

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

ANTHONY J MCDONOUGH
Claimant

APPEAL NO. 07A-UI-02207-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FORREST & ASSOCIATE
Employer

OC: 01/21/07 R: 02
Claimant: Appellant (2)

Section 96.4(3) – Able & Available
871 IAC 24.1(113)(a) – Layoff

STATEMENT OF THE CASE:

Anthony McDonough filed a timely appeal from the February 28, 2007, reference 01, decision that denied benefits effective January 21, 2007 and that concluded he had not been available for work. After due notice was issued, a hearing was held on March 22, 2007. Mr. McDonough participated. Ron Shannon, Project Coordinator, represented the employer. The administrative law judge received Employer's Exhibit One and Claimant's Exhibits A and B into evidence. The hearing in this matter was consolidated with the hearing in appeal number 07A-UI-02208-JTT.

ISSUE:

Whether the claimant has been able to work and available for work since establishing his/her claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On May 1, 1995, Anthony McDonough commenced his employment with Forrest & Associate as a full-time bricklayer. Mr. McDonough last performed services for the employer on January 15, 2007. Mr. McDonough had been assigned to work on a project at Grandview College. Forrest & Associate's foreman on that project was Kelly Parisho. On January 16, the Grandview College jobsite was shut down because the general contractor had failed to obtain the appropriate building permit. Mr. Parisho told the bricklayers, including Mr. McDonough, that he would contact them when the general contractor obtained the appropriate permit. On January 17, 18, and 19, the employer did not contact Mr. McDonough to return to work and Mr. McDonough did not contact the employer with regard to returning to work. On Friday, January 19, Mr. McDonough went to the employer's office to collect his paycheck. Attached to

Mr. McDonough's paycheck was a post-it note with a message written by Ron Shannon, Project Coordinator. The message stated the following:

AJ
Everyone worked when they could this week
You don't bother to call or show up
You need to make up your mind whether you want a job or not
Work has been available so don't bother to sign up for unemployment

Mr. McDonough had not in fact applied for unemployment insurance benefits.

On Monday, January 22, Mr. McDonough reported to the Grandview College jobsite at 7:30 a.m. Mr. Parisho directed Mr. McDonough to report to Forrest & Associate's office to speak with Mr. Shannon. Mr. McDonough reported to the office. Mr. Shannon reprimanded Mr. McDonough for failing to appear for work and told Mr. McDonough that the other five employees assigned to the Grandview College jobsite had worked five hours on January 18 and 19. Mr. McDonough told Mr. Shannon that no one had contacted him about returning to the jobsite. Mr. Shannon told Mr. McDonough to go home and to call him in the morning.

On January 23, Mr. McDonough telephoned Mr. Shannon as directed. Mr. Shannon told Mr. McDonough there was no work because it was too cold. Mortar would not work properly if the outside temperature was too cold. On some jobsites, it was possible to use mechanical means to maintain an appropriate temperature to allow construction to proceed. On January 24, Mr. McDonough telephoned Mr. Shannon and received the same information that there was no work because it was too cold. On January 25, Mr. McDonough contacted Mr. Shannon for work. Mr. Shannon told Mr. McDonough that the general contractor needed bricklayers, but that the general laborers had not yet erected and stocked the necessary scaffolding.

On January 25, Mr. McDonough applied for unemployment insurance benefits. The effective date of the claim was January 21. On January 26, Mr. McDonough did not contact the employer for work and was not contacted by the employer to return to work.

On Monday, January 29, Mr. McDonough contacted Mr. Shannon for work. Mr. Shannon told Mr. McDonough that no work was available for him. Mr. Shannon told Mr. McDonough that no foreman wanted him. Mr. Shannon criticized Mr. McDonough for filing an unemployment insurance claim and asserted that it was wrong for Mr. McDonough to file a claim because he did not come to work every day. On January 30, Mr. McDonough did not contact the employer for work. On January 31, Mr. McDonough contacted Mr. Shannon for work. Mr. Shannon told Mr. McDonough it was too cold.

Mr. Shannon and Mr. McDonough have continued in the same holding pattern since Mr. McDonough established his claim for benefits. When Mr. McDonough contacts Mr. Shannon for work, Mr. Shannon tells Mr. McDonough there is no work available for him and to continue to check in. Mr. McDonough continues to check in on a daily basis, except on those days when he concludes on his own that it is too cold to perform outdoor masonry work. Mr. Shannon continues to tell Mr. McDonough that when he is allowed to return to work, he must report every day. After Mr. McDonough participated in the fact-finding interview and was denied benefits based on his alleged unavailability for work, Mr. McDonough began to tape record his calls to Mr. Shannon. These recorded calls confirm the employer's consistent message from Mr. Shannon that there is no work available for the day or week, but that he must continue to check in.

REASONING AND CONCLUSIONS OF LAW:

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".

A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations. 871 IAC 24.1(113)(a).

The greater weight of the evidence in the record establishes that the employer laid off Mr. McDonough effective January 16, 2007. See 871 IAC 24.1(113)(a) The employer has yet to recall Mr. McDonough, but continues to make statements to Mr. McDonough that work will be forthcoming. The greater weight of the evidence establishes that Mr. McDonough has maintained appropriate contact with the employer during the layoff and has made himself available to return to work for this employer. The greater weight of the evidence establishes that Mr. McDonough is temporarily unemployed from his regular full-time employment at Forrest & Associate and, therefore, is not subject to the broader availability requirements set forth in Iowa Code section 96.4(3). In the event that a final separation from the employment occurs, Mr. McDonough would then be subject to those broader availability requirements, as well as the other requirements set forth in Iowa Code section 96.4(3).

The administrative law judge finds the employer's approach to Mr. McDonough's need for employment, and the employer's approach to the unemployment insurance proceedings, disturbing. The evidence indicates that Mr. Shannon has engaged in a heavy-handed cat-and-mouse game with Mr. McDonough since January 22, 2007. Mr. Shannon announced at the hearing that he had elected not to review the proposed exhibits submitted by Mr. McDonough, even though the Agency provided the exhibits to the employer 11 days before the hearing. The administrative law judge has seldom encountered such a dismissive approach to unemployment insurance proceedings.

DECISION:

The claims representative's February 28, 2007, reference 01, is reversed. The claimant is temporarily unemployed pursuant to a layoff and has been available to return to the employment

since establishing his claim for benefits. Because the claimant is temporarily unemployed from his regular full-time employment, the claimant is not subject to the broader availability provisions set forth in Iowa Code section 96.4(3). The claimant is eligible for benefits effective January 21, 2007, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs