

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

BRANDON J GANNON

Claimant,

and

SALTY'S ON ALKI BEACH

Employer.

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HEARING NUMBER: 12B-UI-11697

**EMPLOYMENT APPEAL BOARD
DECISION**

N O T I C E

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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

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

FINDINGS OF FACT:

The Employment Appeal Board would adopt and incorporate as its own the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.25(16) 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...

The Claimant is deemed to have left is such Claimant becomes incarcerated.

The Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the Employer. Iowa Code §96.6(2) (amended 1998).

The record clearly establishes that the only reason the Claimant lost his employment was due to the fact of his incarceration. A separation resulting from the Claimant's incarceration is deemed a voluntary quit without good cause attributable to the Employer. Even though the Claimant's incarceration arose from an old warrant for his failure to pay a fine, we must nonetheless note that it is by the Claimant's own voluntary actions (in the past) that he "set in motion the chain of events which foreseeably led to his loss of employment..." Sherman Bertram, Inc. v. California Dept. of Employment, 202 Cal. App.2d 733, 21 Cal Rptr. 130 (1962).

In the Sherman Bertram, Inc. case, the Claimant was a paint finisher who was incarcerated because of his involvement in a hit-and-run accident. He lost his employment and subsequently filed for unemployment benefits to which he was denied. The Court of Appeals held that the agency's decision was correct because the Claimant's job loss "was the result of an act of volition on his part and tantamount to a voluntary leaving, and, as the court found, *without good cause*..." See, Sherman Bertram, Inc., supra.

The legislature, purposefully, created legislation, i.e., unemployment compensation, which encompasses the "compulsory setting aside [of] unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." Iowa Code section 96.2 (2005). See, 871 IAC 24.25(16), supra. Consequently, we conclude that the Petitioner's separation is appropriately analyzed to be a voluntary quit without good cause attributable to the Employer.

DECISION:

The administrative law judge's decision dated October 25, 2012 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he is disqualified until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

John A. Peno

Cloyd (Robby) Robinson

CONCURRING OPINION OF MONIQUE F. KUESTER:

I agree with my fellow board members that the administrative law judge's decision should be reversed. However, I would also comment that the only evidence in the record was that of the Claimant. And even though this case went in the Employer's favor this time, the Employer's absence could have well been detrimental and the outcome of this case may have been different. For future reference, it behooves the Employer to follow through with the instructions on the Notice of Hearing so as to present the best case possible before the administrative law judge.

Monique F. Kuester

A portion of the Employer's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

John A. Peno

Monique F. Kuester

Cloyd (Robby) Robinson

AMG/fnv