

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

BRANDT M ROBINSON

Claimant

and

THE AMERICAN BOTTLING COMPANY

Employer

HEARING NUMBER: 18BUI-05599

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Brandt Robinson (Claimant) worked for The American Bottling Company (Employer) as a full-time maintenance mechanic from July 21, 2015 until he was fired on April 18, 2018. As of January 30, 2018 the Claimant was given a warning that additional attendance infractions would result in his termination from employment. On April 13, 2018 the Claimant was incarcerated and he reported this fact to the Employer prior to his scheduled overtime shift. The Claimant returned to work on April 15, and he also worked on April 16. The Claimant requested permission to use an unpaid day for his April 13 absence. The Employer denied the request as of April 17 and the Claimant was terminated for exceeding his attendance points. But for the Claimant's absence on April 13 he would not have been fired. Had the Claimant not been incarcerated he would not have been absent on April 13, thus but for the Claimant's incarceration on April 13 he would not have been separated from employment. As of the date of hearing the charges related to the incarceration were still pending.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(11) (2018) provides:

96.5 Causes for disqualification.

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

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 has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Code section 96.6(2) provides:

The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11,....

Under these statutory provisions once the Employer proves that the Claimant became separated from employment due to the Claimant's incarceration the Claimant must produce evidence on the whether the four conditions for avoiding incarceration disqualification are met.

The Claimant Became Separated Due To Incarceration

Notably the Code does not say that the Employer must prove that motive for firing the Claimant was that he had done something that caused his incarceration. Indeed the Code does not even say that the Employer must prove it discharged the Claimant. This is not a discharge for misconduct case under Iowa Code §96.5(2). It is a separation due to incarceration case. The use of the passive "became separated...due to" is satisfied by proof that the separation was caused by the incarceration. If the employer proves that "but for" the incarceration the Claimant would not have been separated from employment then the Claimant will be disqualified unless and until the 4 conditions for avoiding

such a disqualification are all satisfied.

It is true that the Claimant had a history of absences without which he would not have been fired. Perhaps some of those absences are excused under the law. But the Code does not say that the separation must be solely the result of incarceration. Several places in Chapter 96 the legislature referred to effects flowing “solely by reason of”, §95.4(5)(b); §96.19(18)(a)(5), “solely due to”, Iowa Code §96.7(2)(a)(2); §96.14(3)(f)(5), “solely for”, Iowa Code §96.9(3); §96.13(1), and “solely because of.” Iowa Code §96.19(16)(g). No such language is used to describe disqualification for a separation “due to” incarceration. The legislature could have specified that the separation must be “solely due to incarceration” before a disqualification may be imposed. It did not do so. We conclude that so long as the incarceration is a “but for” cause of the termination and is a current cause of the termination then section 96.5(11) applies to disqualify.

Although there is no *express* requirement that the incarceration be current, we think there is such a requirement. For example, we think a separation for poor attendance where the final absence is *not* incarceration would usually be analyzed as a discharge for misconduct. In such a case it may be true that “but for” the incarceration the claimant would not have lost work, but since the incarceration was not a current cause of the separation we would not apply §96.5(11) to such a case. See *Milligan v. EAB*, 10-2098, slip op. at 8 (Iowa App. June 15, 2011) (“[T]he purpose of [the current act] rule is to assure that an employer does not save up acts of misconduct and spring them on an employee when an independent desire to terminate arises. For example, an employer may not convert a lay off into a termination for misconduct by relying on past acts.”).

Here there is a slight delay between the discharge and the incarceration. Nevertheless it is clear that the trigger for the discharge was the incarceration, and that there was no ulterior or improper motive for the delay. Moreover no cause of the separation intervened between the incarceration and the decision to discharge.

We do not think a claimant has to be discharged while in jail in order to be disqualified under Iowa Code §96.5(11). The Code does not have any temporal language like “while” or “during” or “being incarcerated.” Instead it uses no tense at all referring to the incarceration, that is, it does not say “due to the individual being incarcerated” or “due to the individual having been incarcerated.” It avoids the verbal phrase altogether by using “due to the individual’s incarceration.” The Code thus encompasses both incarceration ongoing at the time of separation and also incarceration completed prior to the separation. Furthermore the exceptions contemplate that the separation can take place once the claimant returns to offer services but this offer is refused – a process that can only occur *following* the “individual’s release from incarceration.” This approach makes sense in terms of policy since it would encourage *quicker* terminations if employers could only avoid benefits by terminating the worker while in jail.

We thus conclude that the Employer has proven that “the individual became separated from employment due to the individual’s incarceration in a jail...” Iowa Code §96.5(11). The case now turns to the four conditions for the exception.

We find that the Claimant has produced sufficient evidence that he notified the Employer prior to his incarceration, that he returned within two days of his release, and that his offer of services was rejected through his subsequent termination. He has not, however, produced evidence that “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...” Accordingly we disqualify the Claimant not for misconduct but rather for a separation due to incarceration under Iowa Code §96.11.

Going Forward

A disqualification under Iowa Code §96.5(11) can be lifted two ways. First, once the four 96.5(11)(a) conditions are all satisfied, the disqualification should be lifted. Second, if the Claimant earns ten times his weekly benefit amount following the date of separation then the disqualification will be lifted. Iowa Code §96.5(11)(b)

So first, of the four conditions a(1), a(3) and a(4) are satisfied as of today. No evidence has been produced showing that Iowa Code §96.5(11)(a)(2) is satisfied. The evidence at hearing was to the contrary. Nevertheless if the Claimant has proof that prior to the date to apply for rehearing the charges related to the incarceration were not filed, were dismissed, or resulted in a verdict of acquittal then he should provide that proof in an application for rehearing filed with us within 20 days of today's decision. If he does so, and we find such proof adequate, we will lift the disqualification and allow benefits.

If, on the other hand, the charges are dismissed in the future, or the Claimant is acquitted of the charges in the future, then he may at that time contact his local Workforce Office (**not** this Board) and inform them of the dismissal and/or acquittal. The agency may then at that time take appropriate action. Whether this means that the Claimant will be allowed benefits from date of the favorable charge disposition forward, or will be allowed benefits retroactively we do not address at this time. Regardless of whether the requalification is retroactive or only prospective, the process is commenced in the same way: the Claimant must provide proof of the favorable disposition of the criminal charges to Iowa Workforce.

Second, we note that the evidence suggested the Claimant is currently employed. If he earns 10 times his weekly benefit amount in covered wages, and is thereafter unemployed then he will be able to collect benefits once he provides proof of the requalifying earnings. This holds regardless of the outcome of the criminal charges.

As always if the Claimant requalifies, no matter how, he could only collect benefits for weeks during which he is able to work, available for work, seeking work, and a files a weekly claim for benefits. Iowa Code §96.4.

DECISION:

The administrative law judge's decision dated June 15, 2018 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was separated from employment in a manner that disqualifies the Claimant from benefits. Accordingly, he is denied benefits until such time the Claimant has worked in and was paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(11)(b). Claimant may also lift the disqualification by submitting proof to Iowa Workforce that criminal charges relating to the incarceration were not filed or that all criminal charges relating to the incarceration were dismissed, or that the Claimant was found not guilty of all criminal charges relating to the incarceration.

The Board remands this matter to the Iowa Workforce Development Center, Benefits Bureau, for a calculation of the overpayment amount based on this decision.

Kim D. Schmett

RRA/fnv

James M. Strohman