IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

RICHARD A PARKER Claimant **CRST VAN EXPEDITED INC** Employer	**APPEAL 16A-UI-05737-DB-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/17/16** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the May 10, 2016, (reference 01) unemployment insurance decision that denied benefits based upon its determination that he voluntarily quit work on March 10, 2016 when he was arrested and confined in jail. The parties were properly notified of the hearing. A telephone hearing was held on June 9, 2016. The claimant, Richard A. Parker, participated personally. The employer, CRST Van Expedited Inc., participated through Driver Manager Nico Muth. Claimant's Exhibits A and B were admitted.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a truck driver. He was employed from March 6, 2014 until March 29, 2016. Claimant's routes required him to drive for five consecutive days and then he did not work for two consecutive days. His immediate supervisor was Mr. Muth. The employer has a handbook that addresses attendance, but it was not submitted for the hearing. The last day the claimant physically worked on the job was March 4, 2016.

Claimant was expected to report to work for another route on March 10, 2016. He did not work between March 5, 2016 and March 10, 2016 because his co-driver was ill. He did not arrive to work on March 10, 2016 because he was incarcerated.

On Sunday, March 6, 2016, the claimant was hospitalized for injuries that stemmed from an incident that occurred at his home on that date. Claimant was discharged from the hospital on Monday, March 7, 2016 and was immediately arrested and incarcerated on that same date. Claimant was charged with attempted murder, assault and battery, and badgering a witness. Claimant was arraigned and bail was set at $1,000,000.00. Claimant was unable to afford bail. On April 8, 2016, the claimant's bail was reduced to $600,000.00. Claimant's mother, La Verne

Parker Diggs, was able to help him with the finances to make bail and he was released on April 15, 2016. After he was released claimant immediately contacted Mr. Muth and was told that he had been discharged for his failure to report to work. Mr. Muth instructed him to contact a recruiter in order to see if he could be re-hired.

During the time claimant was incarcerated, his mother, at his direction, telephoned and spoke to a dispatcher on March 9, 2016. She was told at that time that she needed to speak to Mr. Muth directly regarding claimant's situation. Ms. Diggs telephoned Mr. Muth directly on March 11, 2016. She informed Mr. Diggs of claimant's situation and the fact that he was incarcerated. She told him that the claimant did not know when he would be released. Ms. Diggs also memorialized their conversation in an email which she sent to Mr. Muth on March 11, 2016. See Exhibit A. In this email, Ms. Diggs asked Mr. Muth whether claimant could take a voluntary leave of absence. This employer does allow voluntary leaves of absences but those are not handled by Mr. Muth. Mr. Muth did not forward this request to the human resource department and did not notify Ms. Diggs that he was not the proper person to inquire to about a leave of absence. No response was ever made to Ms. Diggs' inquiry about a voluntary leave of absence. Further, Ms. Diggs specifically stated in her email "if you should require additional information please contact me, I can be reached at …" and she provided a telephone number and email address. Mr. Muth never requested that Ms. Diggs continue to report claimant's continued absenteeism due to incarceration. There was no evidence regarding a written or verbal policy that required the claimant to report his absences.

Claimant was discharged for his absenteeism and failure to report to work from March 10, 2016 through March 29, 2016. He pled not guilty to the charges and believes that the charges will be dismissed prior to trial. The alleged crimes were committed while the claimant was off duty and was not on company property. Employer provided no evidence of claimant's guilt of the alleged crimes for which he was incarcerated or any statements from claimant with any admission of guilt.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

First, it must be determined whether the separation was a voluntary quitting or a discharge from employment.

Iowa Code § 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.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). 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). "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". *Id*. (citing *Cook v. Iowa Dept. of Job Service*, 299 N.W.2d 698, 701 (Iowa 1986)).

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. 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. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016)(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).

However, predicate acts that lead to incarceration can rise to a level of conduct which would disqualify a claimant from receiving benefits. Those predicate acts must be volitional and must lead to an absence from the workplace which results in a loss of employment. 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. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016). 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*. The analysis must also consider whether or not the employee was capable of notifying the employer of the status of the incarceration and the steps the employee took to notify the employer.

If the claimant's leaving of employment was voluntary, the next step is to analyze whether or not the claimant left for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). If the claimant's leaving of employment was not voluntary, the case must be analyzed as a discharge case and the burden of proof falls to the employer. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

This claimant did not voluntarily leave his employment. This claimant did not desire to quit his job. It is clear that this claimant was making efforts to continue working for this employer by requesting a voluntary leave of absence and stating that he did not want his work record to reflect that he walked away from his position. See Exhibit A. Therefore, this case must be analyzed as a discharge.

Iowa Code § 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:
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> 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.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). In the context of disqualification for unemployment benefits based on misconduct, the question is whether the employee engaged in a "deliberate act or omission," 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 conduct with "carelessness or negligence of such degree of recurrence as to manifest equal culpability." See Iowa Admin. Code r. 871 – 24.32(1)(*a*).

Further, 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. See Iowa Admin. Code r. 871 – 24.32(7). However, excessive absences are not considered misconduct unless unexcused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). For example, absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007).

Claimant was arrested and charged with attempted murder, assault and battery and badgering a witness. Claimant pled not guilty to these charges. Claimant has not made statements admitting his guilt in the alleged criminal activity. Claimant testified that it is his belief these charges will be dismissed. There has been no trial on these matters and no verdict has been reached regarding claimant's guilt. There was no evidence presented by the employer that the claimant had committed these crimes or engaged in any volitional acts that would lead to his arrest and subsequent incarceration. Disqualifying conduct for purposes of unemployment benefits cannot be predicated on a mere arrest unsupported by a conviction or other credible evidence of the claimant's intentional conduct. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016)(citing *In re Benjamin*, 572 N.Y.S.2d 970, 972 (App. Div. 1991)(per curiam). As such, the claimant's incarceration was involuntary and his absences due to incarceration were for good cause and the next step in this analysis is to determine whether or not claimant properly notified the employer of his absences.

Mr. Muth testified that the employer did have a policy in place regarding absenteeism, however, he did not know what it was. Further, no written policy was submitted as an exhibit in this matter. Claimant was to work on March 10, 2016. Ms. Diggs telephoned the dispatcher on claimant's behalf on March 9, 2016 and was told she needed to contact Mr. Muth directly. Ms. Diggs spoke to Mr. Muth on claimant's behalf on March 11, 2016 and notified him that claimant was incarcerated and that he did not know when he would be released. She asked for a voluntary leave of absence on his behalf. She did not receive a response to that request. The employer did not instruct Ms. Diggs to continue to report claimant's absence on a daily, weekly, or monthly basis. There was no policy in place requiring her to do so. Ms. Diggs memorialized the telephone conversation in an email and listed her telephone number and email address for any further communications or instructions from the employer. The only date that claimant was absent without properly notifying his employer of his absence was March 10, 2016. After March 10, 2016 claimant properly notified the employer through his mother and did not violate any reporting policy or instructions regarding the reporting of his absenteeism.

Further, claimant's incarceration and alleged criminal acts were unrelated to his employment. Any actions claimant is alleged to have committed occurred off company property and off company time. Claimant's failure to be available for work was predicated on his inability to obtain bail, not his alleged criminal conduct.

Claimant's absenteeism due to his inability to obtain bail is not misconduct or a deliberate violation or disregard of standards of behavior which the employer has the right to expect of an employee. *Irving v. Emp't Appeal Bd.*, No. 15-0104, 2016 WL 3125854 (Iowa June 3, 2016)(citing *State v. Evans*, 901 P.2d 156, 156-57 (Nev. 1995). Claimant further properly

notified the employer of his absences on March 11, 2016 by reasonably notifying the employer of future absences due to his incarceration when Ms. Diggs spoke to Mr. Muth. No further instructions were given to Ms. Diggs and there were no written or verbal policies that claimant failed to follow in reporting his absences.

The claimant properly reported all of his absences except March 10, 2016. As such, claimant had one unexcused absence. Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *See Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. In this case, one unexcused absence is not excessive. The employer has failed to establish that the claimant was discharged for job-related misconduct which would disqualify him from receiving benefits. Because claimant's absences from March 11, 2016 and thereafter were properly reported and not volitional, and his absence on March 10, 2016 was not excessive, benefits are allowed.

DECISION:

The May 10, 2016, (reference 01) unemployment insurance decision denying benefits is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dawn R. Boucher
Administrative Law Judge

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Decision Dated and Mailed

db/pjs