

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AARON M DEAL
Claimant

APPEAL NO. 07A-UI-09415-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BREHM MCDUGAL GROUP INC
KALEIDOSCOOPS
Employer

OC: 12/24/06 R: 02
Claimant: Respondent (1-R)

Section 96.5(3)(A) – Refusal of Suitable Work
Section 96.7-2-a-6 – Employer Not Notified of Claim

STATEMENT OF THE CASE:

Brehm McDougal Group, Inc., doing business as Kaleidoscoops, filed an appeal of the September 26, 2007, reference 03, decision that allowed benefits and that concluded there had been no offer of employment on January 1, 2007. After due notice was issued, a hearing was held on October 31, 2007. Claimant Aaron Deal participated and was represented by his spouse, Lynnette Deal. Tim Brehm represented the employer and presented additional testimony through Amy Brehm, President. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received Department Exhibits D-1 through D-7 into evidence.

ISSUES:

Whether the claimant refused to accept a suitable offer of employment.

Whether the employer's protest was timely.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Aaron Deal was employed by TLDeal, Inc., doing business as Kaleidoscoops, on a part-time basis from November 1993 until the business was sold to Brehm McDougal Group, Inc. The effective date of the sale was December 26, 2006. TLDeal, Inc., was owned and operated by Aaron Deal's parents, Ted and Lynnette Deal. Mr. Deal suffers from epilepsy and his parents had made reasonable accommodations that allowed Mr. Deal to continue in his employment at Kaleidoscoops so long as the Deals owned and operated the business. In the fall of 2006, Ted Deal entered into a discussion with Amy Brehm and Deb McDougal regarding the sale of Kaleidoscoops to Brehm McDougal Group, Inc. Ms. Brehm is President of Brehm McDougal Group. Ms. McDougal was Vice President until March 2007, when she terminated her ownership interest in the business. Brehm McDougal Group, Ted Deal and Aaron Deal said that they would be unwilling, after the sale of the ice cream shop, to continue the work accommodations that Ted and Lynn Deal had extended to Aaron Deal.

Pursuant to the purchase agreement between Brehm McDougal Group and TLDeal, TLDeal was to discharge or layoff all employees prior to the transfer of ownership on December 26, 2006 and Brehm McDougal Group would invite TLDeal's employees to reapply and/or interview for positions with Brehm McDougal Group. Aaron Deal and one or more additional employee did not seek employment with Brehm McDougal Group after being terminated by TLDeal.

In response to his separation from TLDeal, Aaron Deal established a claim for unemployment insurance benefits that was effective December 24, 2006 and received benefits. On January 1, 2007, Brehm McDougal Group sent a letter to Mr. Deal. The letter did not extend an actual offer of employment. Instead, the letter invited Mr. Deal to apply for a position with Brehm McDougal Group. The letter indicated that if Mr. Deal submitted a completed application an interview would be scheduled. The letter said nothing about whether an offer of employment would follow the interview. Based on his prior knowledge that he would not receive the work accommodations necessary for him to engage in the employment, Mr. Deal did not respond to the January 1, 2007 letter. After Mr. Deal established his claim for unemployment insurance benefits, aside from the January 1 letter, there was no other contact between Brehm McDougal Group and Aaron Deal concerning possible employment.

Aaron Deal had discussed with his parents, TLDeal owners, his intent to file a claim for unemployment insurance benefits in connection with the separation from TLDeal. Ted and Lynn Deal did not object to the claim for benefits and advised Aaron Deal that TLDeal would not protest the claim. Ted and Lynn Deal believed benefits would be assessed against TLDeal's employer account, 300984, and would not affect Brehm McDougal Group. On January 3, 2007, a Notice of Claim was directed to TLDeal, Inc., at that employer's address of record, which corresponded to the business location of Kaleidoscoops. The Brehm McDougal Group staff did not open the correspondence and bundled it with other mail to be forwarded to Ted Deal. Ted Deal did in fact receive the Notice of Claim, but did not protest the claim for benefits. Ted Deal did not advise Brehm McDougal Group of the Notice of Claim.

On January 1, 2007, Debra McDougal completed an Iowa Workforce Development Report to Determine Liability, Form 60-0126, for submission to Iowa Workforce Development. Brehm McDougal Group forwarded the document to Iowa Workforce Development. On February 12, 2007, Iowa Workforce Development Field Auditor Connie Johnson acknowledged receipt of the Report to Determine Liability. On June 14, Iowa Workforce Development mailed to Brehm McDougal Group, at the employer's address of record, a Notice of Employer Status and Liability, Form 65-5038. The notice advised Brehm McDougal Group that it was liable for unemployment insurance benefits effective December 26, 2006. The notice advised Brehm McDougal Group that its employer account, 352695-1, had received "a complete transfer of experience from TLDeal Inc., account number 300984-2, in accordance with section 96.7(2)(b)." The notice further indicated, "Your liability includes all monies that the former owner may owe to Iowa Workforce Development." The transfer of TLDeal's "experience" to Brehm McDougal Group entitled Brehm McDougal Group to a preferential employer contribution rate. The Notice of Employer Status and Liability contained an appeal deadline of July 14, 2007. Brehm McDougal Group did not appeal the transfer of experience.

Brehm McDougal Group first learned of Aaron Deal's claim for benefits when it received the quarterly Statement of Charges that Iowa Workforce Development mailed to the employer on August 9, 2007. On September 5, Amy Brehm contacted the Iowa Workforce Development Tax Bureau by e-mail to protest the charges related to Aaron Deal's claim for benefits.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant.

Iowa Code section 96.7-2-a(6) provides:

2. Contribution rates based on benefit experience.
 - a. (6) Within forty days after the close of each calendar quarter, the department shall notify each employer of the amount of benefits charged to the employer's account during that quarter. The notification shall show the name of each individual to whom benefits were paid, the individual's social security number, and the amount of benefits paid to the individual. An employer which has not been notified as provided in section 96.6, subsection 2, of the allowance of benefits to an individual, may within thirty days after the date of mailing of the notification appeal to the department for a hearing to determine the eligibility of the individual to receive benefits. The appeal shall be referred to an administrative law judge for hearing and the employer and the individual shall receive notice of the time and place of the hearing.

871 IAC 24.35(1) provides:

- (1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:
 - a. If transmitted via the United States postal service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
 - b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

The evidence indicates that Brehm McDougal Group first learned of the claim for benefits when it received the quarterly statement of charges. The evidence indicates that Brehm McDougal protested the statement of charges within 30 days of the mail date of the statement. Accordingly, the administrative law judge concludes that the employer's protest should be deemed timely.

Iowa Code section 96.5-3-b provides as follows:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department

or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

b. Notwithstanding any other provision of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

- (1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
- (2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
- (3) If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

Workforce Development rule 871 IAC 24.24(1)a provides as follows:

(1) Bona fide offer of work.

a. In deciding whether or not a claimant failed to accept suitable work, or failed to apply for suitable work, it must first be established that a bona fide offer of work was made to the individual by personal contact or that a referral was offered to the claimant by personal contact to an actual job opening and a definite refusal was made by the individual. For purposes of a recall to work, a registered letter shall be deemed to be sufficient as a personal contact.

Workforce Development rule 871 IAC 24.24(8) provides as follows:

Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa Code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

The evidence in the record indicates that Brehm McDougal Group did not in fact extend a bona fide offer of employment to Aaron Deal on January 1, 2007. The evidence indicates instead that Brehm McDougal Group merely extended an invitation to apply for a position. An invitation to apply for employment is not the same as an actual offer of employment. There was no offer and there was no refusal. Accordingly, Mr. Deal is eligible for benefits provided he is otherwise eligible.

Any employer who becomes a successor to an employer account shall be held liable for any unpaid contributions, reimbursable benefit payments, interest, penalties or costs which are

owed to the department by the predecessor at the time of the transfer. 871 IAC 23.30(1). The evidence indicates that Brehm McDougal Group is a full successor to TL Deal. Accordingly, Brehm McDougal Group's employer account, number 352695, may be assessed for benefits paid to Aaron Deal.

The evidence in the record raises the question of whether Mr. Deal has met the ability and availability requires set forth in Iowa Code section 96.4(3) since he established his claim for benefits. The matter will be remanded to a claims representative so that Mr. Deal's work ability and availability since establishing his claim for benefits may be determined.

DECISION:

The Agency representative's decision dated September 26, 2007, reference 03, is affirmed. There was not offer of employment. The claimant did not refuse a suitable offer of employment. The claimant is eligible for benefits, provided he is otherwise eligible. Brehm McDougal Group is a full successor and may be assessed for benefits paid to the claimant. The matter is remanded to a claims representative so that the claimant's work ability and availability since establishing his claim for benefits may be determined.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css