

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KHAMCHAY LOVANH
Claimant

APPEAL NO. 11A-UI-02486-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STEVE JORDAN
DES MOINES MOTORS INC
Employer

OC: 01/16/11
Claimant: Respondent (1-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Des Moines Motors, filed an appeal from a decision dated February 22, 2011, reference 01. The decision allowed benefits to the claimant, Khamchay Lovanh. After due notice was issued, a hearing was held by telephone conference call on March 24, 2011. The claimant participated on his own behalf and Steve Baccam acted as interpreter. The employer participated by Service Manager Jim Determann and Maintenance Worker Michael Underwood.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Khamchay Lovanh was employed by Des Moines Motors from August 1, 1983 until January 19, 2011 as a full-time service technician. On January 19, 2011, work was slow and around 1:30 p.m. the claimant told his service advisor Travis Ferguson he was not feeling well and was going home. Mr. Ferguson told Service Manager Jim Determann about it and before the claimant could leave Mr. Determann told him he could not leave that the annual performance review had to be done that day. The employer felt the claimant had “gone home sick” quite frequently when work was slow. No written warnings were ever given to him about this.

The claimant insisted that he had to go home and Mr. Determann said if he left he should just “get his tool box and leave.” The claimant returned to the work area and around 4:00 p.m. The service manager came back with a separation notice he wanted the claimant to sign. The claimant refused and was then told he was “done.”

The employer offered the claimant his job back on February 28, 2011, and the claimant refused.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

There is no evidence in the record the claimant quit. The employer stated the claimant was told if he chose to leave at that time he should get his tool box and not come back. The claimant did not leave and this cannot be considered a quit.

The employer discharged the claimant because the service manager felt he was being insubordinate by wanting to leave. But he did not leave at that time. He was not warned about other occasions and was never required to provide a doctor's note for any other absences. In addition the claimant was cited for "lack of production" but there had been no current incidents of Mr. Lovanh not getting his work done or taking too long to perform a specific task.

The record establishes the claimant was discharged but not for any current, final act of misconduct. Disqualification may not be imposed.

The issue of whether the claimant refused an offer of suitable work should be remanded for determination.

DECISION:

The representative's decision of February 22, 2011, reference 01, is affirmed. Khamchay Lovanh is qualified for benefits provided he is otherwise eligible.

The issue of whether the claimant refused an offer of suitable work is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css