

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PATRIC D NELSON
Claimant

FLAGGER PROS USA LLC
Employer

APPEAL 17A-UI-06995-CL-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/01/17
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 7, 2017, (reference 05) unemployment insurance decision that denied benefits based upon a voluntary resignation. The parties were properly notified about the hearing. A telephone hearing was held on July 27, 2017. Claimant participated personally and through witness Kathy Mahoney. Employer participated through human resources manager Victoria Johnson.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was last assigned as a full-time construction flagger from August 29, 2016, through April 19, 2017, when he was separated from employment.

Claimant was scheduled to work on April 19, 2017, at 7:00 a.m. Claimant did not appear for work because he was pulled over and arrested on the way to work for driving without a license. Thus, claimant had a no-call/no-show absence.

The next day, April 20, 2017, claimant was scheduled to work at 7:00 a.m. At approximately 8:30 a.m., claimant's attorney, Kathy Mahoney, called to inform employer that claimant had been arrested and would be incarcerated for the foreseeable future.

Claimant entered a guilty plea to the crime of driving while barred and served out his sentence for the crime. Claimant's actions also violated his probation, so he remained incarcerated until the probation issues were also resolved. Claimant did not have enough money to post bail during this time period.

On June 5 or 6, 2017, claimant was released from jail and called employer to ask if he could return to work. Employer informed claimant he could not return to work until he had a valid driver's license or work permit.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was without good cause attributable to the employer.

In this case, claimant was separated from employment because of his incarceration. Iowa Admin. Code r. 871-24.25(16) presumed that an individual who does not report to the employment because of incarceration had quit without good cause attributable to the employer. The Iowa Supreme Court in *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa, June 3, 2016) invalidated that regulation. Under *Irving*, the employer has the burden of proving that a claimant's departure from employment was voluntary. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016). The claimant then has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). If the leaving was not voluntary, then there is no analysis into whether or not the employee left with good cause attributable to the employer because the case must be analyzed as a discharge. *Id.* (citing *Ames v. Emp't Appeal Bd.*, 439 N.W.2d 669, 673-74 (Iowa 1989)(employees refusing to go to work and cross union picket line due to the risk of violence associated with crossing the picket line was not a voluntary quitting of employment)).

Thus, the question here is whether claimant's separation from employment was voluntary. The term "voluntary" requires volition and generally means a desire to quit the job. *Id.* (citing *Bartelt v. Emp't Appeal Bd.*, 494 N.W.2d 684, 686 (Iowa 1993); *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Cook*, 299 N.W.2d at 701 (Iowa 1986); *Moulton v. Iowa Emp't Sec. Comm'n*, 34 N.W.2d 211, 213 (1948)). There must be substantial evidence to show that claimant's absence from work was voluntary. Incarceration, in and of itself, can never be considered volitional or voluntary. However, predicate acts that lead to incarceration can rise to level of conduct which would disqualify a claimant from receiving benefits. *Id.* Those predicate acts, however, must be volitional and must lead to an absence from the workplace which results in a loss of employment. *Id.* Further, the circumstances that led to the incarceration must establish volitional acts of a nature sufficient to allow a fact finder to draw the conclusion that the employee, by his or her intentional acts, has purposively set in motion a chain of events leading to incarceration, absence from work, and ultimate separation from employment. *Id.* Lastly, if an employee fails to notify the employer of the status of his or her incarceration, or engages in deception regarding the incarceration, that may result in a voluntary quit or disqualifying misconduct. *Id.* It must also be analyzed whether or not the employee was capable of notifying the employer of the status of the incarceration and what steps the employee took to notify the employer.

Here, the claimant took actions that could have reasonably been foreseen to result in incarceration, and ultimately have an adverse impact upon his employment. As a result, his separation from employment was voluntary. Even though he notified the employer of his incarceration as soon as possible, his incarceration on multiple scheduled workdays was not a good-cause reason for the separation attributable to the employer. Employer is not expected to hold employment for employees incarcerated for volitional acts.

Claimant has failed to establish his separation was with good cause attributable to employer. Thus, benefits must be denied.

DECISION:

The July 7, 2017, (reference 05) unemployment insurance decision is affirmed. Claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Christine A. Louis
Administrative Law Judge
Unemployment Insurance Appeals Bureau
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515)478-3528

Decision Dated and Mailed

cal/scn