

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

JOHN A ESCOBAR
Claimant

HY-VEE INC
Employer

**APPEAL 22A-UI-18511-LJ
ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/09/22
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge from Employment
Iowa Code § 96.5(d)(7) and (8) – Discharge due to Incarceration
Iowa Code § 96.5(11) – Disqualification due to Incarceration

STATEMENT OF THE CASE:

On November 1, 2022, claimant John A. Escobar filed an appeal from the October 28, 2022 (reference 01) unemployment insurance decision that denied benefits based on a determination that claimant was discharged on July 18, 2022 for disqualifying misconduct. The parties were properly notified of the hearing. An in-person hearing was held in Creston, Iowa at 9:30 a.m. on Thursday, January 5, 2023. The claimant, John A. Escobar, participated personally. Witness Ana McDonald testified on claimant's behalf. The employer, Hy-Vee Inc., participated through witness Lee Kenyon, Assistant Vice President of Human Resources; and was represented by Brad Sartin, hearing representative. Employer's Exhibits E1 through E7 were received and admitted into the record without objection.

ISSUE:

Was the claimant discharged for disqualifying, job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant John Escobar began working for Hy-Vee Inc. on June 5, 2019. He worked full-time hours for the employer as an order-filler at the Hy-Vee Distribution Center in Chariton. Claimant's employment ended effective July 10, 2022, after the employer terminated the employment relationship due to claimant's incarceration-related absences.

Claimant last reported to work for his scheduled shift on July 10, 2022. On July 11, claimant attended a court hearing related to him driving while having a suspended or revoked license and driving while barred, which violated the conditions of his probation. Claimant was taken into custody at the hearing and was incarcerated for a period of 72 days. Ultimately, claimant pled guilty to a lesser offense.¹

¹ The administrative law judge consulted the Iowa Courts Online Electronic Docket Record Search to clarify and confirm procedural details of the circumstances leading to claimant's incarceration. This information is all publicly available at <https://www.iowacourts.state.ia.us>.

As soon as claimant was taken into custody, his mother Ana McDonald spoke to staff at the courthouse to find out the date of his next court appearance. She then contacted the employer and asked for a supervisor so she could tell them that her son would not be at work because he was in jail. She spoke with a man who asked when her son would be back at work. McDonald told the man that her son's next court appearance was July 19. The following day, she called the employer again and spoke to Kenyon in Human Resources. McDonald again reported that claimant was incarcerated. Kenyon replied that the employer needed to know when he would be returning to work. McDonald called a third time and spoke with a woman who told her the employer would not accept any more calls from her. Claimant himself spoke with shift manager Stephen Wright and reported that he was incarcerated and unable to come to work. Wright said he would make a note of that information. Additionally, several coworkers reported to the employer that claimant was incarcerated and unable to come to work. Claimant's absence on July 11 was not counted as a "no-call/no-show" absence. However, his absence on July 12 was counted as a "no-call/no-show" absence.

Claimant missed his scheduled shifts on July 13, July 14, July 17, and July 18. Each of these absences was caused by his incarceration. The employer does not accept a third-party calling in for an employee unless the employee is hospitalized and unable to call in for themselves. After claimant's absence on July 18, the employer deactivated claimant's badge and sent him a letter notifying him that he was discharged from employment. In the letter, the employer referred to the nature of his criminal charges and his subsequent incarceration as the reason they decided to end his employment.

When claimant was released from incarceration, he promptly contacted the employer to ask about returning to work. He spoke with Tabitha and Mark, both of whom held warehouse lead positions and had some influence in hiring and firing decisions. They told him that the company would no longer employ him.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

The first matter to determine is the reason for the separation. While the employer contends claimant was separated due to his attendance, the claimant maintains he was separated due to incarceration. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how I have resolved the disputed factual issues in this case. I assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using my own common sense and experience. I find McDonald the most credible witness, from her demeanor during the hearing, her lack of motive to be dishonest, and her candor while testifying. Claimant was also a credible witness, truthfully

testifying as to the nature of the incarceration and the underlying charges. He believed these criminal charges may impugn his character, specifically his ability to be honest. I do not, in fact, believe that either the criminal charges or the incarceration as a result of the charges actually did indicate he was untruthful. Claimant appeared forthright and honest. He made direct eye contact during the hearing with the employer witness and me. Claimant notified the employer that he might be incarcerated as a result of the hearing, and he took action – both himself and through advocates on his behalf – to notify the employer promptly after he was taken into custody. All of these factors weighed in his favor.

In contrast, I do not find the employer's stated reason for separating claimant from employment to be credible. The employer provided an undated document that states the claimant quit his employment through four no-call/no-show absences, which conflicts with their attendance policy that states two no-call/no-show absences will result in termination (not quitting). Kenyon testified that the employer does not accept a third-party notifying the employer that an employee will be absent unless the employee is hospitalized and unable to call personally. This requirement is allegedly part of the employer's attendance policy and required per the union contract, but it does not appear in the attendance policy. The employer accepted claimant's mother calling in on his behalf on July 11 to notify them of the incarceration and his related absence from work that day. However, it treated all subsequent days as "no-call/no-show" absences, inconsistently applying its own unwritten policy. Finally, the employer did not provide a copy of the communication it actually sent the claimant to let him know that he no longer had a job. Between the two parties, the employer is the sophisticated business entity who keeps records routinely and would have more reason to retain this letter.

Based on this credibility analysis, I find the employer discharged the claimant because of his incarceration. The separation will be analyzed as an incarceration-related discharge.

Iowa Code section 96.5(2)d(7) 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:

d. For the purposes of this subsection, "*misconduct*" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 even 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. Misconduct by an individual includes but is not limited to all of the following:

(7) Incarceration for an act for which one could reasonably expect to be incarcerated that result in missing work.

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.

In this case, the claimant gave the employer notice that he would be absent from work as soon as the incarceration occurred when McDonald called the employer to report that her son was taken to jail and that he would be absent from work due to incarceration. The claimant did report back to the employer promptly upon release to offer his services, though it remains unclear whether this happened within two work days of his release. The employer rejected claimant's offer of services.

Claimant fails to meet the second element of the four requirements listed above. Specifically, he voluntarily pled guilty and served a 72-day sentence in jail. Because at least one of the requirements of subparagraph a was not met, and the law requires that all four requirements be met, the separation due to incarceration is disqualifying.

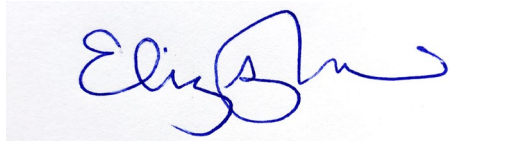
In looking at claimant's discharge under section 96.5(2)d(7), when claimant violated the conditions of his probation, he reasonably could have expected to become incarcerated as a result of that violation. The average individual who has been released on probation certainly understands that a violation of the conditions of probation will result in further significant encounters with the criminal justice system. In claimant's case, these significant interactions with the criminal justice system lasted 72 days and resulted in him missing work, which amounts to disqualifying misconduct.

Benefits must be denied.

DECISION:

The October 28, 2022 (reference 01) unemployment insurance decision is affirmed.

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.



Elizabeth A. Johnson
Administrative Law Judge

January 10, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.