

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

CLINTON K KENNEDY  
103 N PAXTON  
SIOUX CITY IA 51105

SMITH CO MFG INC  
30902 HWY C – 38  
LE MARS IA 51031

Appeal Number: 06A-UI-04842-RT  
OC: 04/16/06 R: 01  
Claimant: Respondent (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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting  
Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Smith Co Manufacturing, Inc., filed a timely appeal from an unemployment insurance decision dated May 3, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Clinton K. Kennedy. After due notice was issued, a telephone hearing was held on May 22, 2006, with the claimant participating. Thomas Tucker, Human Resources Manager, participated in the hearing for the employer. 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 witnesses 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 welder from August 25, 2005, until he was separated from his employment on April 12 or 13, 2006. The claimant was on an approved leave of absence from March 9, 2006 until April 6, 2006. However, the leave of absence was extended by the agreement of both the claimant and the employer and he was due back to work on April 12 or 13, 2006. On the very first night back after leave of absence the claimant was arrested and taken to jail. He was arrested because law enforcement officers believed that he had not finished a certain class he was required to complete. The law enforcement officers informed the employer that the claimant would be incarcerated at least ten days. At that time the employer informed the claimant that he was discharged. However, the claimant was only incarcerated for 15 to 18 hours because he had finished the class which he was required to take and paperwork to that effect was supplied to the law enforcement officers. In 2006 the claimant had absences or tardies but all were excused by the employer. In 2005 the claimant had absences or tardies but beginning in 2006 the employer adopted a new attendance system and provided "amnesty" to all of its employees for absences and tardies in 2005 as the result of the new attendance system. Whether the claimant received any verbal warnings in 2006 for his attendance is uncertain.

#### REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(16) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

- (16) The claimant is deemed to have left if such claimant becomes incarcerated.

871 IAC 24.2(1)h(1), (2) and (3) provide:

Procedures for workers desiring to file a claim for benefits for unemployment insurance.

- (1) Section 96.6 of the employment security law of Iowa states that claims for benefits shall be made in accordance with such rules as the department prescribes. The department of workforce development accordingly prescribes:

h. Effective starting date for the benefit year.

(1) Filing for benefits shall be effective as of Sunday of the current calendar week in which, subsequent to the individual's separation from work, an individual reports in person at a workforce development center and registers for work in accordance with paragraph "a" of this rule.

(2) The claim may be backdated prior to the first day of the calendar week in which the claimant does report and file a claim for the following reasons:

Backdated prior to the week in which the individual reported if the individual presents to the department sufficient grounds to justify or excuse the delay;

There is scheduled filing in the following week because of a mass layoff;

The failure of the department to recognize the expiration of the claimant's previous benefit year;

The individual is given incorrect advice by a workforce development employee;

The claimant filed an interstate claim against another state which has been determined as ineligible;

Failure on the part of the employer to comply with the provisions of the law or of these rules;

Coercion or intimidation exercised by the employer to prevent the prompt filing of such claim;

Failure of the department to discharge its responsibilities promptly in connection with such claim, the department shall extend the period during which such claim may be filed to a date which shall be not less than one week after the individual has received appropriate notice of potential rights to benefits, provided, that no such claim may be filed after the 13 weeks subsequent to the end of the benefit year during which the week of unemployment occurred. In the event continuous jurisdiction is exercised under the provisions of the law, the department may, in its discretion, extend the period during which claims, with respect to week of unemployment affected by such redetermination, may be filed.

(3) When the benefit year expires on any day but Saturday, the effective date of the new claim is the Sunday of the current week in which the claim is filed even though it may overlap into the old benefit year up to six days. However, backdating shall not be allowed at the change of the calendar quarter if the backdating would cause an overlap of the same quarter in two base periods. When the overlap situation occurs, the effective date of the new claim may be postdated up to six days. If the claimant has benefits remaining on the old claim, the claimant may be eligible for benefits for that period by extending the old benefit year up to six days.

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).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The first issue to be resolved is the character of the separation. Both parties maintain that the claimant was discharged for attendance. It is true that the claimant was incarcerated for between 15 and 18 hours but this incarceration was a mistake by law enforcement officials because the claimant had been arrested for allegedly not finishing a class he was required to take but the claimant had finished that class and upon providing paperwork to that effect the claimant was released after 15 to 18 hours. Although one who is incarcerated is deemed to have left his employment, the administrative law judge concludes under the circumstances here that that rule does not apply. First, the employer's witness, Thomas Tucker, Human Resources Manager, credibly testified that the claimant was discharged. The claimant was discharged immediately upon his arrest by law enforcement officers and had really not been absent any particular period of time before his discharge. Accordingly, the administrative law judge concludes that the claimant was discharged. The parties also disagree as to the date; the employer maintains the claimant was discharged on April 12, 2006; the claimant maintains that he was discharged on April 13, 2006. Although it makes little difference here, the administrative law judge concludes that the claimant was discharged on April 13, 2006.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350

N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (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, namely, excessive unexcused absenteeism. The only reason given by the employer for the claimant's discharge was his attendance. However, Mr. Tucker testified that all of the claimant's absences and tardies in 2006 except for April 12 or 13, 2006 when he was arrested, were excused by the employer. These absences and tardies cannot be used to establish excessive unexcused absenteeism. Mr. Tucker also credibly testified that although the claimant had absences and tardies in 2005, all of the employees were given "amnesty" for their absences in 2005 when the employer adopted a new attendance system for 2006. Whether the claimant received any verbal warnings for his attendance is uncertain. The administrative law judge is constrained to conclude that the claimant's absences and tardies in 2006 were for reasonable cause or personal illness and properly reported and excused by the employer with the possible exception of his absence on April 12 or 13, 2006 when he was arrested. The administrative law judge concludes on the circumstances here that that absence also was for reasonable cause and properly reported. The claimant was arrested but it appears that his arrest was due to a mistake by law enforcement officers. Even assuming that this one absence was not for reasonable cause or personal illness, "excessive unexcused absenteeism" implies more than one absence. In general, three unexcused absences are required to establish excessive unexcused absenteeism. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here, the claimant had, at most, one. Accordingly, the administrative law judge concludes that the claimant's absences and tardies were not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$984.00 since separating from his employer on or about April 13, 2006 and filing for such benefits effective April 16, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

**DECISION:**

The representative's decision of May 3, 2006, reference 01, is affirmed. The claimant, Clinton K. Kennedy, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

cs/pjs