

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**JACQUES H NGEDO**

Claimant

**APPEAL NO: 18A-UI-06976-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WHIRPOOL CORPORATION**

Employer

**OC: 12/24/17**

**Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quitting  
Iowa Code § 96.5(11) – Incarceration Disqualification

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the June 19, 2018, (reference 01) unemployment insurance decision that denied benefits based upon separation. The claimant was properly notified about the hearing. A telephone hearing was scheduled but not held on July 17, 2018. The hearing was rescheduled and conducted on August 2, 2018 to allow proper notice to the parties of 96.5(11) related to an incarceration disqualification.

On August 2, 2018, the hearing was held jointly with 18A-UI-06977-JC-T. The claimant participated personally and through a Swahili interpreter from CTS Language Link. Mami Ngedo, wife of the claimant, also testified. The employer did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant due to incarceration?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as an assembler and was separated from employment on May 21, 2018 due to being a no-call/no-show from May 4 through May 21, 2018.

The claimant last performed work on May 3, 2018. Continuing work was available. The claimant was taken into custody on May 3, 2018 during his shift by law enforcement, in

response to a domestic dispute that occurred hours prior with his wife. The claimant did not report to work or notify the employer of his absence on May 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, and 18, 2018 which was due to his incarceration. The employer's policy requires an employee to call the employer in advance of a shift if they are unable to perform work. The employer policy also states an employee will be deemed to have separated from employment due to job abandonment after three no-call/no-shows. The claimant was made aware of the employer policies at hire.

The claimant did not notify the employer that he had been incarcerated or have someone notify the employer on her behalf after initially being escorted from the premises on May 3, 2018. Neither the claimant's wife, nor his lawyer contacted the employer. He indicated there was a protective order against him contacting his wife. The claimant used his phone call to call a friend, who did not contact the employer on his behalf.

The claimant offered inconsistent information regarding the charges that stemmed from his May 3, 2018 arrest. He stated at the fact-finding interview that he was charged with harassment and at the hearing indicated he was not charged, only incarcerated from May 3 through 21, 2018. He indicated that in Africa, law enforcement can tell when a woman makes a report and is lying but that in this case, the law enforcement officers who were assigned to his case could not. Mrs. Ngendo denied calling law enforcement and believed it was neighbors. The claimant presented no evidence regarding the disposition of any charges.

Upon release from incarceration, the claimant attempted to "badge in" to work on May 21, 2018 but his access was denied. He attempted to return to work the next day and was informed that he could not work and he would be contacted by the employer. He was subsequently separated due to being a no-call/no-show for the day May 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, and 18, 2018.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5(2)a provides:

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

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 disqualification 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 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).

In the specific context of absenteeism the administrative code provides:

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. 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.

871 IAC 24.32(7); See *Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984) ("rule [2]4.32(7)...accurately states the law").

Iowa Code section 96.5(11) provides:

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*,

350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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.*, 883 N.W.2d 179 (Iowa 2016) (citing *In re Benjamin*, 572 N.Y.S.2d 970, 972 (App. Div. 1991)(per curiam)).

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). Thus, the first step in the analysis is to determine whether the absences were unexcused. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," Higgins at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. The administrative law judge is persuaded the claimant was aware of the employer's policies which required he notify the employer of an absence in advance if he was going to be late or absent.

The claimant did not notify the employer of his absence, or have someone notify the employer of his absences due to incarceration (as required under Iowa Code section 96.5(11)) on May 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, and 18, 2018 when he was arrested in response to a domestic incident involving his wife. The administrative law judge is persuaded the claimant, his wife, his lawyer or the friend he called from jail, could have notified the employer of his extended absence. It is true that the employer could have deduced the claimant was apprehended after law enforcement came to the employer premises on May 3, 2018, but could not be reasonably expected to assume the claimant remained incarcerated as a result for 18 more days. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. (An employer could reasonable infer the claimant have also quit the employment due to job abandonment after eleven consecutive absences.)

Because the claimant did not notify the employer of his final absence himself or through someone else, Iowa Code section 96.5(11) is not applicable (regardless of the disposition of charges). The administrative law judge concludes that the claimant had a minimum of eleven unexcused absences from May 4 through 21, 2018, due to no-call/no-shows

The second step in the analysis is to determine whether the unexcused absences were excessive. 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. *Higgins*, 350 N.W.2d at 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). Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. In this case, the claimant had eleven consecutive unexcused absences. This is clearly excessive.

Based on the evidence presented, the claimant has established he had eleven unexcused absences due to being incarcerated and did not notify the employer of his extended incarceration. The administrative law judge is persuaded the claimant's discharge for excessive

absenteeism/job abandonment constitutes disqualifying job-related misconduct. Benefits are withheld.

**DECISION:**

The June 19, 2018, (reference 01) decision is affirmed. The 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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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs