

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

RANDY H TUCKER  
420 BENJAMIN BLVD  
PLEASANT HILL IA 50327

BALL ELECTRIC INC  
505 NEW YORK AVE  
DES MOINES IA 50313

Appeal Number: 04A-UI-03040-RT  
OC: 02/15/04 R: 02  
Claimant: Appellant (3)

**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, 4<sup>th</sup> 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 - Required Findings (Able and Available for Work)  
Section 96.5-2-a – Discharge for Misconduct  
Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Randy H. Tucker, filed a timely appeal from an unemployment insurance decision dated March 11, 2004, reference 02, denying unemployment insurance benefits to him as of February 15, 2004 because he was not available for work. After due notice was issued, a telephone hearing was held on April 8, 2004, with the claimant participating. Stephen Ball, President, participated in the hearing for the employer, Ball Electric, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. This appeal was consolidated with Appeal No. 04A-UI-03898-RT concerning an overpayment, for the purposes of the hearing with the consent of the parties. No notice was sent for the overpayment appeal, but the parties

permitted the administrative law judge to take evidence on and decide that issue and waived further notice of that issue and consented that that appeal be consolidated with this appeal. Although not set out on the notice of appeal for this appeal, the parties permitted the administrative law judge to take evidence on and decide, if necessary the issue as to whether the claimant is ineligible to receive unemployment insurance benefits because he is and was at relevant times hereto not able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3. The parties waived further notice of that issue.

#### 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 is a union member of Union Local 347. The claimant was employed by the employer for approximately three to three and one-half weeks in January and/or February 2003 on a short call which means that the claimant is assigned for a particular work assignment and when it is completed the job is over. The claimant successfully completed that job and has not worked for the employer since. In April 2003, the claimant received his real estate license and began working full time as a real estate agent for ReMax and is continuing to work for ReMax full time. Although much of claimant's work is at night, he does do some day work. The claimant has turned down additional short calls from the union since becoming employed with ReMax. The claimant's employment with ReMax is self-employment as an independent contractor. The claimant has placed no restrictions on his ability to work and is seeking work by calling the union every week, but as noted above has refused some short call assignments. The claimant's wage credits were earned working during the day from 7:00 a.m. to 3:30 p.m. Monday through Friday. Since being employed with the employer herein, the claimant also worked for Common Wealth Electric for two short calls in November and December 2003 working the same hours and days.

#### 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 not.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because he is and was not able, available, and earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits beginning with benefit week ending May 3, 2003 and continuing thereafter.

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.

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 provides:

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).

The administrative law judge concludes that the claimant neither voluntarily left his employment with the employer herein nor was he discharged, but was rather laid off for a lack of work when he had completed the assignment or job on the short call in January or February 2003. The witnesses seem to both agree on this. This separation is not disqualifying since it is in the nature of a lay off for lack of work. The claimant has not worked for the employer since. Accordingly, the administrative law judge concludes that the claimant's separation from the employer herein was not disqualifying and, as a consequence, he is not disqualified to receive unemployment insurance benefits if he is otherwise eligible.

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 24.23(7) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(7) Where an individual devotes time and effort to becoming self-employed.

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). 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 is either partially unemployed or temporarily unemployed so as to excuse him from the provisions in Iowa Code Section 96.4-3 requiring the claimant to be able, available, and earnestly and actively seeking work. The administrative law judge further concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he is available for work. The claimant testified that beginning in April 2003 he got his real estate license and has been working full time for ReMax since that time. The claimant testified that he works predominantly evenings and weekends, but concedes that he does some day work. The claimant testified that this did not unreasonably limit his availability for work. The administrative law judge disagrees. A full time position selling real estate would give the claimant precious little time to do other work. The claimant did work on two "short calls" in November and December 2003, but there is evidence also that he turned down several other "short calls." Devoting time and effort to becoming self-employed is a reason for a claimant being disqualified for being unavailable for work. The claimant cannot conduct a full-time self-employed position and at the same time collect full unemployment insurance benefits. Accordingly, the administrative law judge concludes that the claimant is not available for work from and after benefit week ending May 3, 2003. Unemployment insurance benefits are denied to the claimant from benefit week ending May 3, 2003 and continuing until he demonstrates that he is able, available, and earnestly and actively seeking work and is otherwise eligible to receive unemployment insurance benefits.

#### DECISION:

The representative's decision dated March 11, 2004, reference 02, is modified. The claimant, Randy H. Tucker, is not entitled to receive unemployment insurance benefits from and after benefit week ending May 3, 2003 and continuing, until or unless he demonstrates that he is able, available, and earnestly and actively seeking work and is otherwise eligible to receive unemployment insurance benefits.

kjf/b