

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS

Division of Administrative Hearings
Lucas State Office Building
Des Moines, Iowa 50319

DECISION OF THE ADMINISTRATIVE LAW JUDGE

**BRENDA J HEATH
6002 W BENNINGTON ROAD
CEDAR FALLS IA 50613-9719**

**LOCKSPERTS, INC.
1302 JEFFERSON STREET
WATERLOO, IA 50702**

**INVESTIGATION AND RECOVERY
IOWA WORKFORCE DEVELOPMENT
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DAN ANDERSON, IWD

**Appeal Number: 07-IWDUI-003
OC: 02/19/06
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 the department. 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.

(Administrative Law Judge)

MAY 10, 2007

(Decision Dated & Mailed)

Section 96.4-3 - Able and Available
871 IAC 24.22 – Benefit Eligibility
871 IAC 24.23(23) – Availability/Other Work

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of the Iowa Workforce Development Department (Department) dated December 20, 2006, reference 04, which held the claimant ineligible for benefits effective March 12, 2006, upon a finding that the claimant did not meet the availability requirements of the law. That same decision imposed a benefit overpayment as the result of the claimant's failure to meet the imposed availability requirements. The claimant filed a timely appeal of that notice of adverse action.

A hearing on the claimant's appeal was held on May 4, 2007, by telephone conference call. The May 4, 2007 hearing was held pursuant to an Order of Remand issued by the Employment Appeal Board dated March 16, 2007. That Order of Remand set aside a previously issued Administrative Law Judge's Proposed Decision addressing the claimant's appeal and mandated that a new hearing be held in this case.

Due notices for the May 4, 2006 hearing were issued. The claimant participated in the hearing and was represented by Attorney Jay Roberts. The employer, Locksperts, Inc., participated and was represented by Attorney David Roth. Iowa Workforce Development, Investigation and Recovery did not participate in the hearing.

Prior to the hearing, the employer submitted proposed exhibits 1-8. During the hearing, the employer withdrew proposed exhibits 1, 2 and 7. Accordingly, those documents were not admitted into evidence. The employer's exhibits 3, 5, 6, and 8 were admitted into the record over the claimant's objection. The employer's exhibit 4 was offered over claimant's objection and the claimant's objection was sustained. The employer made an offer of proof regarding exhibit 4.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, finds that: The claimant filed a claim for unemployment insurance benefits effective February 19, 2006. The claimant's base period employer, Lockspert, Inc., protested the claim, however, the Department issued a favorable decision on the separation from employment issue and unemployment compensation benefits were awarded to the claimant.

In September 2006, the Department received a complaint alleging that the claimant was working in her own business while receiving unemployment benefits. The complaint was assigned to the Department's Investigations and Recovery Unit and was assigned to Investigator Sally Oordt. Ms. Oordt met with and interviewed the claimant. As part of her investigation, Ms. Oordt also reviewed a local business advertisement concerning a new business in which the claimant was involved.

The claimant's job duties at Lockspert, Inc. included lock smithing and some bookkeeping. Locksperts, Inc. also previously employed the claimant's husband and his job was that of a locksmith. The owners of Lockspert, Inc. were related to the claimant and her husband and both had been employed there for several years. Immediately following a failed attempt to acquire Lockspert, Inc., the claimant separated from employment with Locksperts, Inc. and filled her claim for unemployment compensation.¹

At some point between February 19, 2006 and April 10, 2006, the claimant and her husband discussed opening their own locksmith business. They also discussed this new business idea with a Department representative in the Department's Waverly, Iowa office. The person they spoke to was named Bob. Bob informed the claimant and her husband that it was permissible to start their own business while receiving unemployment compensation benefits. In addition, Bob instructed the claimant and her husband that they must complete their job searches and remain available for employment.

The claimant and her husband moved forward with their idea to open their own business. They acquired a building and opened "B & B Lock and Key" on April 10, 2006. On April 17, 2006, the claimant and her husband hired a full time employee for B & B Lock and Key. This employee, to

¹ The claimant and her husband submitted a sealed bid to purchase Locksperts, Inc. However, the claimant's bid was not the successful bid. Other family members submitted the successful bid for Locksperts, Inc.

whom the claimant is not related, was also formerly employed at Locksperts, Inc. On or about April 18, 2006, Lockspert, Inc. obtained a District Court injunction that enjoined B & B Lock and Key from operating. B & B remained closed until the injunction was lifted on or about May 23, 2006.² During the period of the injunction, the claimant continued to work on inventory and she continued to employ the employee hired on April 18, 2006. B & B Lock and Key was not open to the public during the period of the injunction.

During the claimant's benefit period, business at B & B Lock and Key was slow. Although the business did hire another locksmith one week after it opened, it did so because the claimant's husband obtained new employment at Target. While the claimant worked on inventory, lock smithing, and bookkeeping at B & B, the claimant was never paid wages from B & B during her unemployment compensation benefit claim period. The claimant was not paid wages at B & B Lock and Key because the business lacked sufficient revenue to pay her wages.

At all times material, the claimant looked for full-time work and timely completed her job searches. Investigator Oordt found no issue with her work search effort. The claimant testified that she was willing to accept full-time employment had it been offered to her. There is no evidence in the record that the claimant refused suitable employment. Similarly, although the claimant estimated that she worked on average of 40 hours per week at B & B Lock and Key, there is no evidence in the record that this activity would have resulted in a refusal of suitable employment. The claimant informed at least one prospective employer with whom she was seeking full time employment that she was involved in the start up of a new business. There is no evidence in the record suggesting that the claimant's arrangement with B & B Lock and Key prohibited other employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is able and available for work.

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(96) 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

² The evidence of record establishes that the opening of B & B Lock and Key resulted in litigation between the claimant and her husband, and Locksperts, Inc. There are allegations that the claimant violated a non-compete covenant and that she wrote unauthorized checks to herself and her husband from Locksperts, Inc. accounts before she left employment with Locksperts, Inc. There is little doubt that the parties to that litigation are embroiled in a very acrimonious dispute. However, the pending civil litigation concerns legal claims that are different from the narrow issues presented in this case.

individual is able to work, available for work, and earnestly and actively seeking work.

(1) *Able to work.* An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

(2) *Available for work.* The availability requirement is satisfied when the 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.

871 IAC 24.22(2)(I) *Available for work.* To be considered available for work, the individual must at all times be in a position to accept suitable employment during periods when the work is normally performed.

871 IAC 24.23(96) Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

24.23(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

The administrative law judge concludes that the claimant has remained able and available for full-time employment commensurate with the work she performed for her base period employer, such that no availability disqualification is imposed pursuant to the law sections cited above. There is no issue regarding the claimant's work search effort, and there is no evidence that she refused any offer of employment.

The fact that the claimant started a new business during her benefit claim period is not a per se basis on which to disqualify the claimant. Similarly, the fact that she did not earn wages from B & B during the claim period does not resolve the able and available question. Time and sweat equity put into starting a new business are not disqualifying unless it can be shown that the claimant has effectively removed herself from the labor market. This question cannot be resolved by a single litmus test but rather is resolved on the facts of the particular circumstances presented.

The claimant engaged in a job search that satisfied the Department's requirements; she did not refuse suitable employment; she would have accepted suitable employment had it been offered to her; she sought and relied upon the advice of a Department representative before she started her new business; and the activities of her new enterprise were not sufficiently time consuming so as to take her out of the job market. That the activity at B & B Lock and Key was not sufficient to remove the claimant from the job market is best evidenced by the fact that her husband accepted other employment while keeping his hand in the start up enterprise. The claimant could easily have completed inventory and bookkeeping tasks for the new enterprise on "off hours" and weekends while still engaging in other, full time work.

Although the employer has called the claimant's credibility into question, there is no evidence in the record to dispute her statements made to the Department's representatives regarding her job searches. The claimant's statement to Ms, Oordt is consistent with her testimony that she was available for suitable employment and that she would accept employment if it were offered to her. Her additional statements concerning prospective employment benefits and hours of work do not equate to a refusal of suitable employment since no offer of employment was made. On this record, it cannot be said that the claimant effectively removed herself from the labor market so as to be

unavailable for suitable employment.

DECISION:

The decision of the representative dated December 20, 2006, reference 04, 2006, is **REVERSED**. The claimant was able and available for work, and no disqualification is imposed. The claimant is entitled to receive benefits, provided she is otherwise eligible.