

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

XAVIER ORTIZ
Claimant

APPEAL NO. 23A-UI-04974-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

AG PROCESSING INC A COOPERATIVE
Employer

**OC: 04/16/23
Claimant: Respondent (2)**

Iowa Code Section 96.5(11) – Separation Due to Incarceration
Iowa Code Section 96.5(1) – Voluntary Quit
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

On May 12, 2023, the employer filed a timely appeal from the May 4, 2023 (reference 01) decision that allowed benefits to the claimant, provided he was otherwise eligible, and that held the employer's account could be charged for benefits, based on the deputy's conclusion the claimant was discharged on February 1, 2023 for no disqualifying reason. After due notice was issued, a hearing was held on June 1, 2023. Xavier Ortiz (claimant) did not comply with the hearing notice instructions to call the designated toll-free number at the time of the hearing and did not participate. Travis Robinson represented the employer. Exhibits 1, 2, 4 and 5 were received into evidence. Exhibit 3, Code of Ethics and Conduct, was irrelevant and excluded from evidence. The administrative law judge took official notice of the following Iowa Workforce Development administrative records: DBRO and KFFV. The administrative law judge took official notice of the reference 01 fact-finding materials for the limited purposes of determination whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or willful misrepresentation in connection with the fact-finding interview. The administrative law judge took official notice of the Woodbury County Clerk of Court record for Woodbury County Criminal Case Number AMCR116945, which record is published at www.iowacourts.state.ia.us.

The claimant received appropriate notice of the hearing, as indicated by the claimant's May 24, 2023 submission of a "DIA Contact Form" that included the appeal number, the date and time of the hearing, and the issues set for hearing as stated on the hearing notice.

ISSUES:

Whether the claimant was laid off, was discharged for misconduct in connection with the employment, or voluntarily quit without good cause attributable to the employer.

Whether the claimant separated from the employment due to incarceration under circumstances that disqualify the claimant for unemployment insurance benefits and that relieve the employer's account of liability for benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Xavier Ortiz (claimant) was employed by Ag Processing, Inc. a Cooperative as a full-time material handler at the employer's Sergeant Bluff, Iowa Soy facility. The claimant began the employment on December 5, 2022 and last reported for work on January 23, 2023. The claimant completed his shift on January 23, 2023.

The claimant was next scheduled to work on January 26, 27, 28 and 31, 2023, but did not appear for any of those shifts. The claimant did not make contact with the employer regarding a need to be absent from those shifts. The employer's policy required that the claimant call the workplace and speak with a member of management no later than hour after the start of the shift if he needed to be absent. The employer's policy required that the claimant personally make contact with the employer unless he was unable to do so. The employer reviewed the absence reporting requirement with the claimant at the start of the employment.

On January 24, 2023, the claimant was arrested and incarcerated in Woodbury County, Iowa as a fugitive from justice, based on a Dixon County, Nebraska arrest warrant. See *State of Iowa vs. Xavier Ortiz*, Woodbury County Criminal Case Number AMCR116945, published at www.iowacourts.state.ia.us. On January 24, 2023, the claimant appeared before an Iowa judge his initial appearance on the Nebraska warrant. The claimant waived extradition to Nebraska and was held pending transport to Dixon County, Nebraska.

On January 26, 2023, the claimant's girlfriend called the workplace and spoke to the shift supervisor on duty. The claimant's girlfriend told the employer the claimant would not be in, but she falsely attributed the absent to the claimant being ill. The claimant's girlfriend did not mention the incarceration at that time.

On January 31, 2023, the claimant's girlfriend again contacted the employer on the claimant's behalf. The claimant's girlfriend told the employer that the claimant was incarcerated and that she was unable to say when the claimant might be able to return to the employment. The claimant's girlfriend falsely asserted the claimant's incarceration was based on a child support delinquency, rather than based on a criminal matter as indicated in the Woodbury County Clerk of Court records.

As of January 31, 2023, the claimant had missed four consecutive 12-hour shifts due to incarceration. If the claimant had continued to report for work, the employer had ongoing work for the claimant. However, in light of the extended absence, the lack of direct contact initiated by the claimant, and news of the claimant's indefinite incarceration, the employer determined the employer was ended.

At the time the claimant separated from the employment, the employer had no knowledge of the circumstances of the claimant's incarceration beyond what the girlfriend had shared.

On February 1, 2023, the employer's Director of Employer Relations sent a termination letter to the Sioux City address the employer had for the claimant. The employer representative wrote that the employer had learned on February 1, 2023 that the claimant was incarcerated and would not be able to return to work. The employer stated the claimant was in violation of Plant Work Rule Number 16. That work rule listed "Incarceration for which employee may be in

violation of Company's attendance policy" as a "Serious Conduct Violation" that could warrant immediate termination of the employment with prior corrective discipline. The employer had provided the work rules to the claimant at the time of hire. In the February 1, 2023 letter, the employer found the claimant to be in violation of the work rule and stated the claimant's employment was terminated effective February 1, 2023.

The claimant established an original claim for benefits that was effective April 16, 2023. Ag Processing is a base period employer for purposes of the claim. Iowa Workforce Development set the weekly benefit amount at \$593.00. IWD disbursed \$2,372.00 in benefits to the claimant for the four weeks between April 30, 2023 and May 27, 2023.

On May 3, 2023, and Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed the claimant's separation from the employer. The claimant did not participate in the fact-finding interview. The employer received appropriate notice of the fact-finding interview. At the time of the fact-finding interview, the deputy made contact with a representative of the employer's third-party representative of record, Equifax. The Equifax Charge Analyst told the deputy there was no information to provide beyond that contained in the SIDES protest. The employer had attached to the SIDES protest the same four exhibits the employer submitted for the appeal hearing. The SIDES protest provided dates of employment, the claimant's job title, indication that claimant had been discharged, and cursory narrative that duplicated information set forth in the February 1, 2023 termination letter.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(11) provides as follows:

96.5 Causes for disqualification.

An individual shall be disqualified for benefits:

11. Incarceration – disqualified.

a. If the department finds that the individual became separated from employment due to the individual's incarceration in a jail, municipal holding facility, or correctional institution or facility, unless the department finds all of the following:

(1) The individual notified the employer that the individual would be absent from work due to the individual's incarceration prior to any such absence.

(2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the individual was found not guilty of all criminal charges relating to the incarceration.

(3) The individual reported back to the employer within two work days of the individual's release from incarceration and offered services.

(4) The employer rejected the individual's offer of services.

b. A disqualification under this subsection shall continue until the individual has worked in and been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Administrative Code rule 871-24.26(17) provides as follows:

24.26(17) Separation due to incarceration.

a. The claimant shall be eligible for benefits if the department finds that all of the following conditions have been met:

(1) The employer was notified by the claimant prior to the absence;

(2) Criminal charges relating to the incarceration were not filed against the individual, all criminal charges against the individual relating to the incarceration were dismissed, or the claimant was found not guilty of all criminal charges relating to the incarceration;

(3) The claimant reported back to the employer within two work days of the release from incarceration and offered services to the employer; and

(4) The employer rejected the offer of services.

b. If the claimant fails to satisfy the requirements of subparagraph 24.26(17)“a”(1), the claimant shall be considered to have voluntarily quit the employment if the claimant was absent for three work days or more under subrule 24.25(4). If the absence was two days or less, the separation shall be considered a discharge under rule 871—24.32(96). If all of the conditions of subparagraphs 24.26(17)“a”(2), (3)and (4) are not satisfied, the separation should be considered a discharge under rule 871—24.32(96).

This subrule is intended to implement Iowa Code section 96.5 and Supreme Court of Iowa decision, *Irving v. Employment Appeal Board*, 883 N.W.2d 179.

When the separation from employment is based on incarceration, the claimant has burden of proving the claimant is not disqualified for benefits under Iowa Code section 96.5(11). Iowa Code section 96.6(2).

The evidence in the record establishes the claimant separated from the employment effective January 24, 2023 due to incarceration and under circumstances that disqualify the claimant for unemployment insurance benefits. The claimant was arrested on January 24, 2023 on an outstanding Nebraska warrant, was extradited to Nebraska, and as of February 1, 2023 continued to be incarcerated for an extended, indefinite period. The claimant did not notify the employer prior to the incarceration-based absence that he would be absent due to incarceration. Rather, the claimant’s girlfriend initially misled the employer regarding the basis for the absence. The claimant has presented not evidence to indicate the criminal charge or charges for which he was arrested were dismissed or that the claimant was found not guilty. The claimant has not attempted to return to the employment.

After the claimant had already separated from the employment, the employer mischaracterized the separation as a discharge.

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. Iowa Administrative Code rule 871-24.1(113)(c). A quit is a separation initiated by the employee. Iowa Administrative Code rule 871-24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 698, 612 (Iowa 1980) and *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992). 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. See Iowa Administrative Code rule 871-24.25.

The claimant initiated the separation from the employment through the extended period of incarceration, which made him unavailable for work. This happened before the employer belatedly mischaracterized the separation as a discharge.

Iowa Code section 96.5(1) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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.

Pursuant to Iowa Admin. Code rule 871-24.26(17)(b), and the analysis of the incarceration-based separation set forth above, the claimant's four-day absence due to incarceration amounted to a disqualifying voluntary quit without good cause attributable to the employer.

The claimant is disqualified for benefits until the claimant works in and has been paid wages for insured work equal to 10 times the claimant's weekly benefits amount.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received \$2,372.00 in benefits for the four weeks between April 30, 2023 and May 27, 2023, but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Iowa Administrative Code rule 871-24.10(1) and (4), regarding employer participation in fact-finding interviews, provides as follows:

Employer and employer representative participation in fact-finding interviews.

24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge

for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

...
(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

The employer did not participate in the fact-finding interview within the meaning of the law. The employer's had notice of the fact-finding interview through its agent. The third-party agent lacked personal knowledge and explicitly stated at the time of the fact-finding interview there was no information to share beyond the information set forth in the protest materials. The protest materials provided insufficient detail to prove a disqualifying separation, even if unrebutted by the claimant. The claimant did not participate in the fact-finding interview and therefore did not receive a decision in his favor through fraud or willful misrepresentation. For these reasons, the claimant is not required to repay the overpaid benefits. The employer's account may be charged for the overpaid benefits. The employer's account shall not be charged for benefits for the period beginning May 28, 2023.

DECISION:

The May 4, 2023, (reference 01) decision is REVERSED. The claimant separated from the employment effective January 24, 2023 due to incarceration and under circumstances that disqualify the claimant for unemployment insurance benefits. The claimant's incarceration-based separation may also be characterized as a voluntary quit without good cause attributable to the employer. The claimant was not discharged from the employment. The claimant is disqualified for benefits until the claimant has worked in and been paid wages for insured work equal to 10 times the claimant's weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$2,372.00 in benefits for the four weeks between April 30, 2023 and May 27, 2023. The claimant is not required to repay the overpaid benefits. The employer's account may be charged for the overpaid benefits. However, the employer's account shall not be charged for benefits for the period beginning May 28, 2023.



James E. Timberland
Administrative Law Judge

June 7, 2023
Decision Dated and Mailed

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.