

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIEGO MELENDEZ

Claimant

GODBERSEN-SMITH CONST CO

Employer

APPEAL NO. 11A-UI-06001-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/11/11

Claimant: Appellant (4-R)

Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available
Section 96.5-3-a – Job Refusal
871 IAC 24.1(113)a – Temporary Layoff

STATEMENT OF THE CASE:

The employer appealed a department decision dated April 27, 2011, reference 03, that held the claimant was not able and available for work effective March 1, 2011, and benefits are denied. A hearing was held on June 1, 2011. The claimant participated. Anna Pottebaum served as interpreter. Rebecca Friedrichsen, payroll clerk, participated for the employer.

The claimant and employer representative waived notice to consider the additional issues as to whether claimant was able and available for work and whether he refused a recall to suitable work.

ISSUES:

Whether claimant was temporarily laid-off from work.

Whether claimant was recalled to suitable work.

Whether claimant was discharged for misconduct in connection with employment.

Whether claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge, having heard the witness testimony and having considered the evidence in the record, finds: The claimant began working for the employer as a full-time laborer on June 24, 2010, and he last worked on Friday, December 10. When the work slowed down, claimant requested to leave work to visit his ill mother, who lives in Mexico. The employer granted claimant a temporary layoff with a statement he could expect to be recalled to work January.

An employer supervisor tried to reach the claimant at his cell phone number beginning mid-January 2011 about coming back to work. After several unsuccessful attempts to contact the claimant, the employer sent him a certified letter on March 1 that terminated his employment for failing to return to work. The post office sent notices to claimant on March 2 and March 7 for the certified letter, but when he failed to claim it by March 17, it was returned to the employer and received on March 22.

Claimant called the employer representative on April 19 about work and stated that he was working in Mexico and his brother was sending him his unemployment benefits. Later, the claimant recanted his statement. The claimant has received unemployment benefits on his claim.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.1(113)a provides:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status (lasting or expected to last more than seven consecutive calendar days without pay) initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

The administrative law judge concludes that the employer placed claimant on a temporary layoff on December 17, 2010, which is an employment separation for no disqualifiable reason. The employer did not protest claimant's claim, and it did so knowing he would be going to Mexico.

Iowa Code section 96.5-3-a provides:

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.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is

suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

- (1) One hundred percent, if the work is offered during the first five weeks of unemployment.
- (2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.
- (3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.
- (4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

The administrative law judge further concludes the employer failed to communicate to claimant a recall to suitable work in January 2011, and no benefit disqualification is imposed.

While the employer might have indicated to claimant he could expect a recall to work in January, there is no evidence the claimant was told on a date certain he was to come back to his former job.

Iowa Code section 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.

The administrative law judge further concludes the claimant was not discharged for misconduct on March 1, 2011. While claimant failed to return to work after his layoff, there was no certain date communicated to him, such that his failure to report is misconduct.

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 further concludes claimant is disqualified from receiving benefits for the period from March 2, 2011 to April 19, because he was not able and available for work. Once the employer rescinded the temporary layoff status by its March 1 termination letter, claimant is required to be able and available for work

The best evidence claimant was not at his address of record from March 2 to March 17 is his failure to respond to the post office notice to pick up the employer's certified letter. This evidence is corroborated by the employer speaking with claimant on April 16 with his statement he was in Mexico, which he later recanted. The claimant's testimony was inconsistent and lacks credibility on his whereabouts. Being out of the United States constitutes an availability disqualification.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Since claimant has received benefits on his claim during the period from March 1 to April 16, 2011, the overpayment issue is remanded to claims for a decision.

DECISION:

The department decision dated April 27, 2011, reference 03, is modified. The claimant was temporarily laid off for no disqualifiable reason on December 19, 2010. The employer failed to issue a recall to suitable work in January 2011. The claimant was discharged by certified letter dated March 1, 2011 for no act of misconduct. The claimant is disqualified and ineligible for benefits from March 2, to April 19, 2011, as he was not able and available for work. The overpayment issue for the availability period is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw