

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

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Appeal Number: 04A-UI-02129-RT
OC: 12/28/03 R: 01
Claimant: Appellant (1)

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 – Required Findings (Able and Available)

STATEMENT OF THE CASE:

The claimant, Robert R. Tiemann, Jr., filed a timely appeal from an unemployment insurance decision dated February 18, 2004, reference 04, denying unemployment insurance benefits to him from December 28, 2003 through January 10, 2004 because he was not able and available for work. After due notice was issued, a telephone hearing was held on April 12, 2004, with the claimant participating. The claimant was represented by Richard Sturgeon. The employer, Larry Clark, doing business as Larry Clark Construction, participated in the hearing on his own behalf. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Although the claimant had propounded interrogatories to the employer, the claimant withdrew those interrogatories.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer until on or about January 10, 2004. However, the claimant refused to work for two weeks from December 28, 2003 through January 10, 2004. The claimant refused to work for the employer because the employer had withheld \$85.00 from his check, which he had received December 27, 2003. The \$85.00 was withheld to pay for damages to a bulldozer that the claimant had done through some kind of negligence. The claimant had not signed any document or permission for the employer to withhold such funds. Although the employer had done this on prior occasions, there was no explicit agreement between the two permitting this. During this period of time, the claimant had placed no other restrictions on his availability for work and placed no restrictions on his ability to work and was actively and earnestly seeking work. Eventually, on or about January 10, 2004, the claimant was repaid the \$85.00. The claimant separated from his employment on or about January 10, 2004, but that separation is not before the administrative law judge. Iowa Workforce Development records indicate that that separation is not disqualifying by decision dated March 5, 2004, reference 03, and has not been appealed.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant is ineligible to receive unemployment insurance benefits from December 28, 2003 through January 10, 2004, because he was not able, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits for that period.

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".

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is 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 met his burden of proof to demonstrate by a preponderance of the evidence that he is and was during relevant times hereto able, available, and earnestly and actively seeking work. The claimant so testified and the employer seemed to agree. However, the claimant had refused to work for the employer during the subject time in question from December 28, 2003 to January 10, 2004 because the employer had withheld funds from his check received on December 27, 2003. It is a reason for a claimant to be disqualified for being unavailable for work when the claimant is not willing to work in his occupation, or not willing to work the number of hours required to work in

his occupation, or not willing to work during the hours in which suitable work was available, or refusing to work when work is available. The issue here really is whether the claimant was justified in refusing to work during the subject time in question. The administrative law judge concludes that he was. Both witnesses agree that the employer withheld a portion of the claimant's wages and this was the reason the claimant refused to work. Was the withholding of the wages justified? The administrative law judge concludes that they are not. Iowa Code Section 91A.5 outlines when an employer can withhold money from an employee's wages and none of the reasons apply here. The employer had no written authorization to deduct such money and the administrative law judge is not aware of any federal or state law permitting the employer to do so. Losses due to breakage, damage to property and so forth shall not be deducted from an employee's wages so long as such losses are not attributable to the employee's willful or intentional disregard of the employer's interest. The administrative law judge concludes that there is no evidence that the claimant's damage to the bulldozer, which caused the employer to withhold the funds, was willful or intentional. Even the employer testified that the damage was due to the claimant's negligence. This is not a good reason to withhold money from the claimant's pay. Mr. Clark testified that he had done so before and they had an agreement, but the claimant denied the agreement. The administrative law judge concludes that prior acts do not establish an agreement sufficient here to allow the employer to deduct that money because such an agreement must be in writing and no such agreement exists in writing. Accordingly, the administrative law judge concludes that the claimant was justified in refusing to work for the employer and, as a consequence, he remained able, available, and earnestly and actively seeking work and is not ineligible to receive unemployment insurance benefits for the subject time. Unemployment insurance benefits are allowed to the claimant from December 28, 2003 through January 10, 2004 provided he is otherwise eligible.

DECISION:

The representative's decision dated February 18, 2004, reference 04, is reversed. The claimant, Robert R. Tiemann, Jr., is entitled to receive unemployment insurance benefits for the period from December 28, 2003 through January 10, 2004, provided he is otherwise eligible, because he was able, available, and earnestly and actively seeking work during that period of time.

kjf/b