

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JESSICA MCCORKLE
29227 – 108TH AVE
HILLSDALE IL 61257

KELLY SERVICES INC
999 W BIG BEAVER RD
TROY MI 48084-4716

Appeal Number: 04A-UI-08853-DT
OC: 07/18/04 R: 12
Claimant: Respondent (5/R)

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 Workforce Development. 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)

(Decision Dated & Mailed)

Section 96.4-3 - Able and Available

STATEMENT OF THE CASE:

Kelly Services, Inc. (employer) appealed a representative's August 10, 2004 decision (reference 01) that concluded Jessica McCorkle (claimant) was qualified to receive unemployment insurance benefits in conjunction with her employment with the employer as being able and available for work. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 8, 2004. The claimant participated in the hearing. Laurie Martin appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE: Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began taking assignments with the employer on March 20, 2002. Her most recent assignment began on January 9, 2004. Her last day worked on the assignment was June 11, 2004. As of the date of the hearing, there had been no representative's decision issued regarding the merits of that separation.

Beginning June 14, the claimant's doctor had ordered her off work; she was released June 23, 2004. On or about June 18, the claimant spoke with her contact with the employer. Although the parties differ as to which party ended the assignment, both parties at least understood that the claimant was off the assignment. Thereafter, the claimant did not maintain contact with the employer, did not check in for available work, and did not report in any change in her available schedule, despite the fact that the claimant had signed an agreement in 2002 to maintain contact with the employer to remain available for work, primarily because she understood that her overall employment relationship with the employer had ended. The claimant established an unemployment insurance benefit year effective July 18, 2004. She did perform her regular weekly work searches and applied for work with other employers. On August 20, 2004, an Agency representative issued a decision granting the claimant Department Approved Training (DAT) so she could attend classes beginning August 23, 2004. Some evidence was presented that on September 2 the employer offered the claimant an assignment back with the same business client for whom the claimant had previously worked, but that the claimant declined because of her class schedule and her DAT.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant is currently eligible for unemployment insurance benefits by being able and available for employment.

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(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.

Being "able and available for work" is not defined in conjunction with a particular employer, rather, it determined in the context of the claimant's position in the labor market as a whole. To be found able to work, "[a]n 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." Sierra v. Employment Appeal Board, 508 N.W.2d 719, 721 (Iowa 1993); Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). Further, a determination as to a claimant being able and available is governed by the provisions of the statute and rules; an employer's attempt to further define "availability" for purposes of being eligible for unemployment insurance benefits is ineffective. As long as the employer is aware that the claimant's assignment has ended, the statute and rules do not require a claimant to affirmatively make herself available to the employer after the ending of an assignment in order to be found "available" for purposes of benefit eligibility. 871 IAC 24.26(19). In such instances, the better test of the claimant's availability is through the process of offer and potential refusal of new work.

Generally, being unavailable for offers of work due to being occupied with school will render a claimant ineligible as unavailable for work.

871 IAC 24.23(5) provides:

(5) Full-time students devoting the major portion of their time and efforts to their studies are deemed to have no reasonable expectancy of securing employment except if the students are available to the same degree and to the same extent as they accrued wage credits they will meet the eligibility requirements of the law.

However, where a person has been granted DAT, the availability and work search requirements are waived, and the claimant is not disqualified for refusing work. 871 IAC 24.39(2) provides:

A claimant may receive unemployment insurance while attending a training course approved by the department. While attending the approved training course, the claimant need not be available for work or actively seeking work. After completion of department-approved training the claimant must, in order to continue to be eligible for unemployment insurance, place no restriction on employability. The claimant must be able to work, available for work and be actively searching for work. In addition, the claimant may be subject to disqualification for any refusal of work without good cause after the claimant has completed the training.

See also, Iowa Code Section 96.4-6-a. Therefore, even the fact that the claimant may have refused an offer of work on September 2, during her DAT period, would not render the claimant ineligible as unavailable for work. However, any benefits paid to the claimant during the time she is under DAT are not chargeable to the employer's account. Iowa Code Section 96.4-6-a. Benefits are allowed, if the claimant is otherwise eligible.

During the hearing, it became apparent that the underlying issue is whether the ending of the claimant's assignment in June 2004 was for disqualifying reasons. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on the merits of the separation. 871 IAC 26.14(5).

DECISION:

The representative's August 10, 2004 decision (reference 01) is modified with no effect on the parties. The claimant is not employed by the employer under her prior arrangement, but she is able to work and available for work effective July 18, 2004. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account is not subject to charge for benefits paid to the claimant during her period of Department Approved Training. The matter is remanded to the Claims Section for investigation and determination of the separation issue.

ld/tjc