

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GONZALO RIOS**

Claimant

**APPEAL NO. 17A-UI-06447-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**

Employer

**OC: 06/04/17**

**Claimant: Appellant (5)**

Iowa Code Section 96.5(11) – Incarceration Disqualification

**STATEMENT OF THE CASE:**

Gonzalo Rios filed a timely appeal from the June 22, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Rios was discharged on May 31, 2017 for misconduct in connection with the employment. After due notice was issued, a hearing was held on July 11, 2017. Mr. Rios participated. Kristy Steele represented the employer. Exhibits 1, 2, 3, A, B and C were received into evidence.

**ISSUE:**

Whether the claimant separated from the employment for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer's account of liability for benefits

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Gonzalo Rios was employed by Swift Pork Company, a/k/a JBS, as a full-time production worker at the employer's Ottumwa plant from 2008 and last performed work for the employer on May 5, 2017. Mr. Rios' work hours were 5:25 a.m. to 2:20 p.m., Monday through Friday and occasional Saturdays. Mr. Rios' immediate supervisor was Line Supervisor Samuel Duran. If Mr. Rios needed to be absent from work, the employer's absence reporting policy required that he personally notify the employer of the absence by calling the designated absence reporting number at least 30 minutes prior to the scheduled start of his shift. Mr. Rios was familiar with the absence reporting policy. After Mr. Rios completed his work day on Friday, May 5, 2017, he was next scheduled to work on May 8, 2017. Mr. Rios did not report for additional shifts after May 5, 2017.

On the evening of May 5, 2017, police officers from the Ottumwa Police Department arrested Mr. Rios at his home and charged him with Burglary First Degree in violation of Iowa Code section 713.3, a class B felony, and Sexual Abuse Third Degree in violation of Iowa Code section 709.4(1)(a), a class C felony. The charges stemmed from an incident in June 2016. On the evening of May 5, 2017, Mr. Rios was booked into the Wapello County Jail and his bond was set at \$35,000.00 cash. Mr. Rios remained incarcerated in the Wapello County Jail until

June 6, 2017, when he posted an amended \$25,000.00 bond and was released from custody at 2:32 a.m. Mr. Rios did not personally notify the employer of his incarceration or his need to be absent due to incarceration. Mr. Rios asked his girlfriend, Blanca Franco, to notify Regelio Bahena, Human Resources Supervisor, that Mr. Rios would be unable to report for work due to incarceration and until he could post bond. Ms. Franco also worked the first shift at JBS. On the afternoon of May 8, Ms. Franco reported to Mr. Rios that she had spoken with Mr. Bahena and that Mr. Bahena had indicated she should report Mr. Rios' absences by calling the absence reporting number each work day so long as Mr. Rios remained incarcerated. Thereafter someone provided timely notice of Mr. Rios' absences for each work day during his period of incarceration except for one. On those days when someone provided notice on Mr. Rios' behalf, they indicated that Mr. Rios would be absent for personal business. The exception in the daily notice occurred on May 22, 2017, for which the employer documented a no-call/no-show.

On May 30, 2017, Mr. Bahena sent Mr. Rios a letter by certified mail. At that point, Mr. Bahena had been absent from 15 consecutive shifts. The letter included the following:

After reviewing your case, JBs has decided to terminate your employment with the company effective today, due to excessive uabsenteeism [sic].

You have continued to be away from work violating the company's attendance policy; you have exhausted all available points permitted per policy. Your employment is being terminated effective today due to exceeding the number of points permitted by company policy without proper documentation.

Mr. Rios did not receive the letter until June 6, 2017, when he collected the letter from the post office in response to a delivery notice left in his home mailbox.

Following Mr. Rios' release from custody in the early hours of June 6, 2016, he personally called the absence reporting at 4:33 a.m. and reported that he would be absent for personal business. The court had released Mr. Rios to the supervision of the Eighth Judicial District Department of Correctional Services and had directed Mr. Rios to contact agency on the morning of June 6. Mr. Rios met with the probation officer that morning and was finished at the Department of Correctional Services by 9:00 a.m. Mr. Rios then went to his attorney's office. Mr. Rios left the attorney's office before noon. Mr. Rios then went home to bed. Mr. Rios had asked Ms. Franco to notify Mr. Bahena that he would report for work the following morning, June 7, 2017. Later that day, Ms. Franco reported to Mr. Rios that Mr. Bahena had told him not to report for work and to discontinue providing notice of absences. Ms. Franco reported to Mr. Rios that Mr. Bahena had directed Mr. Rios not to return to work unless and until the charges against him were dropped or until the case was settled. Ms. Franco reported to Mr. Rios that Mr. Bahena had said that if the charges were dropped or that Mr. Rios was exonerated, Mr. Rios could return to the employer with proof and would be reinstated to the employment with no loss in seniority. Based on this information from Ms. Franco, Mr. Rios did not make personal contact with the employer. Mr. Rios did make contact with a union secretary and was advised the union was engaged in collective bargaining all that week. Mr. Rios did not hear further from the union.

Subsequent to Mr. Rios' release from custody, the Wapello County Attorney's Office filed a trial information in Wapello County Case Number FECR011002 that charged Mr. Rios with three counts. Those charges included Sex Abuse in the First Degree in violation of Iowa Code section 709.2, a class A felony, Burglary in the First Degree in violation of Iowa Code section 713.3, a class B felony, and Tampering with a Witness in violation of Iowa Code section 720.4,

an aggravated misdemeanor. All three charges are still pending. Mr. Rios has a pre-trial conference set for September 2017 and a tentative trial date set for October 2017.

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

The employer's letter of May 30, 2017 reflects the employer's belief and position that the employer discharged Mr. Rios on May 30, 2017 for excessive unexcused absences. Mr. Rios asserts that he was discharged for attendance, but that the absences were due to incarceration, that all but one of the absences were properly reported to the employer, and that absences should not be deemed unexcused.

Iowa Administrative Code rule 871-24.1(113) provides as follows:

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.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

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.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

The law regarding separations due to incarcerations has undergone substantial changes during the last 13 months. Prior to the Iowa Supreme Court's decision in *Irving v. Employment Appeal Board*, 883 N.W.2d 179 (Iowa 2016), Iowa Workforce Development would presume an employee who left employment due to incarceration to have voluntarily quit the employment without good cause attributable to the employer. See Iowa Code section 96.5(1) and Iowa Administrative Code rule 871-24.25(16). In *Irving*, the Supreme Court concluded "that incarceration in and [of] itself does not establish a voluntary quit. Instead, 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 intentional acts has purposely set in motion a chain of events leading to incarceration, absence from work and ultimate termination from employment." *Irving* at 209. Elsewhere in the decision, the Court considered whether absences due to incarceration could be deemed volitional and, therefore, unexcused absences for determining eligibility for unemployment insurance benefits. *Irving* at 201-203. The Court stated:

We recognize that in some instances, conduct leading to incarceration may be so egregious and incarceration interfering with employment so predictable that an employer may establish willful or wanton disregard of its interests. We further recognize that failure to inform the employer of the incarceration, particularly over extended periods of time, may amount to misconduct.

*Irving* at 202. The Court added:

We further find that involuntary incarceration, at least where the charges are dismissed, also falls within the “other reasonable grounds” for absence contemplated under rule 871-24.32(7). Like illness, absences due to incarceration are involuntary.

*Irving* at 203.

In response to *Irving*, the Iowa Legislature enacted Iowa Code section 96.5(11) as part of the 2017 legislative session. The statute took effect on July 2, 2017, and is, for now, the law of the land. The statute moves separations due to incarceration outside the voluntary quit/discharge analysis and creates a completely new category of separation and basis for disqualification 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.

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).

Mr. Rios became separated from the employment due to incarceration in the Wapello County Jail. Mr. Rios' incarceration began on Friday, May 5, 2017. Mr. Rios' absence from the employment began on Monday, May 8, 2017. Mr. Rios did not notify the employer prior to that absence that he would need to be absent due to incarceration. Mr. Rios was without the means to make direct contact with the employer to provide such notice. Mr. Rios asked his girlfriend, who also worked the first shift at JBS, to tell the employer during her shift on May 8 about Mr. Rios' absence from work due to incarceration. The weight of the evidence establishes that Ms. Franco did indeed speak with the employer to let the employer know that Mr. Rios was

absent due to incarceration. The criminal charges against Mr. Rios have not been dismissed. Nor has Mr. Rios been acquitted. Indeed, the criminal prosecution is still pending. Though Mr. Rios was released from custody on June 6, 2017, he has not reported back to the employer to offer his services. Once Mr. Rios was released from custody, he had the ability to make direct contact with the employer. At the time Mr. Rios was released from custody he was unaware of the letter the employer had mailed to him on May 30, 2017. Accordingly, that letter would not provide him with a reasonable basis for not making direct contact with the employer. On the morning of June 6, Mr. Rios' contact with the employer was limited to accessing the automated absence reporting line. Rather than make direct contact with the employer, Mr. Rios elected to send a message through his girlfriend, Ms. Franco, indicating that he would report for work the next morning. The administrative law judge concludes that Mr. Rios' use of Ms. Franco as a messenger on June 6, 2017 did not satisfy the post-incarceration contact required by the statute. The weight of the evidence supports Mr. Rios' assertion that the employer sent a message through Ms. Franco on June 6, directing Mr. Rios not to make further contact unless or until the criminal charges were dismissed or the matter was otherwise resolved in favor of Mr. Rios. However, that return communication from the employer occurred in the absence of Mr. Rios reporting back to the employer as required by the statute.

Based on the evidence and the controlling statute, the administrative law judge concludes that Mr. Rios separated from employment for a reason that disqualifies him for unemployment insurance benefits. Accordingly, Mr. Rios is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Rios must meet all other eligibility requirements. The employer's account shall not be charged.

**DECISION:**

The June 22, 2017, reference 01, decision is modified as follows. The claimant separated from the employment due to incarceration. Attending factors disqualify the claimant for benefits under the controlling statute. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs