

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DODI L JENSEN
Claimant

APPEAL NO. 16A-UI-10363-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MENARD INC
Employer

OC: 09/04/16
Claimant: Respondent (3-R)

Section 96.4-3 – Able and Available for Work
871 IAC 24.23(26) – Employed At Same Hours and Wages as in Agreement of Hire

STATEMENT OF THE CASE:

Menard, Inc. filed a timely appeal from a representative's decision dated September 20, 2016, reference 01, that held the claimant eligible to receive partial unemployment insurance benefits effective September 4, 2016 finding the claimant was still employed part time or working on call and was available for her regular hours of work. After due notice was provided, a telephone hearing was held on October 6, 2016. Although the claimant, Ms. Jensen, supplied a telephone number for the hearing, she was not available at the number provided. Two messages were left for the claimant. The employer participated by Mr. Lance Gisell, Plant Manager.

ISSUE:

The issue is whether the claimant is disqualified for being unavailable for work.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Dodi Jensen was hired on June 25, 2013 as a full-time accounts payable office assistant at the rate of \$12.15 per hour. On September 4, 2016, the employer unilaterally reduced Ms. Jensen's employment status from full time (40 hours per week) to part time (24 hours per week). The change from full-time status to part-time status initiated by the employer was because Ms. Jensen had often called off work because she was sick and had not maintained an average of at least 32 hours of work per week, that is required by company policy for full-time employees. Although the claimant's unsatisfactory attendance was brought to her attention on repeated occasions by the plant manager, Ms. Jensen, nonetheless had continued to call off due to illness and report for work for less than the 40 hours that she had been scheduled. Because the claimant had not improved her attendance and continued to call off work due to the sickness of herself or her child, the claimant was given the option of accepting the reduction to part-time work or leaving employment.

The change from full-time status to part-time status was effective September 4, 2016. Although the employer offered Ms. Jensen 24 hours of work each week at the specified hours and days,

Ms. Jensen only reported for the hours available to her for the first two weeks, the weeks ending September 10 and September 17, 2016. The next week, the claimant called off work again due to illness and then one day during the week ending October 1, 2016.

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 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. 871-24.23(26) provides:

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

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

In this case the claimant was hired as a full-time worker but as of September 4, 2016, no longer was working full time. The claimant had been removed from her full-time work status, working 40 hours per week, to a part-time status working 24 hours per week by action of the employer because the claimant's attendance had been unsatisfactory due to illness.

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The administrative law judge concludes that the decision to remove the claimant from full-time status to part-time status was a unilateral decision made by the employer and the claimant's only options were to accept the change or to leave employment. Under those conditions, the claimant's acceptance of changes in her work hours continuing employment is not volitional. Failing to report for work due to illness that is properly reported is not considered misconduct in connection with the work. The employer's decision to reduce Ms. Jensen from full-time work to part-time work may have been a sound management decision, however, evidence establishes the claimant did not continue to be employed at the same hours and wages as contemplated in the original agreement of hire and effective September 4, 2016 was working on a reduced workweek basis different from the original agreement. The claimant is, therefore, considered to be partially unemployed and potentially eligible to receive unemployment insurance benefits, provided that she meets all other eligibility requirements of the law.

The administrative law judge also notes that there has been a separation from employment that has taken place after September 4, 2016 and also notes that the claimant has not made herself available for the part-time hours offered by the employer for the weeks ending September 24, 2016 and October 1, 2016. The issues of whether there has been a job separation and if so, if it was disqualifying and the issue of the claimant's continuing availability for work is remanded to the Claims Division for investigation and the issuance of appealable determinations.

DECISION:

The representative's decision dated September 20, 2016, reference 01, is affirmed as modified. Claimant is eligible to receive partial unemployment benefits based upon a reduced workweek from full time, 40 hours per week, to 24 hours per week by the employer. Because the claimant was no longer employed at the same hours and wages as contemplated in the original agreement of hire, and is working on a reduced workweek basis different from the contract of hire, the claimant is partially unemployed and eligible to receive unemployment insurance benefits if she meets all other eligibility requirements of Iowa law.

The issue of the claimant's job separation and whether the claimant now meets the availability requirements of the law is remanded to the Claims Division for investigation and issuance of appealable determinations.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs