

In appeal number 05A-UI-06550-RT, the administrative law judge concluded that the claimant was not entitled to receive unemployment insurance benefits beginning June 2, 2005, or beginning with benefit week ending June 4, 2005, and continuing thereafter, because she was employed by an educational institution between two successive academic years or terms and was merely off work but had reasonable assurance that she would be performing the same services in the new or ensuing academic year or term, 2005-2006, that she had performed in the prior academic year or term, 2004-2005. However, the claimant had applied for benefits effective April 24, 2005, and the administrative law judge remanded this matter to Claims for an investigation and determination as to whether the claimant was ineligible to receive unemployment insurance benefits from April 24, 2005 through and including benefit week ending May 28, 2005, because at relevant times she was not able, available, or earnestly and actively seeking work under Iowa Code section 96.4-3. Claims determined that the claimant was not eligible to receive unemployment insurance benefits because she voluntarily left her employment on April 25, 2005 because of a non-work related injury or illness. The claimant appealed that decision and a hearing was set for September 29, 2005, at 2:00 p.m. Neither party called in telephone numbers where the parties could be reached for that hearing. However, because the administrative law judge had telephone numbers from the parties from the prior hearing, the administrative law judge called those numbers but could reach no parties. Consequently, no hearing was held at that time. At 2:18 p.m. on Thursday September 29, 2005, the claimant called the administrative law judge and informed the administrative law judge that she had not called in a new number nor had she been available for the hearing because the employer had told her that the employer would take care of it. Accordingly, the administrative law judge entered an order rescheduling the hearing. That order was dated October 4, 2005, and, by this reference, is incorporated herein as if it was fully and completely set forth.

#### FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: At all material times hereto, the claimant was employed as a part-time cook for the employer averaging approximately 32 hours per week. The claimant has never separated from her employment. The claimant was off work between two successive academic years or terms from June 2, 2005 until she returned to work for the employer on August 22, 2005 for the new school year, 2005-2006. The claimant has been employed ever since.

Beginning with March 31, 2005 and continuing through June 2, 2005, the claimant was off work for the employer. Although she remained employed, she was not working for the employer, because she had lost some or all of her eyesight. On April 30, 2005, the claimant was released to work with restrictions only as to what she could do with limited eyesight. The claimant contacted the employer at that time and offered to return to work. The employer told the claimant that they had no work available at that time. The employer had found a replacement for the claimant as a cook. Although the claimant might not have been able to perform the functions of a cook, there were other jobs that she could have performed for the employer, but the employer had other individuals performing those. The claimant, although she could not drive, could have arranged for transportation to work by riding with a co-worker who lives near the claimant. The employer informed the claimant that she should simply take the time off to get better. Throughout the period until June 2, 2005, the claimant's eye condition improved but she was not allowed to return to work. The claimant filed for unemployment insurance benefits effective April 24, 2005. In appeal number 05A-UI-06550-RT, the administrative law judge concluded that the claimant was not entitled to receive unemployment insurance benefits

beginning with and continuing after benefit week ending June 4, 2005, because she was subject to a "between terms denial" for an educational institution.

#### REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times she was not able, available, or earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits for benefit week ending April 30, 2005 because she was not able to work. Thereafter, through and including benefit week ending May 28, 2005, the claimant is eligible to receive unemployment insurance benefits because she was able and available for work and did not have to be earnestly and actively seeking work. Beginning with benefit week ending June 4, 2005, and continuing thereafter, the claimant is not entitled to benefits because of the decision in appeal number 05A-UI-06550-RT.

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(1)a, (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.

(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.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(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.

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or as 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 her burden of proof to demonstrate by a preponderance of the evidence that she was able, available, and earnestly and actively seeking work for benefit week ending April 30, 2005. The claimant credibly testified that she was not released by her physician to work because of her eye problem until April 30, 2005. Consequently, the claimant is not entitled to unemployment insurance benefits for benefit week ending April 30, 2005.

The claimant credibly testified that she was released by her physician to work on April 30, 2005 with the only restriction to do whatever she could do with her limited eyesight. The claimant also credibly testified that she contacted the employer and the employer had no work for her because it had already found a replacement. The claimant credibly testified that although she might not have been able to cook, there were other jobs for the employer that she could do but the employer had no work for her because those jobs were filled by others. In order to be entitled to benefits, an individual must be physically and mentally able to work in some gainful employment, but not necessarily in the individual's customary occupation. The administrative law judge concludes that the claimant was, beginning with April 30, 2005, able to work in some gainful employment and therefore was able to work through June 2, 2005. The claimant also credibly testified that although she was not able to drive, she was available for work because she could ride with a co-worker who lived nearby. The administrative law judge concludes that the claimant was available for work from and after April 30, 2005. The administrative law judge finally concludes that the claimant did not have to be earnestly and actively seeking work, because she already had employment but was not allowed to work. Accordingly, the administrative law judge concludes that beginning with April 30, 2005, or beginning with benefit week ending May 7, 2005, through and including benefit week ending May 28, 2005, the claimant was able and available for work and did not have to be earnestly and actively seeking work and, as a consequence, she is not ineligible to receive unemployment insurance benefits for that period. Unemployment insurance benefits are allowed to the claimant for four weeks from benefit week ending May 7, 2005 to benefit week ending May 28, 2005. For benefit week ending April 30, 2005, the claimant is not entitled to benefits, because she was not able and available for work. Beginning with benefit week ending June 4, 2005, and continuing thereafter, the claimant is not entitled to benefits, because she was subject to "between terms denial" for an educational institution as set out in appeal number 05A-UI-06550-RT.

The administrative law judge concludes that the claimant has never separated from her employment. The claimant, at all material times hereto, has been employed by the employer but has been off work either because of illness or injury or because she was between academic years or terms while working for an educational institution, but, nevertheless, the claimant remained job attached throughout this period.

DECISION:

The representative's decision of August 30, 2005, reference 02, is reversed. The claimant, Melissa A. Dahl, is entitled to receive unemployment insurance benefits for four weeks, from benefit week ending May 7, 2005 to and including benefit week ending May 28, 2005, because she was able, available, and earnestly and actively seeking work or was not subject to those requirements. The claimant is not entitled to unemployment insurance benefits for benefit week ending April 30, 2005, because she was not able and available for work. The claimant is not entitled to unemployment insurance benefits from and after benefit week ending June 4, 2005, because she was still employed by an educational institution but off work between successive academic years or terms and had reasonable assurance as set out in appeal number 05A-UI-06550-RT. The claimant has not permanently separated from her employment.

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