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

SONDRA S IRVING	:	
	:	**HEARING NUMBER:** 14B-UI-00780
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
THE UNIVERSITY OF IOWA	:	
Employer.		

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: 96.5-1, 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. With the following modification, the members of the Appeal Board find the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Employment Appeal Board would make the following addition to the administrative law judge's reasoning and conclusions of law:

We generally agree with the Administrative Law Judge's decision in this matter and hereby provide this additional analysis.

Quit Analysis

In the usual situation a voluntary quit requires a subjective intent on the part of the employee to terminate the employment. *FDL Foods, Inc. v. Employment Appeal Board*, 460 N.W.2d 885, 887 (Iowa App. 1990), *accord Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992). This is not the usual case. This is a case where the reality of the incarceration and his subjective hopes of keeping the job are at odds. The Iowa Department of Workforce Development [Department] has passed the following rule to deal with such situations:

> 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 Petitioner is disqualified for benefits pursuant to Iowa Code section 96.5…. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (16) The claimant is deemed to have left if such claimant becomes incarcerated.

871 IAC 24.25.

The rule, as applied in this case, means that if a Claimant loses work because the Claimant is in jail then the Claimant is deemed to have left employment without good cause attributable to the Employer.

Although the rule states that quitting, "in general", requires an intention to quit, no general rule can address the myriad situations that arise in the thousands of unemployment compensation claims filed each year. This is why the rule qualifies the introductory statement by describing voluntary quits with "in general". The rule goes on to state that in particular a person who become incarcerated will be deemed to have voluntarily quit.

Of course the rule uses "deemed to have left" not "quit." Yet any concern that "left" is ambiguous and vague is resolved by the context of the rule. The rule, in context, must mean that the Claimant left employment for disqualifying reasons. The rule cannot mean that a Claimant was simply no longer physically present on the job. We need no rule to tell us that a person who is in jail is not on the job. Instead the rule means by being put in jail the Claimant "left" the employment (i.e. quit), not just the job site. Further, the rule is not limited to the reasons for leaving. This subrule does not describe merely the reason for leaving as with some other subrules found in this rule. These other subrules say "The claimant left because of…" lack of child care or going to school or getting married. (Note these rules also say "left" rather than "quit" but are clearly about reasons for *quitting*). These other subrules all assume a leaving has occurred and are addressed to the reason for leaving. Unlike these subrules the incarceration subrule does not say "The claimant left because the claimant was incarcerated" but rather that incarceration is "deemed" to be the same as leaving. Thus it is clear that incarceration is, by rule, quitting .

In addressing the existence of a quit the incarceration subrule is much like several others in the same rule. For example the "no call/no show" rule states "[t]he claimant was absent for three days without giving notice to employer in violation of company rule." 871 IAC 24.25(4). Under this rule even an unreasonably sanguine employee who figures that skipping three consecutive days' work is acceptable would still be considered to have quit by job abandonment and this would be disqualifying unless the worker abandoned the job because of harassment, safety issues, etc. Thus the no call/no show rule is addressed to the existence of a quit. Similarly, the labor strike rule states "[t]he claimant failed to return to work upon the termination of a labor dispute." 871 IAC 24.25(7). Clearly, this rule does not describe why the claimant "failed to return" but instead is specifying that such a failure is considered to be a quit. Also the moving rule states "[t]he claimant moved to a different locality," which is not addressed just to why the claimant left work, but makes clear that moving away is considered a quit. 871 IAC 24.25(2). And subrule 24.25(37) expressly addresses when a "claimant will be considered to have left employment" by specifying it is when a resignation is accepted and by further specifying that this applies to educational workers who refuse

reasonable assurance to work the next fall. This subrule makes no mention of reasons for resigning or not accepting the contract. Thus it is simply not the case that subrules of rule 25.25 are all addressed to reasons for quitting rather than the existence of a quit.

Other rules, which all are tabulated after the same introductory phrase "The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer" are narrative rules addressed to complex situations rather than being limited to either the existence of a quit or the reasons for it. For example, subrule 24.25(38) describes what is to be done about allowing benefits when a claimant gives notice of quitting but is fired in the notice period, and subrule 24.25(4) describes the flip side of this when the employer gives notice of pending layoff and the claimant quits in the interim. Frankly, these two subrules simply do not make sense when tabulated with the introductory phrase. Thus one cannot rely on this tabulation as meaning all subrules of 24.25 must deal with the reasons for a quit rather than any other subject, such as the existence of quit.

Given this, the plain meaning of the subrule is that incarceration is "deemed" to be a voluntary quit, notwithstanding a subjective intent to quit. The word "deem" of course means "to treat (something) as if were really something else or it has qualities it doesn't have." Black's Law Dictionary, p. 425 (7th Ed. 1999). If the subrule were directed only to the reason for quitting there would be no need to use the word "deem." As the law does use "deem," the meaning is clear that notwithstanding the general requirements for quits in the introductory paragraph, an incarceration is a quit. Any other approach would leave the law in a unreasonable position. A claimant is put in jail, misses work and loses his job. The Employer hardly ever knows why a worker gets put in jail, much less do they have any idea what evidence should be presented to show why the claimant was put in jail. Moreover, criminal cases usually move much more slowly than unemployment cases, and requiring the employer to start digging around for witnesses of the claimant's off-duty crime would frequently hamper law enforcement. These factors mean the Employer will very often only know that the claimant was jailed. The result of requiring detailed proof of the reasons for jailing would be to give jailed workers unemployment benefits as a matter of routine. Some of these will be innocent, it is true, but many others will be guilty. A choice has to be made and the rule rationally denies benefits for incarceration resulting in separation.

As the rule is binding, and clearly deems incarceration to be a quit, all that is left is whether the Claimant can show good cause attributable to the Employer. Here such leaving is not "good cause attributable to the employer" and thus the Administrative Law Judge was right to disqualify. 871 IAC 24.25.

Absenteeism Analysis

This is no short stay in jail at issue in this case. The Claimant was in jail for nearly a month. She was thus not at work. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). In the specific context of absenteeism the administrative code provides:

> 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").

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). Second the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds", *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984), or because it was not "properly reported". *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982)(excused absences are those "with appropriate notice"). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused for reasonable grounds. *Higgins v. IDJS*, 350 N.W.2d 187, 191 (Iowa 1984); c.f. 871 IAC 24.23(4).

The Petitioner's legal problems are clearly not excused. The general rules is that "absenteeism arising from matters of purely personal responsibilities" are not excused. *Harlan v. IDJS*, 350 N.W.2d 192, 194 (Iowa 1984)(late bus). Thus car trouble, lack of childcare, late buses, and the like are not reasonable grounds for an absence. In *Harlan* a **late bus** was not excused absence. Similarly, the *Higgins* Court found unexcused "personal problems or predicaments other than sickness or injury. Those include oversleeping, delays caused by **tardy babysitters**, car trouble, and no excuse." *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187, 191 (Iowa 1984)(emphasis added). In *Clark v. IDJS*, 317 N.W.2d 517 (Iowa App. 1982) the claimant was absent for eyeglasses repair, for a job interview, and for a "**family problem**." The Court affirmed a finding of misconduct for absenteeism. *Clark* at 518. The case at bar presents similar problems of personal responsibility. The Claimant went to jail, and apparently could not post bond, and then was held by the Court after preliminary proceedings. We find that the Petitioner was in jail for issues of personal responsibility and thus her absences cannot be unexcused. This is so even if the Petitioner is innocent. After all, the claimant in *Harlan* had a late bus for which she had no responsibility, the Claimant in *Higgins* had a late baby sitter entirely outside of that claimant's control, and so also with car trouble. So too with the inability to make bail. It is unfortunate but no more a reasonable ground for missing work – and here it was a lot of work - than late buses or late babysitters. In the alternative, independent of the effect of rule 871 IAC 24.25(16), we also affirm the disqualification on a misconduct theory.

We have accepted the Claimant's new and additional evidence of the dismissal, but not the letter attached concerning the reasons for dismissal (exhibit 1). The letter was written a month before the hearing, and could have been presented at the hearing. We accepted the other exhibit as that is a matter of public record and official notice of it can be taken without advanced notice. Iowa Code §17A.14(4). We notice, under this same authority, that case 06521 SMSM096683, apparently regarding a 911 call violation on 11/28/13 remains pending with a trial date currently set for 5/9/14. Our above analysis would remain unchanged, however, even if no charges were currently pending.

Finally, for the Claimant's edification we note that the Claimant was disqualified based on separations from two jobs, when the separations occurred only 3 days apart, in the same week. The effect of a disqualification for misconduct is that the Claimant will not receive benefits until earning 10 times her weekly benefits amount, from the date of separation. Obviously the Claimant earned nothing while in jail, and so the requalification would commence, for both discharges, once she got out of jail, at the earliest.

Once the Claimant requalifies, assuming she does, then the disqualification for *both* discharges will be lifted. In other words, where two separations occur in the same week, and where there are no earnings between the two separation dates, the effect is the same whether there is one or two disqualifications imposed. This observation played no role in our decisions today, and is provided only for informational purposes.

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Monique F. Kuester

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Cloyd (Robby) Robinson

RRA/fnv