

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**DONALD T GILL
1429 BALTIMORE AVE
WATERLOO IA 50702**

**KERRY INC
% TALX UC EXPRESS
P O BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-04414-CT
OC: 03/14/04 R: 03
Claimant: Appellant (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Donald Gill filed an appeal from a representative's decision dated April 14, 2004, reference 02, which denied benefits based on his separation from Kerry, Inc. After due notice was issued, a hearing was held by telephone on May 12, 2004. Mr. Gill participated personally and offered additional testimony from Mark Fischer. The employer participated by Chad Wilson, Plant Manager, and Mike Patterson, Production Manager. Exhibits One through Eleven were admitted on the employer's behalf.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Mr. Gill was employed by Kerry, Inc. from May 13, 2002 until March 16, 2004 as a full-time production worker. He was discharged because of multiple accidents with the forklift. The final incident occurred on March 5, when he damaged a temperature probe on the side of a drier. The employer learned of the incident on March 6. The individual who was the plant manager at the time indicated he wanted to think about what disciplinary action to take. A new plant manager came on board on March 15 and reviewed personnel files. Because of the number warnings Mr. Gill had received, the decision was made to discharge him. He was notified of the discharge on March 16, 2004.

On November 7, 2003, Mr. Gill hit a synthesizer on a pre-cooker when backing up in the forklift. On November 4, 2003, he struck the toasted split tank when backing up. He received a written warning covering both incidents on November 12. On October 23, 2004, Mr. Gill received two written warnings. One was for not cleaning the "krunch" room before leaving for the day. Mr. Gill believed his manager was going to clean the room. The other warning was because the employer felt there was too much time between batches. There were equipment malfunctions which inhibited the ability to complete the batches in the normal amount of time.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Gill was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct in connection with the employment. The employer had the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer's burden included establishing that the discharge was predicated on a current act of misconduct. In the case at hand, the final incident occurred on March 5 and came to the employer's attention on March 6. Although the plant manager was immediately aware of the incident, no action was taken until ten days later when Mr. Gill was discharged after the new plant manager reviewed his file. All of the information necessary to determine what action to take was available to the employer on March 6. The evidence of record does not establish any good cause for the delay in discharging Mr. Gill. The employer's delay precludes considering the March 5 conduct as a current act of misconduct. Inasmuch as the employer failed to establish a current act of misconduct, no disqualification may be imposed. See 871 IAC 24.32(8).

For the reasons cited herein, the administrative law judge concludes that the employer has failed to sustain its burden of proving that Mr. Gill should be disqualified from receiving benefits.

DECISION:

The representative's decision dated April 14, 2004, reference 02, is hereby reversed. Mr. Gill was discharged but a current act of misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

cfc/s