

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

CESAR GUTIERREZ-AYON
416 W 27TH ST
SOUTH SIOUX CITY NE 68776

GLOBAL FOODS PROCESSING INC
1826 CHICAGO AVE
SIOUX CITY IA 51106

RICHARD STURGEON
PO BOX 3372
SIOUX CITY IA 51102-3372

CESAR GUTIERREZ-AYON
PO BOX 731
SIOUX CITY IA 51102-0731

Appeal Number: 04A-UI-09125-RT
OC: 07-25-04 R: 01
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Cesar Gutierrez-Ayon, filed a timely appeal from an unemployment insurance decision dated August 18, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on September 17, 2004 with the claimant participating. The claimant was represented by Richard Sturgeon. The claimant was assisted by an interpreter, Susana Jacquez. Athena Gutierrez-Ayon, the claimant's wife, was available to testify for the claimant but not called because her testimony would have been repetitive and unnecessary. Dolores Guest, Controller, participated in the hearing for the employer, Global Foods Processing, Inc. Jeff VanVelzen sat in on the hearing for the

employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

The first notice of claim sent to the claimant was returned undelivered. The administrative law judge obtained a bi-lingual staff person who called the claimant at the number shown in Workforce Development records. The staff person informed the claimant of the hearing on September 17, 2004 at 9:00 a.m. and, further, obtained the correct addresses for the claimant. New notices were sent to the claimant on September 9, 2004 and the claimant participated in the hearing. At the time the claimant was called, September 8, 2004 at 4:00 p.m., the claimant's representative had not called in a telephone number and, therefore, the administrative law judge did not call him.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time hand boner from October 10, 2002 until he was separated from his employment on July 16, 2004. On July 15, 2004, the claimant wrote out a written request to leave work early to go to court. It was approved by the employer. The claimant started his shift at 6:30 a.m. and left work at 8:00 a.m. to attend a court hearing at 9:00 a.m. The claimant did not return to work that day or the next day. The reason the claimant did not return to work is that he was incarcerated. The claimant was incarcerated from July 15, 2004 through July 27, 2004. He was incarcerated for fighting on a street, which was unrelated to his employment. The claimant, as an hourly employee, was not entitled to any personal days and had utilized all of his vacation. The claimant informed his supervisor, David Rodman, that he might be gone more than just for the court day and asked to take personal days but the claimant had none. The claimant had also utilized all of his vacation. On July 16, 2004, the claimant's wife called and spoke to the employer's witness, Dolores Guest, Controller. At that time, she informed Ms. Guest that the claimant was to be incarcerated until July 27, 2004. Ms. Guest checked to see if there was any vacation pay accumulated for the claimant and there was none. She returned to the telephone and told the claimant's wife that he had no vacation time or time off and that his absences would be considered a voluntary quit. Ms. Guest also told the claimant's wife that when the claimant was released he could reapply for employment. When the claimant was released from jail on July 27, 2004, the claimant called the employer and asked for his job back but was informed that he had been terminated as a voluntary quit but was informed that he could reapply. The claimant chose not to reapply. The claimant had never expressed any concerns to the employer about his working conditions nor had he ever indicated or announced an intention to quit if any concerns he had were not addressed by the employer. If the claimant had returned to work as expected on July 16, 2004, work would have been available for him. In 2004 the claimant had no other unexcused absences. In 2003 the claimant had four unexcused absences. In 2002 the claimant had one unexcused absence. The claimant had received two oral warnings for his attendance in 2003. The claimant had received no written warnings about attendance.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is ineligible to receive unemployment insurance benefits because he is and was at relevant times not able, available, and earnestly and actively seeking work. He is, for benefit week ending July 31, 2004.

Iowa Code Section 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.

871 IAC 24.25 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.

871 IAC 24.25(16) provides:

- (16) The claimant is deemed to have left if such claimant becomes incarcerated.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when he was incarcerated from July 15, 2004 to July 27, 2004. The claimant maintains that he was discharged when his wife called the employer on July 16, 2004 and was told that he was terminated because he had voluntarily quit due to his incarceration. The administrative law judge concludes that the claimant is deemed to have voluntarily left his employment because he was incarcerated. 871 IAC 24.25(170) clearly states that a claimant is deemed to have left employment if such claimant becomes incarcerated. It is uncontested that the claimant was incarcerated in this case. The claimant was incarcerated for fighting on the street which was unrelated to his employment. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily. The issue then becomes whether the claimant left his employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that he has left his employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The only reason for the claimant's voluntary quit was his incarceration. The claimant conceded that he was incarcerated for fighting in the street and that his incarceration was unrelated to his employment. The claimant also conceded that he was incarcerated from July 16, 2004 to July 27, 2004. There is no evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental or that he was subjected to a substantial change in his contract of hire. There is also no evidence that the claimant ever expressed any concerns to the employer about his working conditions or announced or threatened to quit if his concerns were not addressed. The claimant's incarceration was the claimant's fault and not due to the

employer. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily without good cause attributable to the employer and, as a consequence, he is disqualified to receive unemployment insurance benefits.

Iowa Code Section 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.

871 IAC 24.32(1)a, (7) provide:

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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

(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.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. The claimant was absent from work for a number of days because he was incarcerated. The incarceration as noted above was unrelated to his employment. The administrative law judge would conclude that these absences were not for reasonable cause or personal illness and were excessive unexcused absenteeism. The claimant makes much of the fact that he was informed of his termination on July 16, 2004, the first unexcused day of absence. However, at that time, the employer was informed that the

claimant was going to be incarcerated through July 27, 2004 which would involve a number of additional days of work. Further, the evidence discloses that the claimant had four unexcused absences in 2003 and one in 2002 and also had received two oral warnings in 2003 for his attendance. In Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), the Iowa Supreme Court provided that excessive unexcused absenteeism necessarily requires the consideration of past acts and warnings. Here, the claimant had past acts and warnings prior to the absences related to his incarceration. Accordingly, even if the claimant's separation should be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism, and would still be disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code Section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that there is no evidence that the claimant was not able, available, and earnestly and actively seeking work following his discharge from jail on July 27, 2004. However, the claimant filed for unemployment insurance benefits effective July 25, 2004. The administrative law judge concludes that for benefit week ending July 31, 2004, the claimant was not available for work because he was incarcerated. Thereafter, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and would not be ineligible to receive unemployment insurance benefits beginning with benefit week ending August 7, 2004 and continuing thereafter. However, as noted above, the administrative law judge concludes that the claimant is disqualified to receive unemployment insurance benefits because he left his employment voluntarily without good cause attributable to the employer.

DECISION:

The representative's decision of August 18, 2004, reference 01, is affirmed. The claimant, Cesar Gutierrez-Ayon, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he left his employment without good cause attributable to the employer when he was incarcerated. The claimant was also not available for work for benefit week ending July 31, 2004 because he was incarcerated. Thereafter, the claimant was able, available, and earnestly and actively seeking work but was disqualified to receive unemployment insurance benefits because he voluntarily left his employment.

tjc/b