

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

DEBRA L MORGAN  
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Appeal Number: 06A-UI-04882-JTT  
OC: 04/02/06 R: 04  
Claimant: Appellant (2)

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Claimant Debra Morgan filed a timely appeal from the April 28, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 23, 2006. Ms. Morgan participated personally and was represented by John Graupmann of H.E.L.P Legal Assistance. Director of Nursing Robbie Hinz represented the employer. At the request of the claimant, the administrative law judge took official notice of the Agency administrative file.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On October 20, 2003, Debra Morgan commenced her employment at the Lutheran Home for the Aged as a full-time certified medical aide. Ms. Morgan continued in her full-time position until February 27, 2005, when the employer, pursuant to a collective bargaining agreement, changed

Ms. Morgan's position to a p.r.n. or on-call position. On February 27, Director of Nursing Kathy Wiesengate told Ms. Morgan that she had the option of going to P.R.N. status or separating from the employment. Ms. Morgan elected to continue in the employment on P.R.N. status. Thereafter, Ms. Morgan was able to regularly pick up hours on the schedule when other employees needed time off or when the Director of Nursing solicited employees to cover open shifts. Robbie Hinz became the new Director of Nursing in April 2005. Between June 2005 and March 2006, the number of hours Ms. Morgan worked during a given two-week period varied from zero to 88.

At the beginning of April 2006, there was a marked decrease in the number of hours available to Ms. Morgan. For the period of April 2-16, Ms. Morgan was able to pick up only eight hours. For the periods of April 16-29, April 30-May 15, and the current two-week schedule, Ms. Morgan has not been scheduled for or able to pick up any hours. Ms. Morgan established a claim for benefits that was effective April 2, 2006. Though Ms. Morgan worked third-shift at Lutheran Home for the Aged, Ms. Morgan has been available for full-time employment on any shift since establishing her claim for benefits.

During the first quarter of 2005, which was the first quarter of the applicable base period, Ms. Morgan briefly worked on a full-time basis for Silvercrest Retirement Home and grossed \$2,259.95 from that employment. Ms. Morgan's only other base period employment was with Lutheran Home for the Aged.

Workforce Development records generated by Ms. Morgan's weekly automated telephone report to the Agency indicate that Ms. Morgan has made two in-person employer contacts per week since establishing her claim for benefits.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Morgan has been able and available for employment since establishing her claim for benefits. It does.

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".

871 IAC 24.22(2)i(3) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) 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....

i. On-call workers.

(3) An individual whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work, such as a banquet worker, railway worker, substitute school teacher or any other individual whose work is solely on-call work during the base period, is not considered an unemployed individual within the meaning of Iowa Code section 96.19(38)"a" and "b." An individual who is willing to accept only on-call work is not considered to be available for work.

Another portion of this same Code section dealing with timeliness of an appeal from a representative's decision states that such an appeal must be filed within ten days after notification of that decision was mailed. In addressing an issue of timeliness of an appeal under that portion of this Code section, the Iowa Supreme Court held that this statute prescribing the time for notice of appeal clearly limits the time to do so, and that compliance with the appeal notice provision is mandatory and jurisdictional. Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979).

The administrative law judge considers the reasoning and holding of that court in that decision to be controlling on this portion of that same Iowa Code section which deals with a time limit in which to file a protest after notification of the filing of the claim has been mailed. The employer has not shown any good cause for not complying with the jurisdictional time limit. Therefore, the administrative law judge is without jurisdiction to entertain any appeal regarding the separation from employment.

The evidence in the record indicates that Ms. Morgan is not merely holding herself available for Lutheran Home for the Aged and/or failing to accept other work and/or declining other work. See 871 IAC 24.22(2)(i)(1). The evidence indicates that Ms. Morgan's base period wage credits do not consist *exclusively* of wage credits from performing on-call work. Ms. Morgan earned wage credits for full-time work with Lutheran Home for the Aged and Silvercrest during the first quarter of 2005. Nor does the evidence indicate that Ms. Morgan is only willing to accept on-call employment. See 871 IAC 24.22(2)(i)(3). Ms. Morgan would prefer permanent full-time employment. The evidence in the record indicates that at the beginning of April 2006 Ms. Morgan experienced a significant decrease in the number of hours available to her and is currently receiving zero hours employment from Lutheran Home for the Aged. See 871 IAC 24.23(26).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Morgan has been available for employment since establishing her claim for benefits and is eligible for benefits based on a theory of partial unemployment, provided she is otherwise eligible.

#### DECISION:

The Agency representative's decision dated April 28, 2006, reference 01, is reversed. The claimant has been available for employment since establishing her claim for benefits and is

eligible for benefits based on a theory of partial unemployment, provided she is otherwise eligible.

jt/kkf