

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSICA E TOMPKINS

Claimant

APPEAL NO. 15A-UI-14131-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEW CHOICES INCORPORATED

Employer

OC: 11/01/15

Claimant: Appellant (2)

Iowa Code Section 96.4(3) – Able & Available

STATEMENT OF THE CASE:

Jessica Thompkins, formerly known as Jessica Shannon, filed a timely appeal from the December 16, 2015, reference 02, decision that denied benefits effective November 1, 2015, based on an Agency conclusion that she was unduly restricting her availability for work. After due notice was issued, a hearing was held on January 14, 2016. Ms. Thompkins participated. Joe York represented the employer and presented additional testimony through Heather Bulten. The administrative law judge took official notice of the Agency's administrative record of wages reported by or for the claimant and the record of benefits disbursed to the claimant (DBRO, KCCO and WAGEA). The hearing in this matter was consolidated with the hearing in appeal number 15A-UI-14132-JTT.

After the hearing record closed, the employer submitted a request to withdraw the appeal. Because the employer was not the appellant, the request is of no effect.

ISSUES:

Whether Ms. Thompkins was able to work and available work within the meaning of the law during the seven-week period of November 1, 2015 through December 19, 2015, when her unemployment insurance claim was active.

Whether Ms. Thompkins unduly restricted her availability for work during the period when her claim was active.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jessica Thompkins has worked for New Choices, Inc., as a Direct Support Professional (DSP) since March of 2011 and continues in the employment. The employer provides home and community based support for adults and children with intellectual and/or physical disabilities. As a Direct Support Professional, Ms. Thompkins assisted with and supported clients in meeting individualized goals related to activities of daily living. Ms. Thompkins generally performed her work duties in clients' homes. Her duties could involve working on various individualized coping skills, taking a client shopping, and assisting a client with getting up and ready in the morning.

Until the last week of October 2015, Ms. Tompkins' work schedule was as follows. On Tuesdays and Wednesdays, Ms. Tompkins would work an overnight shift, from 10:00 p.m. to 8:00 a.m., providing assistance to a couple clients with autism. One or both clients were considered difficult clients by the employer's standards and the work in the assignment qualified Ms. Tompkins for an "enhanced plus" pay rate. When Ms. Tompkins worked the overnight shift on Tuesdays and Wednesdays, she was the only employee assigned to the home during those shifts. In addition to these two ten-hour overnight shifts, Ms. Tompkins worked with other clients on Saturdays from 4:00 p.m. to 10:00 p.m., on Sundays, from 3:00 p.m. to 10:00 p.m., and on alternating Saturdays from 10:00 p.m. to 8:00 a.m. The combined assignments provided Ms. Tompkins with 43 hours of work during the weeks that included the Saturday overnight work and 33 hours during the weeks that did not include the Saturday overnight shift.

On Tuesday, October 27, 2015, Ms. Tompkins spoke to her supervisor, Cindy Sherman, to request that she be removed from particular Tuesday and Wednesday overnight assignment out of concern for her personal safety. One or both the clients in that particular assignment was prone to violent outbursts that were on multiple occasions directed at Ms. Tompkins. Shortly before Ms. Tompkins requested to be removed from the assignment, Ms. Tompkins had suffered a broken nose, blackened eyes, and various superficial scrapes when one of the clients bolted at an intersection as Ms. Tompkins was assisting the client in getting on a bus. Ms. Tompkins had to chase after and seize the client to prevent the client from being hit by a car. When Ms. Tompkins seized the client to prevent him from being injured, the client repeatedly head-butted Ms. Tompkins, causing her broken nose and blackened eyes. The same client had previously thrown a wood crate at Ms. Tompkins and slammed her head into a metal medicine cabinet. When Ms. Tompkins spoke to her supervisor about her desire to be removed from the particular assignment, the two agreed to the change. Ms. Sherman agreed to assign another employee to the assignment. Ms. Tompkins agreed to contact the employer's scheduler, Chrissy Ronnfeldt, to secure a new assignment to replace the Tuesday and Wednesday overnight shifts that had provided half of Ms. Tompkins' work hours.

On Wednesday, October 28, 2015, Ms. Tompkins spoke with Ms. Ronnfeldt about getting a new assignment to replace the Tuesday and Wednesday overnight shifts. Ms. Tompkins indicated that she wanted to maintain the same work schedule. In other words, Ms. Tompkins intended to remain available for her Saturday and Sunday evening shifts, the Saturday overnight shift on alternating weekends and wanted another overnight assignment on Tuesdays and Wednesdays. Ms. Tompkins also indicated that she could make herself available for Saturday overnight shifts one those weekends when she did not work the pre-existing Saturday overnight shift. Ms. Tompkins told Ms. Ronnfeldt that she was not available for overnight shifts on Thursdays or Fridays and was not available for day shifts on Thursdays and Fridays. Ms. Tompkins is the mother of a toddler and a five-year-old. The sitter who had stayed overnight with her children on Tuesday and Wednesdays had other employment that prevented her from staying overnight with the children on Thursday and Friday nights. Ms. Tompkins had not previously worked overnight shifts for the employer on Thursdays or Fridays. Ms. Ronnfeldt agreed to look for a new assignment for Ms. Tompkins.

Ms. Tompkins established a claim for unemployment insurance benefits that was effective November 1, 2015. Workforce Development calculated Ms. Tompkins' weekly benefit amount at \$401.00. Ms. Tompkins continued to work her assigned shifts, but established the claim for benefits in an attempt to make up for the Tuesday and Wednesday overnight shifts that she had given up. During the seven weeks during which Ms. Tompkins' unemployment insurance claim was active, she reported wages and received unemployment insurance benefits as follows:

<u>Benefit week end date</u>	<u>Wages reported</u>	<u>Benefits paid</u>
11/7/15	202.00	299.00
11/14/15	148.00	353.00
11/21/15	165.00	336.00
11/28/15	198.00	203.00
12/05/15	237.00	264.00
12/12/15	148.00	353.00
12/19/15	323.00	0.00

On December 17, 2015, Heather Bulten, Human Resources Manager, notified Ms. Tompkins that she had additional assignments available for Ms. Tompkins. The employer had not previously offered additional assignments to assist with recovering the 20-hour reduction in work hours that resulted from discontinuation of the Tuesday and Wednesday overnight shifts. On December 17, Ms. Bulten told Ms. Tompkins she had overnight shifts for her on Wednesdays, Thursdays and Fridays and that the work hours would be 11:00 p.m. to 6:00 a.m. Ms. Tompkins accepted the Wednesday overnight shift, but declined the Thursday and Friday overnights shifts due to the lack of childcare. Ms. Tompkins accepted the Wednesday overnight shift even though the shift provided only seven hours and the hourly pay was less than she had made in the earlier overnight assignment.

On December 16, 2015, a Workforce Development claims deputy entered the reference 02, decision from which Ms. Tompkins appeals in this matter. In connection with entry of that decision, Workforce Development discontinued payment of unemployment insurance benefits. Ms. Tompkins discontinued her weekly claims after the week that ended December 19, 2015.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 § 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in § 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 § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 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(16) and (29) provide:

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

(16) Where availability for work is unduly limited because a claimant is not willing to work during the hours in which suitable work for the claimant is available.

(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

An individual shall be deemed *partially unemployed* in any week in which, 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. Iowa Code Section 96.19(38)(b).

Ms. Tompkins' reasonably requested to be removed from the two overnight shifts after being assaulted by client who was prone to violent outbursts. Ms. Tompkins made the request only after she had suffered injury that included blackened eyes and a broken nose. At the time, the employer acquiesced in the change. Ms. Tompkins did not ask to be removed from all Tuesday and Wednesday overnight shifts. Rather, she merely wanted a new assignment for those shifts. Ms. Tompkins desired to maintain the scheduled she had worked for a substantial period. She did not in fact change the hours during which she was available. In light of the overnight nature of the work and the difficulty in securing a sitter for overnight hours, there was nothing unreasonable about restrictions Ms. Tompkins placed on her availability. Again, she merely desired to maintain the same work hours. Ms. Tompkins did in fact open up her availability to a limited extent so that she could add shifts. Thus the evidence does not support a conclusion that Ms. Tompkins unduly restricted her availability. Nor did the request to be removed from working with a client who was prone to violent outbursts prevent Ms. Tompkins from meeting the availability requirement. Ms. Tompkins' reported wages and the reduced work hours indicate that Ms. Tompkins was indeed partially unemployed during the period of November 1, 2015 through December 19, 2015, when her unemployment insurance claim was active. Ms. Tompkins is eligible for benefits for that period, provided she meets all other eligibility requirements. The employer's account may be charged.

DECISION:

The December 16, 2015, reference 02, is reversed. The claimant was able to work and available work within the meaning of the law during the seven-week period of November 1, 2015 through December 19, 2015, when her unemployment insurance claim was active. The claimant was partially unemployed during that period. The claimant is eligible for benefits for that period, provided she meets all other eligibility requirements. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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