

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PAUL S GRACE
Claimant

HY-VEE INC
Employer

APPEAL 22A-UI-00793-CS-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/03/20
Claimant: Appellant (2)

Iowa Code § 96.4(3) – Able and Available
Iowa Admin. Code r. 871-24.23(26) – Able & Available – Part time, same hours and wages
Iowa Code § 96.1A(37)a & b – Total and Partial Unemployment
Iowa Code § 96.7(2)a – Same Base Period Employment
Iowa Admin. Code r. 871-24.23(10) – Leave of Absence
Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

On December 1, 2021, the claimant/appellant filed an appeal from the November 12, 2020, (reference 02) unemployment insurance decision that denied benefits based on claimant still employed at the same hours and wages. Benefits denied as of May 3, 2020. The parties were properly notified about the hearing. A telephone hearing was held on January 31, 2022. The hearing was held together with appeals 22A-UI-00794-CS-T and 22A-UI-00795-CS-T and combined into one record. Claimant participated through hearing representative, Ann Harmon. Claimant also used a Karen interpreter through CTS Language Link. Saw served as the Karen Interpreter (Identification No. 7078). Mu Paw was present as a witness for the claimant. Employer participated through hearing representative, Jennifer Rice. Brandy Kading was called as the employer's witness. Administrative notice was taken of claimant's unemployment insurance benefits. The parties waived the ten day notice of the issue of whether claimant as on a leave of absence.

ISSUES:

Is claimant's appeal timely?

Is the claimant able to work and available for work?

Is the claimant on an approved leave of absence?

Does the claimant meet the definition of being considered partially unemployed?

Does the claimant meet the definition of being considered totally unemployed?

Does the claimant meet the definition of being temporarily unemployed?

Is claimant employed for the same hours and wages?

Is the employer's account subject to charge?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The unemployment insurance decision was mailed to the appellant's address of record on November 12, 2020. The appellant did not receive the decision. The first notice of disqualification was when he had the overpayment decisions dated September 22, 2021. However, claimant does not read English and does not know someone that reads English. On or about December 1, 2021 claimant contacted EMBARC and they read the overpayment letters to him and notified him that he needed to appeal the decisions.

On January 22, 2019, the claimant began working for the employer full-time in the dish room. Claimant was paid \$13.00 an hour. Claimant filed for benefits on May 3, 2020. At that time claimant was still working full-time for the employer and was earning \$14.50 an hour. Claimant's hours and wages were not reduced.

On April 29, 2020, claimant reported to the employer he was experiencing COVID symptoms. On May 2, 2020, claimant tested positive for COVID. Claimant was experiencing a fever and coughing.

The employer had a policy that prohibited an employee from working if they were experiencing COVID symptoms or if they tested positive for COVID. The employees was required to mandatorily quarantine for fourteen days.

Claimant's illness was not severe and he could have continued working if the employer allowed him to continue working. Claimant returned to work on May 16, 2020.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause

attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The appellant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The claimant filed an appeal within a reasonable period of time after discovering the disqualification. Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant partially, totally, temporarily unemployed. For the reasons that follow, the administrative law judge concludes the claimant is temporarily and totally unemployed effective May 3, 2020 through May 15, 2020.

Iowa Code § 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 § 96.19, subsection 38, paragraph "b", subparagraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Code § 96.1A(37) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Iowa Code § 96.7(2)(a)(a),(b), and (c) provides:

2. Contribution rates based on benefit experience.

a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

(a) However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and § 96.8, subsection 5.

(b) An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

(c) The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under § 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under § 85.33, § 85.34, subsection 1, or § 85A.17, or responsible for paying indemnity insurance benefits.

Iowa Code § 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 § 96.19, subsection 38, paragraph "b", subparagraph 1, or temporarily unemployed as defined in § 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 § 96.5,

subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Admin. Code 871. 24.22(2) provides:

Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

h. Available for part of week. Each case must be decided on its own merits. Generally, if the individual is available for the major portion of the workweek, the individual is considered to be available for work.

j. Leave of absence. A leave of ***absence negotiated with the consent of both parties***, employer and employee, ***is deemed a period of voluntary unemployment for the employee-individual***, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

(Emphasis added).

Here, claimant was put on a mandatory leave of absence beginning May 3, 2020, through May 15, 2020. Claimant did not request a leave of absence during these weeks. However, due to the COVID pandemic and the risk of exposing coworkers to COVID-19, the employer required claimant to remain away from work. Because it was the employer's choice that claimant was removed from work and not claimant's choice, the administrative law judge finds that claimant was not on a voluntary leave of absence. Claimant was otherwise able to and available for work. Since claimant was on a mandatory leave of absence he was temporarily and totally unemployed. Since the claimant was not receiving the same employment from the employer while he was on the leave of absence the employer's account shall be charged. Benefits are allowed, provided he is otherwise eligible.

DECISION:

The claimant's appeal is timely.

The November 12, 2020, (reference 02) unemployment insurance decision is reversed. The claimant is temporarily and totally unemployed and benefits are allowed effective May 3, 2020 through week ending May 16, 2020, provided he is otherwise eligible. The employer's account is subject to charge.

A handwritten signature in black ink that reads "Carly Smith". The signature is written in a cursive, flowing style. Below the signature, there is a small, faint, illegible stamp or mark.

Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

February 18, 2022
Decision Dated and Mailed

cs/mh