

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

BILL D SOMMERFELT
536 NEWTON ST
WATERLOO IA 50703-5856

CORKERY INDUSTRIES LC
300 ANSBOROUGH AVE
WATERLOO IA 50701

Appeal Number: 06A-UI-04670-RT
OC: 04/02/06 R: 03
Claimant: Respondent (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 96.5-1 – 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, Corkery Industries LC, filed a timely appeal from an unemployment insurance decision dated April 28, 2006, reference 02, allowing unemployment insurance benefits to the claimant, Bill D. Sommerfelt. After due notice was issued, a telephone hearing was held on May 17, 2006, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. Larry Corkery, Owner, 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 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 operator from August 22, 2005, until he separated from his employment on April 4, 2006. On that day the claimant came to work late and was told that he no longer had a job and the employer was treating his absences as a quit. The claimant was tardy on December 5, 2005; January 4, 2006; January 30, 2006; and did not inform the employer why and did not notify the employer for any of the tardies. The claimant was also absent on March 27, 2006 as a no-call/no-show without reporting to the employer and the employer did not know why. The claimant was absent on April 3, 2006 as a no-call/no-show without notifying the employer and the employer did not know why. The claimant had other absences and tardies throughout his employment but the employer had no specific record of those. The claimant had at least six verbal warnings from the employer about his attendance. Pursuant to his claim for unemployment insurance benefits filed effective April 2, 2006, the claimant has received unemployment insurance benefits in the amount of \$1,342.00 as follows: \$201.00 per week for four weeks from the benefit week ending April 8, 2006 to the benefit week ending April 29, 2006 and \$181.00 for the benefit week ending May 6, 2006 (earnings \$70.00); \$181.00 for the benefit week ending May 13, 2006 (earnings \$70.00); and \$176.00 for the benefit week ending May 20, 2006 (earnings \$25.00). Of that amount \$202.00 was offset against an overpayment from 1999.

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.

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).

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. The employer maintains that the claimant voluntarily quit because of absences in which he failed to report to the employer. The claimant seems to maintain that he was discharged. The administrative law judge is constrained to conclude that the employer has not demonstrated by a preponderance of the evidence that the claimant left his employment voluntarily. There is no record either that the claimant was absent for three days in a row without notifying the employer or that the employer had a written policy providing that such absences would be considered a quit. See 871 IAC 24.25(4). Further, after being absent as a no-call/no-show the claimant did return to work, albeit late. This does not indicate a voluntary quit. Accordingly, the administrative law judge concludes that the claimant was discharged on April 4, 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). The administrative law judge concludes that the employer has met 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 employer's witness, Larry Corkery, Owner, credibly testified that in the last four months of the claimant's employment he had four tardies as set out in the Findings of Fact for which the claimant gave no reason and for which the claimant did not notify the employer. Mr. Corkery also testified that in the last ten days of the claimant's employment, he had two no-call/no-show absences, which he did not report and for which he gave no reason. Mr. Corkery also credibly testified that he gave the claimant at least six verbal warnings throughout his employment about his attendance. Mr. Corkery finally testified that the claimant had other absences and tardies but did not have any specific record of those for the hearing. The claimant did not participate in the hearing and provide evidence to the contrary. The administrative law judge concludes the claimant's absences and tardies set out above were not for reasonable cause or personal

illness and not properly reported and are excessive unexcused absenteeism and disqualifying misconduct. Therefore, 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.

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 \$1,342.00 since separating from the employer herein on or about April 4, 2006 and filing for such benefits effective April 2, 2006. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with provisions of Iowa law.

DECISION:

The representative's decision of April 28, 2006, reference 02, is reversed. The claimant, Bill D. Sommerfelt, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism and tardies. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,342.00.

cs/pjs