

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROSE M MOLINA-LEICHTMAN
Claimant

APPEAL NO. 11A-UI-14750-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**GARDNER DRUG INC
TOM'S FAMILY PHARMACY**
Employer

OC: 10/09/11
Claimant: Appellant (1)

Section 96.4(3) – Able & Available
Section 96.4(3) – Still Employed Same Hours and Wages

STATEMENT OF THE CASE:

Rose Molina-Leichtman filed a timely appeal from the November 3, 2011, reference 02, decision that denied benefits effective October 9, 2011, based on an Agency conclusion that she was not partially unemployed from Tom's Family Pharmacy. After due notice was issued, a hearing was held on December 7, 2011. Ms. Molina-Leichtman participated. Rosemary Deutsch, store manager, represented the employer.

ISSUES:

Whether the claimant has been able to work and available for work since establishing her claim for benefits.

Whether the claimant was partially unemployed from her employment.

Whether the employer's account may be assessed for benefits paid to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Rose Molina-Leichtman established a new original claim for benefits that was effective October 9, 2011. Ms. Molina-Leichtman has not received benefits in connection with the new original claim. Ms. Molina-Leichtman's base period for purposes of the new original claim consists of the third and fourth quarter of 2010 and the first and second quarter of 2011. During all four base period quarters, Ms. Molina-Leichtman had wages from her part-time employment with Gardner Drug, Inc., doing business as Tom's Family Pharmacy. During the third and fourth quarter of 2010, Ms. Molina-Leichtman also had wages from employment with Dolgencorp, L.L.C., d/b/a Dollar General. The employment with Dollar General had been 30-35 hours per week. The employment with Dollar General had ended on October 14, 2010, when Ms. Molina-Leichtman was discharged for no disqualifying reason. Ms. Molina-Leichtman had established an original claim for benefits that was effective October 10, 2010 in response to her separation from Dollar General. Ms. Molina-Leichtman received benefits during the period of October 10, 2010 through October 1, 2011 in connection with the claim she established October 10, 2010.

Ms. Molina-Leichtman commenced her part-time employment with Tom's Family Pharmacy, in 2006. Ms. Molina-Leichtman performs cleaning duties for Tom's Family Pharmacy. While Ms. Molina-Leichtman continued in the nearly full-time employment with Dollar General, she worked five or six hours per week in the part-time employment at Tom's Family Pharmacy. Since Ms. Molina-Leichtman separated from Dollar General, her hours at Tom's Family Pharmacy have been five to ten per week. There has been no decrease in the number of hours or the wage that Tom's Family Pharmacy has made available to Ms. Molina-Leichtman.

Ms. Molina-Leichtman has health issues and other issues that impact on her work ability and work availability. Ms. Molina-Leichtman is experiencing gradual vision loss. Ms. Molina-Leichtman uses a magnifier to read. While Ms. Molina-Leichtman still has a valid driver's license, she expects she will not be able to renew it next year due to her vision impairment. Ms. Molina-Leichtman still operates her car on a limited basis, but walks to work. Ms. Molina-Leichtman suffers from diabetes and is insulin dependent. Ms. Molina-Leichtman's health issues have prompted her to abandon cutting coupons, have made shopping difficult, and have impacted her personal hygiene. Ms. Molina-Leichtman has contacted social services agencies for assistance, but so far has not been able to obtain assistance. Ms. Molina-Leichtman has limited her job search to an area within walking distance of her home in New Hampton.

Ms. Molina-Leichtman "retired" at the end of August 2011 and began receiving regular Social Security Insurance benefits. Ms. Molina-Leichtman has applied for Social Security Disability Insurance benefits, but has so far been denied. Ms. Molina-Leichtman is not interested in full-time or nearly full-time work such as she had with Dollar General or between the two jobs, but instead is interested in adding 20 hours per week to the five to ten hours she works at Tom's Family Pharmacy. Ms. Molina-Leichtman indicates that she is willing to work, but has doubts about her ability to perform work beyond the sort of cleaning work she performs for Tom's Family Pharmacy. Ms. Molina-Leichtman desires additional cleaning employment.

REASONING AND CONCLUSIONS OF LAW:

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".

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).

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.

871 IAC 24.23(26). Contract for hire merely means the established conditions of the employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986).

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.

2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

(a) However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

[Emphasis added.]

The evidence indicates that Ms. Molina-Leichtman has not been partially unemployed from Tom's Family Pharmacy since she established the new original claim for benefits that was effective October 9, 2011. Accordingly, the employer will not be charged for benefits paid to Ms. Molina-Leichtman so long as she continues in the employment under the same conditions.

The evidence establishes that Ms. Molina-Leichtman's is not working to the same extent as she did during the base period upon which the October 9, 2011 claim is based. There are several reasons for this. One reason is the loss of employment with Dollar General in October 2010. Another reason is Ms. Molina-Leichtman's gradually deteriorating health. Yet another reason is the limit Ms. Molina-Leichtman has placed on her availability to avoid negative consequences to her Social Security benefit eligibility.

Where a claimant is ill and presently not able to perform work due to illness, the claimant is deemed not available for work. See 871 IAC 24.23(1). The weight of the evidence establishes that despite Ms. Molina-Leichtman's health issues she has demonstrated, and continues to demonstrate, the ability to perform the sort of cleaning work she does not Tom's Family Pharmacy. Ms. Molina-Leichtman's base period employment was in the New Hampton area, and the weight of the evidence indicates that Ms. Molina-Leichtman remains available to perform work in the New Hampton area. Thus, the administrative law judge does not find Ms. Molina's diminished use of her car to be a disqualifying factor.

Where a claimant does not want to earn enough wages during the year to adversely affect receiving of Social Security benefits, the claimant is deemed not available for work. See 871 IAC 24.23(22). This provision presents a problem for Ms. Molina-Leichtman. Ms. Molina-Leichtman's "retirement" at the end of August 2011 to commence receiving regular Social Security benefits has prompted Ms. Molina-Leichtman to limit the number of hours she is available to work each week. Based on this, the administrative law judge must conclude that Ms. Molina-Leichtman has not met the work availability requirements of Iowa Code section 96.4(3).

DECISION:

The Agency representative's November 3, 2011, reference 02, is affirmed. The claimant has not been partially unemployed from Tom's Family Pharmacy, since she established the new original claim for benefits that was effective October 9, 2011. That employer will not be charged for benefits, so long as the claimant continues in the employment under the same hours and wages. The claimant has restricted the number of hours she is available for work relative to her base period work history in order to avoid impact to her Social Security benefits and, as a result, has not met the work availability requirement since October 9, 2011. Benefits are denied effective October 9, 2011. The disqualification continued as of the December 7, 2011 appeal hearing.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw