

**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**

**STEVIE L KIMMONS
1544 W 17TH ST
DAVENPORT IA 52804**

**SEARS MANUFACTURING COMPANY
C/O EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000**

**Appeal Number: 05A-UI-01860-RT
OC: 01-23-05 R: 04
Claimant: Appellant (1)**

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:

The claimant, Stevie L. Kimmons, filed a timely appeal from an unemployment insurance decision dated February 18, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on March 9, 2005, with the claimant participating. Fernando Mora was available to testify for the claimant but not called because his testimony would have been repetitive and unnecessary. The employer, Sears Manufacturing Company, did not participate in the hearing because the employer did not call in any telephone numbers, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The employer was represented by Employers Unity, Inc., which is well aware of the need to call in a telephone

number in advance of the hearing if the employer wants to participate in the hearing. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. When the administrative law judge called the claimant he heard a beeping sound on the claimant's phone. The claimant indicated that his phone was going dead but there was nothing that he could do about it. While conducting the hearing the claimant's telephone was disconnected three times prior to the end of the hearing at 11:10 a.m., 11:13 a.m., and 11:15 a.m. The administrative law judge was able to reconnect with the claimant on those three occasions but the claimant's phone began going dead faster and the claimant indicated that it would not last much longer. The administrative law judge took what evidence was necessary to determine this case.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time machine operator from April 3, 2002 until he was discharged on January 7, 2005. The claimant was discharged for coming to work intoxicated and for failing an alcohol test. On January 6, 2005 until 5:30 a.m. on January 7, 2005, the claimant was drinking alcoholic beverages. The claimant then went to work at 3:00 p.m., the start of his shift. The claimant worked a few hours but his back hurt and so the employer took the claimant to the hospital for his back condition and as part of the employer's alcohol testing policy an alcohol test was given to the claimant on his saliva. The test was positive for alcohol in a percentage of .063 which exceeds the employer's limit of .040. The claimant was then discharged for being intoxicated at work and for failing the alcohol test. The employer has an alcohol testing policy and it was appropriately followed for the claimant's alcohol test. Pursuant to his claim for unemployment insurance benefits filed effective January 23, 2005, the claimant has received no unemployment insurance benefits but records show that the claimant is overpaid unemployment insurance benefits in the amount of \$514.00 from 2003.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant testified, and the administrative law judge concludes, that the claimant was discharged on January 7, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Although the employer did not participate in the hearing, the administrative law judge nevertheless concludes that there is a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The claimant was discharged for two reasons, coming to work intoxicated and failing an alcohol test. The claimant denied being intoxicated at work but conceded that he had drunk alcoholic beverages beginning on January 6, 2005 and continuing until 5:30 a.m. on January 7, 2005 when he went to work at 3:00 p.m., 9 ½ hours later. The administrative law judge can well imagine that the claimant was intoxicated at work after having drunk throughout that period. The claimant should have been aware that drinking until 5:30 a.m. on January 7, 2005, the day he was to work, would be inappropriate and a violation of the employer's policy. The employer has an alcohol policy prohibiting such acts. The administrative law judge concludes that the claimant's act in coming to work while intoxicated was a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interest and is disqualifying misconduct.

The second reason for the claimant's discharge was a positive alcohol test showing a level of alcohol at .063 in the claimant's saliva. The claimant testified that the employer has an alcohol testing policy and it was followed appropriately. The claimant further testified that the limit under the employer's alcohol testing policy is .040 percent. The claimant easily exceeded the limit on the employer's policy. The claimant's alcohol test was done pursuant to an injury when he complained about an injury and was taken to the hospital where a saliva test was administered on the claimant. Iowa Code section 730.5(7)(f) provides that notwithstanding any provision of Iowa Code section 730.5 to the contrary, alcohol testing, including initial and confirmatory testing, may be conducted pursuant to requirements established by the employer's written policy. The subsection continues that the policy shall include requirements consistent with regulations adopted by the United States Department of Transportation. The administrative law judge concludes here that the alcohol testing performed on the claimant was pursuant to requirements established by the employer's written policy. Even the claimant testified to that. The administrative law judge also concludes that the claimant's alcohol test complies with 49 C.F.R. subtitle A, Part 40, which is procedures for the federal requirements of

drug and alcohol testing. The administrative law judge notes that the employer's limit of .040 percent is so set out at Iowa Code section 730.5(9)(e). Accordingly, the administrative law judge concludes that the claimant's positive alcohol test in violation of the employer's standard is also disqualifying misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

DECISION:

The representative's decision of February 18, 2005, reference 01, is affirmed. The claimant, Stevie L. Kimmons, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. The claimant is shown as being overpaid unemployment insurance benefits in the amount of \$514.00 from 2003.

pjs/kjf