

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

SWALWELL, RICK, L
Claimant

APPEAL NO. 13A-UI-02946-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AKERUE INDUSTRIES LLC
Employer

OC: 10/28/12
Claimant: Appellant (4)

871 IAC 24.1(113) – Layoff
Section 96.3(5) – Duration of Benefits
871 IAC 24.29 – Business Closing

STATEMENT OF THE CASE:

Rick Swalwell filed a timely appeal from the March 6, 2013, reference 01, decision that denied his request to have his unemployment insurance claim redetermined as being based on a layoff pursuant to a business closing. After due notice was issued, a hearing was held on April 9, 2013 Mr. Swalwell participated and presented additional testimony through David Nylin. John Murray represented the employer. Exhibits One, Two and A were received into evidence.

ISSUE:

Whether the claimant was laid off pursuant to a business closing. The administrative law judge concludes that Mr. Swalwell was indeed laid off pursuant to a business closing and is eligible for enhanced benefits, provided he meets all other eligibility requirements.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Akerue Industries, L.L.C., purchased the assets of Woodlink in June 2011. Akerue Industries, L.L.C., is headquartered in Antioch, Illinois. Woodlink maintained an office in at 2020 Grand Avenue in Des Moines from which Akerue Industries continued to conduct primarily sales and marketing work until the end of May 2012. At that point, Akerue Industries closed its Des Moines office. Rick Swalwell was employed by Woodlink as Vice President for Marketing and Communications at the time Akerue Industries purchased Woodlink. Mr. Swalwell continued in the same position after he became an employee of Akerue Industries in June 2011. Mr. Swalwell's immediate supervisor both before and after the change in ownership was David Nylin, President of Woodlink. Mr. Swalwell and Mr. Nylin both worked out of the Des Moines office.

Jack Murray is C.E.O. of Akerue Industries. Mr. Murray concluded in March 2012 that Mr. Swalwell was not a good fit for Akerue Industries. Mr. Murray was disappointed in a presentation Mr. Swalwell had given in March and in Mr. Swalwell's marketing ideas and efforts generally. At no point did Mr. Murray communicate to Mr. Swalwell, directly or indirectly, that the company was discharging Mr. Swalwell from his employment.

On March 27, 2012, Akerue Industries gave notice to the landlord of Des Moines office that the company would not be renewing its lease when the lease expired on May 31, 2012. On that same day, Mr. Murray told Mr. Nylin that the company was closing the Des Moines office at the end of May, that company would be transferring the bulk of the Des Moines operations to its location in Mount Ayr, that the company would be buying out Mr. Swalwell's contract, and that Mr. Swalwell would not be continuing with the company once the Des Moines location closed. Mr. Murray left it to Mr. Nylin to communicate matters to Mr. Swalwell as Mr. Nylin saw fit. At no point did Mr. Murray communicate to Mr. Nylin that the employer was discharging Mr. Swalwell due to misconduct. Mr. Nylin took from Mr. Murray's remarks that the employer was laying Mr. Swalwell off.

On March 27, 2012, Mr. Nylin told Mr. Swalwell that the company would be closing the Des Moines office at the end of May and that the company was buying out Mr. Swalwell's contract. Mr. Nylin told Mr. Swalwell that the company intended to lay Mr. Swalwell off. Mr. Nylin told Mr. Swalwell that he had the option of working until the end of May, working just a week or two, or staying for any period of time between those two options. Mr. Swalwell elected to continue working for a couple weeks and to have April 6, 2012 be his last day in the office. Between March 27 and April 6, Mr. Swalwell assisted Mr. Nylin with preparing the Des Moines office for closing. Prior to Mr. Swalwell's last day in the office, Mr. Murray stopped by and wished Mr. Swalwell well. After Mr. Swalwell worked his last day, the employer continued to conduct diminished business at the Des Moines office until the end of May and then ceased operations at that location. The employer continued to pay Mr. Swalwell his salary through October 6, 2012.

REASONING AND CONCLUSIONS OF LAW:

The evidence in the record establishes that Mr. Swalwell's separation from the employer was involuntary. As such, the separation could only take one of two forms, a discharge or a layoff. Only if the separation occurred as a layoff do the benefit enhancements concerning duration of benefits and maximum benefit amount come into play.

Iowa Workforce Development rule 871 IAC 24.1(113) provides, in relevant part, as follows:

24.1(113) Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

* * *

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

Iowa Code section 96.3-5 provides:

5. Duration of benefits. The maximum total amount of benefits payable to an eligible individual during a benefit year shall not exceed the total of the wage credits accrued to the individual's account during the individual's base period, or twenty-six times the individual's weekly benefit amount, whichever is the lesser. The director shall maintain a separate account for each individual who earns wages in insured work. The director shall compute wage credits for each individual by crediting the individual's account with one-third of the wages for insured work paid to the individual during the individual's base period. However, the director shall recompute wage credits for an individual who is laid off due to the individual's employer going out of business at the factory, establishment, or other premises at which the individual was last employed, by crediting the individual's account with one-half, instead of one-third, of the wages for insured work paid to the individual during the individual's base period. Benefits paid to an eligible individual shall be charged against the base period wage credits in the individual's account which have not been previously charged, in the inverse chronological order as the wages on which the wage credits are based were paid. However if the state "off indicator" is in effect and if the individual is laid off due to the individual's employer going out of business at the factory, establishment, or other premises at which the individual was last employed, the maximum benefits payable shall be extended to thirty-nine times the individual's weekly benefit amount, but not to exceed the total of the wage credits accrued to the individual's account.

871 IAC 24.29(2) provides:

(2) Going out of business means any factory, establishment, or other premises of an employer which closes its door and ceases to function as a business; however, an employer is not considered to have gone out of business at the factory, establishment, or other premises in any case in which the employer sells or otherwise transfers the business to another employer, and the successor employer continues to operate the business.

The evidence in the record establishes that Mr. Swalwell reasonably concluded from the employer's words and conduct that he was being laid off from the employment. Nothing in the employer's words or conduct directed at Mr. Swalwell would suggest to a reasonable person that the employer was discharging him from the employment, rather than laying him off. The weight of the evidence also establishes that Mr. Swalwell's layoff occurred in the context of a business closing. The employer chose the same day to give notice to Mr. Swalwell that his employment would be ending and to give notice to the landlord of the Des Moines office that the company would not be renewing its lease once the lease expired on May 31, 2012. Mr. Nylin at all relevant times functioned as Mr. Murray's agent in dealing with Mr. Swalwell. Mr. Nylin clearly communicated to Mr. Swalwell that his employment was coming to an end because the employer was closing the Des Moines office and would have no further need for his services. The weight of the evidence indicates that Mr. Swalwell spent his last two weeks at the office helping Mr. Nylin begin the process of closing that office. The weight of the evidence indicates that from April 6 to May 31, 2012, the employer continued the process of closing the Des Moines office. The employer no longer conducts business from that office.

Based on the evidence in the record and application of the law cited above, the administrative law judge concludes that Mr. Swalwell was indeed laid off pursuant to a business closing. Mr. Swalwell's unemployment insurance benefits shall be redetermined accordingly.

DECISION:

The Agency representative's decision dated March 6, 2013, reference 01, is modified as follows. The claimant was laid off due to a business closing and his benefit eligibility shall be redetermined accordingly.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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