong box. In February 2011, Mr. Keomany received a reprimand for not following ergonomic protocol when packing product by not folding down the front flap of boxes in which he was placing product. In April 2011, Mr. Keomany became verbally and physically aggressive with a coworker who was supposed to relieve him so he could go home. When questioned about it, Mr. Keomany indicated that he sometimes got angry and admitted that he had poked the other employee.

Mr. Keomany is an immigrant from Laos and has limited English skills. The employer did not use an interpreter when interacting with Mr. Keomany. This included not using an interpreter in connection with any of the disciplinary matters.

**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).

The weight of the evidence in the record establishes two instances in 2011 when Mr. Keomany intentionally disrupted the workplace with inappropriate behavior. The first occurred in April, when Mr. Keomany became verbally and physically aggressive with another employee. Mr. Keomany readily admitted to the conduct in connection with that incident. The second and final instance of disruptive behavior was the conduct on June 13, that triggered the discharge. Mr. Keomany climbed on and sat on a piece of production equipment and then refused to comply with the Crew Leader's directive to get off until she had directed him to do so three times. The weight of the evidence indicates that Mr. Keomany knew he was not to sit on the production equipment and that he understood the supervisor's repeated directives to get off the equipment. These two incidents indicate, separately and together, a willful disregard of the employer's interests in maintaining a safe and civil work environment.

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

Because Mr. Keomany did not appear for the November 17, 2011 proceeding, the administrative law judge deems it appropriate not to rule on the availability issue, but to remand that issue to the Claims Division for initial adjudication.

**DECISION:**

The Agency representative's August 4, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs