

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MICHAEL E HENSLEY
Claimant

APPEAL NO. 20A-UI-09219-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OAK VIEW FARMS LLC
Employer

OC: 04/19/20
Claimant: Appellant (2)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.19(38) – Temporary and Partial Unemployment

STATEMENT OF THE CASE:

Michael Hensley filed a timely appeal from the July 27, 2020, reference 01, decision that denied benefits for the period beginning April 19, 2020, based on the deputy's conclusion that Mr. Hensley requested and was granted a leave of absence, was voluntarily unemployed and was unavailable for work. After due notice was issued, a hearing was held on September 18, 2020. Mr. Hensley participated. Cindy Butikofer represented the employer and presented additional testimony through Mark Kipp. Exhibits 1 through 4, A, D and E were received into evidence. The administrative law judge took official notice of the following Agency administrative records: KCCO, DBRO, KPYX and WAGE-A.

ISSUES:

Whether the claimant was able to work and available for work during the period of April 19, 2020 through May 23, 2020.

Whether the claimant was partially and/or temporarily unemployed during the period of April 19, 2020 through May 23, 2020.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Since 2017, Michael Hensley has been employed by Oak View Farms, L.L.C. on a full-time basis. Mr. Hensley began the employment as a feed mill laborer. During the most recent two years of the employment, Mr. Hensley has been the housing coordinator for about 100 H-2A temporary agriculture employees housed in 10 locations at a density of 12 men per three-bedroom unit. The H-2A workers operated trucks for the employer during the overnight hours. Mr. Hensley's regular duties include repairing appliances, air conditioning, carpentry, plumbing, electrical, and weekly inspections of housing units pursuant to USDOL standards. Mr. Hensley's regular duties bring him into close proximity to off-duty workers. Mr. Hensley's regular work hours are 7:00 a.m. to 5:00 p.m., Monday through Thursday, and 7:00 a.m. to 4:00 p.m. on Friday. His wage is \$27.50 per hour. Mark Kipp is Mr. Hensley's supervisor.

Mr. Hensley is 63 years old and has a medical history that includes bladder and kidney cancer. In March 2020, when the COVID-19 pandemic arrived in Iowa, Mr. Hensley became concerned that his work conditions placed him at risk of being exposed to and contracting the virus. The employer had at that point just begun a discussion about social distancing. On Friday, March 20, 2020, Mr. Hensley sent the following email message to Mr. Kipp:

Mark, can y'all get me a N95 mask which I will use in conjunction with gloves. When working in the H2A Housing, your to [sic] ability to "social distance" yourself is a challenge. (muchas personnas). Thanks for your help.

On Monday, March 23, 2020, Mr. Kipp replied: "Will look into this and see what we can do."

On April 2, 2020, Mr. Kipp and Justin Haught, Maintenance Supervisor, contacted Mr. Hensley and told him that they were trying to identify employees who were at high risk. Mr. Haught was aware of Mr. Hensley's health history. They asked Mr. Hensley to get a note from his doctor regarding whether it was suitable for Mr. Hensley to continue to work in the particular environment. Mr. Hensley had only wanted a mask to wear while performing his duties, but complied with the request for the medical note. On April 3, 2020, Mr. Hensley provided the employer with a letter from his doctor. The note stated as follows:

I am Mr. Hensley's personal physician. I know him and his medical history very well.

It has come to my attention that Mr. Hensley is working in a high risk environment which includes locations with as many as 8 individuals living in the same travel trailer. As he provides maintenance in these confined spaces with so many individuals, he is at high risk of contracting contagious infectious diseases.

Particularly in light of COVID-19, given his history of malignancy and multiple medical conditions he should not be working in these conditions. Contracting COVID-19 would likely be catastrophic for him.

It is my professional medical opinion that he should be reassigned to a different work environment with less travel and extreme observance of social distancing.

If this is not possible, it is my strong medical recommendation that the company allow Mr. Hensley to observe strict adherence to social distancing by providing a schedule for the occupants of such living situations to evacuate the trailers for 4 hours daily during which time company maintenance employees such as Mr. Hensley can provide maintenance to such spaces after the 3 hour known aerosolization risk has expired. He should still observe extreme contact precautions with standard mask, gloves and protective suit at that time.

After Mr. Hensley provided the employer the note from his doctor, Mr. Kipp and Cindy Butikofer, Human Resources Director, told Mr. Hensley that the matter required additional discussion. Mr. Hensley was interested in pursuing workplace accommodations, such as those referenced in the medical note, and did not want to go off work. Mr. Hensley requested to work at night when the H2A drivers would be gone, offered to return to working in the mill, and offered to work in the office. The employer declined to pursue the accommodations set forth in the medical note and those suggested by Mr. Hensley. Instead, the employer provided Mr. Hensley with an "Emergency Paid Sick Leave Request" form and told him that completing the form would lead to him getting two weeks of federal pandemic benefits. The document header includes the following: "Employees requesting Emergency Paid Sick Leave (EPSL) pursuant to ... (FFCRA)

must complete his form. You must provide as much advance notice as is reasonably possible. Upon completion of this form, submit it to Human Resources.” The form included a section that began with the following header: “Reason for Leave (check all applicable) I am unable to work (or telework) for the following reasons:” Mr. Hensley did not think any of the stock reasons set forth on the document pertained to him, but felt compelled to check a box. Mr. Hensley checked the box next to “I have been advised by a health care professional to self-quarantine due to concerns related to COVID-19. The form indicated the applicable leave period as April 8, 2020 through April 21 2020. These dates were determined by the two-week maximum duration for Emergency Paid Sick Leave (EPSL). Mr. Hensley signed and dated the form on the April 7, 2020. Upon the employer’s initiative, Mr. Hensley commenced a period of time off effective April 8, 2020. Mr. Hensley checked in weekly to see whether the employer would allow him to return to the employment, but the employer deferred his return to May 27, 2020.

On April 19, 2020, the employer paid Mr. Hensley the equivalent of 80 hours, two weeks’, 10 days’ wages for Emergency Paid Sick Leave (EPSL) under FFCRA. This amounted to \$220.00 per work day for each of the days between April 8, 2020 and April 21, 2020. Thus, \$660.00 of the pay was for the week that ended April 11, \$1,100.00 was for the week that ended April 18, 2020, and the remaining \$440.00 was for the week that ended April 25, 2020. Mr. Hensley’s time away from work was otherwise unpaid time off.

On May 7 or 8, Ms. Butikofer spoke with Mr. Hensley regarding Governor Reynolds’ relaxing of some COVID-19 restrictions and about the employer’s plan to start having employees return to work, if it was reasonable to do so based on the particular circumstances of the employee. On May 10, 2020, Ms. Butikofer notified Mr. Hensley that he would need to provide a note from his doctor releasing him to return to work before the employer would allow him to return to work. On May 11, 2020, Mr. Hensley gave the employer a note from his doctor that released Mr. Hensley to work without restrictions other than wearing personal protective gear, including an N95 respirator, when appropriate. At that time, Ms. Butikofer told Mr. Hensley that the employer would not be ready for him to return until May 27, 2020, the day after Memorial Day.

Mr. Hensley established an original claim for benefits that was effective April 19, 2020. Iowa Workforce Development set his weekly benefit amount at \$500.00. Mr. Hensley made weekly claims for the five weeks between April 19, 2020 and May 23, 2020 and received benefits for each week. For the week that ended April 25, 2020, Mr. Hensley reported \$425.00 in wages. Mr. Hensley’s wages for the week that ended April 25, 2020 were actually \$440.00, due to the apportionment of two days of the Emergency Paid Sick Leave to that week. For the other weeks, Mr. Hensley had zero wages and reported zero wages.

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".

Iowa Admin. Code r. 871-24.22(2) 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. 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.

Iowa Admin. Code r. 871-24.23(10) provides:

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

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

Iowa Code section 96.19(38) 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.

If a claimant 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. Iowa Code section 96.7(2)(a)(2)(a).

Mr. Hensley's March 20, 2020 request for an N95 mask/respirator was a request for a reasonable accommodation in the context of the COVID-19 pandemic, his medical history, and the conditions of the employment. Mr. Hensley's request for the mask/respirator was not a request for a leave of absence. The employer's request for a medical note from Mr. Hensley's doctor, the employer's refusal to engage in interactive discussion regarding reasonable accommodations, and the employer's refusal to provide reasonable accommodation were all likely violations of the American's with Disabilities Act (ADA). The weight of the evidence establishes that the employer initiated a temporary layoff that was effective April 8, 2020. The layoff was a paid layoff through April 21, 2020, but then became an unpaid layoff thereafter. The weight of the evidence establishes that Mr. Hensley was able to work, available for work, and temporarily unemployed from the April 19, 2020 effective date of his unemployment insurance claim through the benefit week that ended May 23, 2020. Mr. Hensley is eligible for benefits for the period of April 19, 2020 through May 23, 2020, provided he meets all other eligibility requirements.

DECISION:

The July 27, 2020, reference 01, decision is reversed. The claimant was able to work, available for work, and temporarily unemployed during the period of April 19, 2020 through May 23, 2020 and is eligible for benefits for that period, provided he meet all other eligibility requirements.



James E. Timberland
Administrative Law Judge

November 9, 2020
Decision Dated and Mailed

jet/scn