

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**ABU O WILLIAMS**  
Claimant

**CG ACQUISITION CO**  
Employer

**APPEAL 16A-UI-06714-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/15/16  
Claimant: Appellant (5)**

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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 June 9, 2016, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on July 1, 2016. Claimant participated. Employer participated through human resource manager, Joan 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 employed full-time as a tank cleaner from August 24, 2015, and was separated from employment on March 30, 2016.

The employer has an attendance policy. An employee starts with eight points and once they reach zero points, they are discharged. Employees are warned as they accumulate points. Employees lose points for being tardy, leaving early, and being absent. If you miss one day, you lose one point. It is a no fault attendance policy. If an employee is going to miss work, they are supposed to call an hour before the start of their shift. Every month that an employee does not miss work or is not late, points are added. The employer has a no-call/no-show policy where if an employee is a no-call/no-show for three consecutive scheduled work days, it is considered a voluntary quit. Claimant was aware of the policies. Claimant received the employee handbook. The employee handbook also explained that jail time is not an excused absence.

Around September 2015, claimant pled guilty to Driving While Barred and was sentenced to serve 30 days in jail. Claimant was ordered to complete the jail time by around the end of October 2015, but for sure by the end of 2015. Prior to March 28, 2016, claimant had only served approximately six days.

Claimant last worked for the employer on March 24, 2016. Claimant had 2.25 points after his shift on March 24, 2016. After March 24, 2016, claimant was arrested for having failed to complete his jail sentence. Claimant was incarcerated to serve the remaining jail sentence on consecutive days (approximately 24 days). Claimant was scheduled to work on March 28, 29, and 30, 2016, but he did not work because he was in jail. Someone did contact the employer on March 28, 2016 and informed it that claimant was not going to be at work. The employer also learned from several employees that claimant was in jail and would be there for a while.

Claimant received a written, final warning, on November 17, 2015 for absenteeism. Claimant was down to one point. Claimant was warned that his job was in jeopardy. Claimant signed for the warning. On November 3, 2015, claimant received a second written warning for attendance issues. Claimant signed for the warning. On October 16, 2015, claimant received a written warning for attendance issues. Claimant signed for the warning.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant did not quit, but was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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. *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)).

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.

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Although the employer did have a no-call/no-show policy and claimant did miss three consecutive work days, someone contacted the employer on his behalf on March 28, 2016, and informed the employer he would not be at work. Although the employer considers it a no-call/no-show because it requires the employee to contact the employer about an absence,

clearly the employer was on notice claimant was going to absent from work on March 28, 2016. Furthermore, claimant testified he tried to contact the employer after he was processed into jail, but he was not able to leave a message and he was not allowed to make another phone call. Therefore, claimant's separation is not because of no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

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:

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.

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).

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). 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).

Disqualifying conduct 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)). Prior to being hired, claimant testified he told the employer he was having court issues. Ms. Johnson testified she did not remember the conversation, but if it happened she would have explained that jail time is not considered an excused absence. This policy is also explained in the employee handbook. In September 2015, after having already started working for the employer, claimant pled guilty to a criminal offense and was sentenced to 30 days in jail. Claimant testified he was ordered to complete the jail time by around the end of October 2015, but for sure by the end of 2015. Even though claimant was aware of this requirement, he did not complete his jail time in that time frame and on March 24, 2016, he had approximately 24 days left to serve. After March 24, 2016, claimant was subsequently arrested by the sheriff and had to serve approximately 24 consecutive days, including March 28, 29, and 30, 2016. March 28, 29, and 30, 2016 were scheduled work days for claimant.

Even though claimant did not notify the employer personally, he instructed people to notify the employer of the circumstances regarding his absence. Someone did notify the employer he would be absent on March 28, 2016 and the employer discovered from several employees that he was in jail and would be there for a while. As such, claimant did report his absences to the employer; however, his absences are not considered excused for the purposes of unemployment insurance benefits.

Claimant’s failure to be available for work was not predicated on his inability to obtain bail, but was predicated on his criminal conviction and failure to serve his jail sentence. Claimant’s conviction resulted in him having to serve 30 days in jail within a certain time frame and he became ineligible for work due to his failure to serve his sentence in the required time frame. Claimant’s actions in failing to serve his jail time by the deadline were deliberate and evidence of willful and wanton disregard for the employer’s interest and violated the employer’s attendance policy. Claimant was warned on November 17, 2015 that his job was in jeopardy. Claimant’s final three absences (March 28, 29, and 30, 2016) are considered unexcused.

Because claimant was convicted and therefore engaged in the behavior that led to his incarceration, the resulting absences due to claimant’s failure to comply with his jail sentence are volitional and constitute misconduct. As such, benefits are denied.

**DECISION:**

The June 9, 2016, (reference 02) unemployment insurance decision is modified with no change in effect. Claimant was discharged from employment due to job-related misconduct. 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.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/pjs

**NOTE TO EMPLOYER:**

If you wish to change the address of record, please access your account at:  
<https://www.myiowaui.org/UITIPTaxWeb/>.  
Helpful information about using this site may be found at:  
<http://www.iowaworkforce.org/ui/uiemployers.htm> and  
[http://www.youtube.com/watch?v=\\_mpCM8FGQoY](http://www.youtube.com/watch?v=_mpCM8FGQoY)