

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SEAN FOLEY
Claimant

APPEAL 20A-UI-06735-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

COLLINS MAUS LLC
Employer

OC: 03/22/20
Claimant: Respondent (4-R)

Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22 – Able & Available - Benefits Eligibility Conditions
Iowa Code § 96.19(38) – Total, Partial, and Temporary Unemployment
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Overpayment of Benefits
Public Law 116-136 § 2104(b) – Federal Pandemic Unemployment Compensation

STATEMENT OF THE CASE:

On June 22, 2020, Collins Maus, LLC (employer) filed an appeal from the June 19, 2020, reference 01, unemployment insurance decision that allowed benefits effective March 22, 2020, based upon the determination Sean Foley (claimant) was on a short-term layoff from employment and considered able to and available for work. After due notice was issued, a telephone conference hearing was held on July 29, 2020. The claimant participated. The employer participated through Javier Lira, Executive Chef. No exhibits were offered into the record. The administrative law judge took official notice of the administrative record, specifically the claimant's claim and wage histories. The hearing notice referenced the issues of ability to and availability for work and the parties agreed to waive notice on the issue of separation from employment.

ISSUES:

Did the claimant voluntarily quit employment with good cause attributable to the employer?
Is the claimant totally, partially, or temporarily unemployed?
Was the claimant able to and available for work effective March 22, 2020?
Has the claimant been overpaid regular unemployment benefits and Federal Pandemic Unemployment Compensation (FPUC)?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant began working for the employer as a part-time cook on April 2, 2018 and his last day worked was March 14, 2020. On March 2, Javier Lira began employment as the Executive Shift and the claimant's supervisor.

On March 14, Lira asked the claimant if he would like to be promoted to Sous Chef. The claimant declined and explained that his availability would be changing after March 17. He later disclosed it was due to medical treatment. On or about March 15, Governor Reynolds closed restaurants and the employer did not have work for the claimant.

The week of May 16, the claimant began a job with East 53rd Pizzeria and Pub. Whether the claimant is able to and available for work effective May 16 or partially unemployed with his new employer has not yet been addressed by the Benefits Bureau.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge finds the claimant did not voluntarily quit employment until the week of May 16, 2020, when he left to accept employment elsewhere. Between March 22 and May 15, the claimant was temporarily unemployed and benefits are allowed.

- I. Did the claimant voluntarily quit employment with good cause attributable to the employer?*

Iowa Code section 96.5(1)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:

- a. The individual left employment in good faith for the sole purpose of accepting other or better employment, which the individual did accept, and the individual performed services in the new employment. Benefits relating to wage credits earned with the employer that the individual has left shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Iowa Admin. Code r. 871-24.28(5) provides:

Voluntary quit requalifications and previously adjudicated voluntary quit issues.

- (5) The claimant shall be eligible for benefits even though the claimant voluntarily quit if the claimant left for the sole purpose of accepting an offer of other or better employment, which the claimant did accept, and from which the claimant is separated, before or after having started the new employment. The employment does not have to be covered employment and does not include self-employment.

Iowa Admin. Code r. 871-23.43(5) provides:

Charging of benefits to employer accounts.

- (5) Sole purpose. The claimant shall be eligible for benefits even though the claimant voluntarily quit if the claimant left for the sole purpose of accepting an

offer of other or better employment, which the claimant did accept, and from which the claimant is separated, before or after having started the new employment. No charge shall accrue to the account of the former voluntarily quit employer.

The parties disagree as to when the claimant's employment ended. The employer contends the claimant voluntarily quit on March 14 by saying that day would be his last day. The claimant contends he said his availability would be changing after March 17 and he did not leave employment until he accepted a new job.

The burden of proof rests with the employer to show that the claimant voluntarily left his employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The findings of fact show how the disputed factual issues were resolved. The witnesses have equal credibility and no additional evidence was provided to show the claimant was no longer employed with the employer after March 14. Therefore, the employer has not met the burden of proof to show that the claimant made a voluntary choice to end his employment effective March 14.

However, the employer can show the claimant voluntarily left employment effective May 16, as he started a new job that week. Even though the separation was without good cause attributable to the employer and would, standing alone, disqualify the claimant from receiving benefits, the claimant did leave in order to accept other employment and did perform services for the subsequent employer. Accordingly, benefits are allowed and the account of the employer shall not be charged for any benefits paid effective May 16, 2020.

II. Is the claimant totally, partially, or temporarily unemployed? Is the claimant able to and available for work effective March 15?

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".

Iowa Code section 96.19(38) provides:

Definitions.

38. Total and partial unemployment

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) 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.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

Iowa Admin. Code r. 871-24.22(2) provides, in relevant part:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area

in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

a. Shift restriction. The individual does not have to be available for a particular shift. If an individual is available for work on the same basis on which the individual's wage credits were earned and if after considering the restrictions as to hours of work, etc., imposed by the individual there exists a reasonable expectation of securing employment, then the individual meets the requirement of being available for work.

...

f. Part-time worker, student-other. Part-time worker shall mean any individual who has been in the employ of an employing unit and has established a pattern of part-time regular employment which is subject to the employment security tax, and has accrued wage credits while working in a part-time job. If such part-time worker becomes separated from this employment for no disqualifiable reason, and providing such worker has reasonable expectation of securing other employment for the same number of hours worked, no disqualification shall be imposed under Iowa Code section 96.4(3). In other words, if an individual is available to the same degree and to the same extent as when the wage credits were accrued, the individual meets the eligibility requirements of the law.

As the claimant did not permanently separate from employment on March 14, he was temporarily laid off due to a lack of work. He is considered able to and available for work during that time. Benefits are allowed.

As benefits are allowed the issue of state and federal overpayment through the week ending May 15 is moot. The employer's account would normally be subject to charge for the benefits paid from March 22 through May 15; however, the agency has waived charges for benefits paid as a result of the pandemic.

Whether the claimant is able to and available for work effective May 16 or partially unemployed with his new employer is remanded to the Benefits Bureau for a fact-finding interview to include both parties followed by an unemployment insurance decision issued to both parties with appeal rights.

DECISION:

The June 19, 2020, reference 01, decision is modified in favor of the appellant. The claimant was temporarily laid off effective March 22, 2020 through May 15, 2020. Benefits are allowed and the employer's account will not be charged, as the layoff was related to the COVID-19 pandemic. The claimant voluntarily left employment effective May 16, 2020, to accept other employment. Benefits are allowed, provided he is otherwise eligible. The account of the employer (account number 538304) shall not be charged for any benefits paid after May 16, 2020.

REMAND:

Whether the claimant is able to and available for work effective May 16 or partially unemployed with his new employer is remanded to the Benefits Bureau for a fact-finding interview to include both parties followed by an unemployment insurance decision issued to both parties with appeal rights.



Stephanie R. Callahan
Administrative Law Judge

August 17, 2020
Decision Dated and Mailed

src/sam