

**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**

**KATHLEEN E KIMM
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MARENGO IA 52301**

**THE MAYTAG COMPANY
c/o TALX EMPLOYER SERVICES
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**Appeal Number: 05A-UI-07746-RT
OC: 12-26-04 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:

The claimant, Kathleen E. Kimm, filed a timely appeal from an unemployment insurance decision dated July 21, 2005, reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on August 29, 2005, with the claimant participating. The claimant was represented by Dennis Mathahs, Attorney at Law. The employer, The Maytag Company did not participate in the hearing. Although the employer did call in a telephone number where witness, Jeff Anderson and Reggie Graham, could purportedly be reached for the hearing, when the administrative law judge called that number at 3:00 p.m. he reached the voice mail for Mr. Graham. The administrative law judge attempted to reach an urgent number but no one would answer. The administrative law judge then left a voice mail message for Mr. Graham indicating that he was calling for the hearing with Ms. Kimm at 3:00 p.m. on August 29, 2005, and that if Mr. Graham or the employer wanted to participate

in the hearing, someone would need to call before the hearing was over and the record was closed. The administrative law judge left an 800 number for Mr. Graham to call. No one called before the hearing was over. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

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 material handler from August 4, 2003 until she was discharged on June 28, 2005. The claimant was discharged for allegedly violating a safety rule of the employer. The claimant was discharged for standing on the fork of a forklift truck. The claimant did stand on the fork of a forklift truck, which was approximately two to three feet high, so as to be able to reach into a box, which was out of reach for the claimant from the ground. The claimant did not know that this was a violation of the employer's safety rules. This was the only reason for the claimant's discharge. The claimant had never received any warnings or disciplines for any violation of safety rules.

Pursuant to her claim for unemployment insurance benefits filed effective, December 26, 2004, and reopened effective, July 3, 2005, the claimant has received no unemployment insurance benefits since separating from the employer herein on or about June 28, 2005, and reopening her claim effective, July 3, 2005.

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 not.

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 credibly testified, and the administrative law judge concludes, that the claimant was discharged on June 28, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant credibly testified that she was discharged for allegedly violating the employer's safety rule, when she stood on the fork of a forklift truck approximately two to three feet in the air. She did so, so as to reach into a box, which was out of reach for her from the ground. The claimant credibly testified that at the time she did so, she did not know that this was a violation of the employer's safety rule. This was the only safety violation the claimant had and the claimant had never received any warnings or disciplines for any violations of safety rules.

On the record here, and in the absence of any evidence of the contrary, the administrative law judge concludes that claimant's act in standing on the fork of a forklift truck was, at most, ordinary negligence in an isolated instance or a good faith error in judgment or discretion and is not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

DECISION:

The representative's decision of July 21, 2005, reference 02, is reversed. The claimant, Kathleen E. Kimm, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged, but not for disqualifying misconduct.

dj/pjs